

NOTE: DISTRICT COURT ORDER IN [2018] NZDC 13568 PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF VICTIMS REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA376/2022
[2024] NZCA 269**

BETWEEN DERMOT GREGORY NOTTINGHAM
Applicant

AND ELIZABETH MAY CURRIE
First Respondent

JOHN DOE AND/OR JANE DOE
Second Respondent

Hearing: 7 November 2023

Court: Katz, Mander and Osborne JJ

Counsel: Applicant in person
D M Connor and K M Muller for First Respondent
No appearance for Second Respondent

Judgment: 26 June 2024 at 12.00 pm

JUDGMENT OF THE COURT

- A The application for an extension of the time to apply for the allocation of a hearing date and file the case on appeal is declined.**
- B The applicant must pay the respondent costs for a standard interlocutory application on a band A basis and usual disbursements.**
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REASONS OF THE COURT

(Given by Katz J)

[1] This is an application by Mr Nottingham pursuant to r 43(2) of the Court of Appeal (Civil) Rules 2005 (the Rules) for an extension of the time within which, pursuant to r 43(1), he must apply for the allocation of a hearing date and file his case on appeal.

Background

The High Court proceedings

[2] In 2016, Ms Currie and two co-plaintiffs filed defamation proceedings in the High Court in respect of certain publications on the website *Lauda Finem*.¹ As the publishers could not be identified with certainty, the defendants were cited as John and/or Jane Doe. Mr Nottingham was identified as a person who might have an interest in the proceeding because he was believed to be involved with the *Lauda Finem* website. Despite apparently denying any involvement, Mr Nottingham applied successfully to be joined to the proceeding as second defendant.

[3] Since his joinder, Mr Nottingham has taken multiple steps in the proceedings. He filed two applications to strike out the proceedings, appealed the adverse finding of the High Court to this Court, applied for a recall of this Court's judgment dismissing his appeal and then applied (unsuccessfully) for leave to appeal to the Supreme Court.² As a result, although Mr Nottingham was joined to the proceeding on 18 November 2016, his first statement of defence was not filed until 10 December 2021.³

[4] [Redacted].⁴

¹ On 3 March 2020, the co-plaintiffs discontinued the proceedings and Ms Currie remained as the sole plaintiff.

² There are four outstanding interlocutory costs orders totalling over \$13,000 against Mr Nottingham in respect of these decisions, see *Currie v Doe* [2022] NZHC 1547 [High Court judgment] at [14].

³ High Court judgment, above n 2, at [8].

⁴ [Redacted].

The decision under appeal

[5] Mr Nottingham’s appeal concerns an interlocutory decision of Hinton J that determined:⁵

- (a) applications by Ms Currie to strike out Mr Nottingham’s statement of defence, debar him from defending the proceeding, remove him as a party, and list the claims for formal proof; and
- (b) applications by Mr Nottingham to strike out Ms Currie’s amended statement of claim, for sanctions against Ms Currie, her counsel and her previous co-plaintiffs for contempt of court and for various other interlocutory orders.

[6] The Judge declined Mr Nottingham’s applications,⁶ and granted Ms Currie’s applications.⁷ The Judge was highly critical of Mr Nottingham’s statement of defence, which she found was “unnecessarily prolix and unintelligible” and “expressed in a way that is difficult, in fact almost impossible, to follow”.⁸ It contained “scandalous and irrelevant material to a significant degree”,⁹ and was non-compliant with the High Court Rules 2016 and the Defamation Act 1992.¹⁰ The Judge also found:

- (a) Mr Nottingham was misusing Court processes by filing documents with irrelevant, scandalous and unsupported statements about Ms Currie and also using his involvement in this case to continue to harass her, [redacted];¹¹
- (b) Mr Nottingham’s conduct of the case and his defence was an abuse of the court process, an abuse of Ms Currie and of her counsel, and was entirely vexatious and scandalous;¹² and

⁵ High Court judgment, above n 2, at [1].

⁶ At [101]–[102].

⁷ At [103]–[105].

⁸ At [73].

⁹ At [79].

¹⁰ At [74]–[78].

¹¹ At [90].

¹² At [91].

- (c) there was nothing in the voluminous material put forward by Mr Nottingham to indicate there was any real defence.¹³

[7] The Judge concluded:

[99] In all of the above circumstances, it would be farcical and seriously unjust for this Court to countenance anything other than an order to debar Mr Nottingham from defending. I consider there are clear grounds to make such an order, both under r 7.48 and in terms of this Court's inherent jurisdiction.

Should an extension of time to file the case on appeal be granted?

[8] Mr Nottingham filed a notice of appeal within time. He was required by the Rules to file his case on appeal by 25 October 2022.¹⁴ The Deputy Registrar granted two extensions of time for the filing of the case on appeal.¹⁵ However, when the case on appeal was not filed by the second extended due date (16 January 2023) it was deemed abandoned.¹⁶ Mr Nottingham then filed a further extension application under r 43 of the Rules, which is now before us for consideration. Rule 43 provides, relevantly:

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.

...

(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.

...

¹³ At [91].

¹⁴ Court of Appeal (Civil) Rules 2005, r 40(2)(a).

¹⁵ Pursuant to r 43(1B).

¹⁶ Pursuant to r 43(1).

Legal principles

[9] In *Yarrow v Westpac New Zealand Ltd* this Court confirmed that when considering applications under r 43(2) the criteria articulated by the Court in *Almond v Read* apply.¹⁷ The criteria from *Almond v Read* are as follows:¹⁸

- (a) the length of the delay;
- (b) the reasons for the delay;
- (c) the conduct of the parties, particularly of the applicant;
- (d) any prejudice to the respondent or to others with a legitimate interest in the outcome; and
- (e) the significance of the issues raised by the proposed appeal, both to the parties and more generally.

[10] Given that any consideration of the substance of a decision must be relatively superficial at the prehearing stage, a decision to refuse an extension of time based substantially on the lack of merit of a proposed appeal should be made only where the appeal is “clearly hopeless”.¹⁹ This will include where there is an abuse of process, or an appeal is frivolous or vexatious. The appeal’s lack of merit must be “readily apparent”.²⁰

The length of delay and the reasons for it

[11] Mr Nottingham’s notice of appeal was filed on 25 July 2022. The Registry advised him by letter the following day that the appeal would be deemed abandoned if the case on appeal was not filed by 25 October 2022. Despite two extensions, the case on appeal had still not been filed by 16 January 2023, almost six months after the notice of appeal had been filed.

¹⁷ *Yarrow v Westpac New Zealand Ltd* [2018] NZCA 601 at [4], citing *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

¹⁸ *Almond v Read*, above n 17, at [38].

¹⁹ At [39(c)].

²⁰ At [39(c)].

[12] Mr Nottingham has provided little explanation as to why he did not file the case on appeal by the extended due date of 16 January 2023. It appears, however, that Mr Nottingham sees the delay, and the reasons for it, as being inextricably linked with security for costs issues. These had not yet been resolved at the time the appeal was deemed abandoned, largely due to delays on the part of Mr Nottingham.

The security for costs issues

[13] The Registry advised Mr Nottingham, in its 26 July 2022 letter, that any application for a waiver of the requirement to pay security for costs (waiver application) had to be made by 22 August 2022, which was the due date for payment. Security for costs was not paid by that date. Nor was any waiver application made.

[14] On 21 September 2022, a Deputy Registrar wrote again to Mr Nottingham, noting that security for costs had not been paid by the due date and must now be paid immediately. In response, on 27 September 2022, Mr Nottingham purported to file a waiver application. He was now out of time to file a waiver application as of right, however, and needed to seek an extension of time to make such an application.²¹

[15] The Deputy Registrar drew to Mr Nottingham's attention that his purported waiver application was out of time and asked whether he was seeking an extension of time for bringing such an application. An explanation was also sought for the delay in filing a waiver application. As no response had been received by 1 November 2022, the Deputy Registrar sent a follow up email. Mr Nottingham replied on 6 November 2022 asserting that he had already replied and asking "[d]id you get it". The Deputy Registrar advised that she had not received a reply and requested Mr Nottingham re-send it. He did not do so, but instead simply stated that he thought he "had done all that was necessary on this and nothing else needed to be done".

[16] The Deputy Registrar yet again asked Mr Nottingham to confirm whether he wished to apply for an extension and sought an explanation for the delay in seeking a

²¹ Court of Appeal (Civil) Rules, r 35(7)(a) and (10).

waiver. Finally, on 15 November 2022, Mr Nottingham confirmed that he was seeking an extension. As to the reasons for delay, he said that he believed that he had filed a waiver application within time that had “either gone astray or is in the system somewhere”. This response is somewhat puzzling, however, given that there was no issue that Mr Nottingham had filed a waiver application, and that it had been received by the Registry. The difficulty was that he had not filed it until 27 September 2022, which was out of time. That is what prompted the repeated communications from the Registry asking Mr Nottingham if he was seeking an extension. No further explanation was provided for the delay.

[17] On 22 November 2022, the Deputy Registrar declined Mr Nottingham’s extension application. She further noted that even if an extension had been granted, the security for costs application would have been declined. The decision advised Mr Nottingham of his right to apply for a review by a Judge within 20 working days (namely, by 20 December 2022).

[18] No review was sought within that period and, as a result, Mr Nottingham lost his entitlement to seek a review of the Deputy Registrar’s decision as of right. On 16 January 2023, the Deputy Registrar wrote to Mr Nottingham noting that the case on appeal was due to be filed by that date and that there were no grounds for a further extension. Mr Nottingham filed a memorandum in response stating that he believed he had filed an application to review the Registrar’s decision within time, but that “due to ongoing email issues confirmation that that filing occurred cannot be annexed at this time.” That confirmation was never provided. However, on 8 February 2023, Mr Nottingham purported to file an application to review the Registrar’s decision. As this was well out of time, an extension of time is required before Mr Nottingham can pursue security for costs issues any further. That matter has been put on hold pending determination of the present r 43 application. If we were to grant the present application, with the effect of “reviving” Mr Nottingham’s appeal that has been deemed abandoned, it would then be necessary for any application by Mr Nottingham for an extension of time to seek a review of the Registrar’s decision to then be considered.

The delay in filing the case on appeal

[19] This brings us to Mr Nottingham's delay in filing the case on appeal. Mr Nottingham has provided minimal explanation as to the reasons for the delay. As we understand it, Mr Nottingham's position is that he should not have to file a case on appeal while security for costs issues remain unresolved. On the assumption that a further extension would be granted if sought, he did not take any steps to comply with the extended deadline for filing the case on appeal.

[20] The Registrar has a discretion to extend the time for filing a case on appeal where a party has applied to the Registrar to waive security for costs and the application has not yet been determined or has only recently been determined (within the last month).²² It is common practice for the Registrar to grant an extension of time for filing a case on appeal when a waiver application has been made within the time period specified by the Rules. Here, however, no waiver application was made within the required timeframe. Instead, there have been repeated delays in progressing this appeal. Mr Nottingham failed to: pay security for costs; apply within time to dispense with security; seek a review of the Registrar's extension decision within time; and file the case of appeal within time (despite being granted two extensions). This is despite repeated correspondence from the Registry reminding Mr Nottingham of the required timeframes under the Rules. These delays ultimately resulted in Mr Nottingham's appeal being deemed to be abandoned.

[21] Despite Mr Nottingham's dilatoriness, the Deputy Registrar exercised her discretion to grant him two extensions to file his case on appeal. However, unless and until a further extension of time was granted, the 16 January 2023 date stood. Mr Nottingham needed to take all reasonable steps to meet that deadline. Any further extension was discretionary, not mandatory. Mr Nottingham was clearly aware of this, as evidenced by his 16 January 2023 memorandum in which he submitted that:²³

The issue of security of costs remains unresolved and while the matter remains extant a time extension *should* be granted.

²² Rule 43(1B)(b).

²³ Emphasis added.

[22] Mr Nottingham is not in the same position as an appellant who makes a waiver application within time and then, if the Registrar declines the application, seeks a review of that decision within time. Here, Mr Nottingham’s failures to comply with the time requirements of the Rules have delayed the progress of the appeal and resulted in Mr Nottingham having to repeatedly seek time extensions. Appellants who, through their own default, find it necessary to seek repeated indulgences from the Court cannot simply assume that such indulgences will be granted.

[23] For completeness, we note that we are not persuaded by Mr Nottingham’s argument that his delay in seeking a review of the Registrar’s decision is somehow the responsibility of the Deputy Registrar. Specifically, Mr Nottingham says that the Deputy Registrar misinformed him in her email of 15 December 2022 that “all necessary documents” (implicitly including the review application) had been filed. We note, however, that Mr Nottingham’s inquiry to the Deputy Registrar that precipitated that response related to three separate appeals. He asked whether the Court had received “all the necessary documents” required to be filed before the Christmas break. An application for review of a Registrar’s decision is not a “necessary document” for the purposes of the Rules. A party may file a review application if they wish to, but it is not a mandatory step in proceedings. The Deputy Registrar cannot be faulted for stating that nothing further was required in respect of this appeal before Christmas. The application for a hearing date and the case on appeal were not required to be filed until 16 January 2023, after Christmas.

[24] We acknowledge that Mr Nottingham is self-represented. However, he is an experienced litigant who is no stranger to this Court.²⁴

[25] In conclusion, Mr Nottingham has not persuaded us that there are good reasons for his failure to prepare the case on appeal by the extended due date of 16 January 2023.

²⁴ See for instance *Nottingham v Real Estate Agents Authority* [2021] NZCA 357; *Nottingham v Real Estate Agents Authority* [2022] NZCA 488; *Nottingham v Real Estate Agents Authority* [2023] NZCA 233; *Nottingham v Ardern* [2020] NZCA 144, 2 NZLR 197; *Nottingham v Attorney-General* [2020] NZCA 632; and *Nottingham v District Court at Auckland* [2018] NZCA 345, [2018] NZAR 1308.

The conduct of the appellant

[26] As noted above, the High Court proceeding appears to have been characterised by extensive delay, primarily as a result of interlocutory applications and appeals taken by Mr Nottingham. In addition, there are a number of outstanding interlocutory costs awards against Mr Nottingham in the High Court. In this Court, the appeal has not been prosecuted diligently. These factors weigh against granting a further extension of time.

Prejudice to the respondent

[27] We accept that Ms Currie is prejudiced by the ongoing delays in this litigation.

The prospects of success on appeal/public interest factors

[28] Finally, we turn to the prospects of success on appeal. Mr Nottingham's notice of appeal and associated documents are discursive and difficult to follow. They include: allegations of judicial corruption, perjury and misconduct by counsel as well as an argument that the Limitation Act 2010 bars the defamation claim; issues relating to the multiple publication rule; a claim that the Judge's findings were "contrary to law and fact"; and that the Judge failed to consider relevant authorities.

[29] We have been unable to identify a ground of appeal that appears to be seriously arguable. For example, in relation to the "multiple publication rule" ground of appeal, this Court observed in Mr Nottingham's previous appeal that the proceeding is not a money claim, and that, consequently, whether the publication was to be treated as having occurred on the first day of publication or subsequently, under the multiple publication rule "cannot affect the respondents' position".²⁵ There appears to be no proper evidential basis for various other grounds of appeal, including the allegations of champerty, and the allegation of conspiracy on the part of the Judge. [Redacted].²⁶

[30] The apparent lack of merit in the various grounds of appeal lends considerable force to Ms Currie's submission that "the vexatiousness of the entire proceeding"

²⁵ *Nottingham v Maltese Cat Ltd* [2019] NZCA 641 at [15]–[16]. See also High Court judgment, above n 2, at [43].

²⁶ [Redacted].

extends to the appeal, and that the likely intent of the appeal is to delay and hinder Ms Currie's pursuit of her claim, and to use Court processes improperly to continue Mr Nottingham's ongoing campaign of harassment against Ms Currie.

[31] In conclusion, this is one of those relatively rare cases where the lack of merit of an appeal is so readily apparent that the appeal falls into the "clearly hopeless" category.

Conclusion

[32] This is not a marginal case. The combination of factors we have outlined above lead overwhelmingly to the conclusion that Mr Nottingham's application for a further extension of time should be declined.

Result

[33] The application for an extension of the time to apply for the allocation of a hearing date and file the case on appeal is declined.

[34] The applicant must pay the respondent costs for a standard interlocutory application on a band A basis and usual disbursements.

Solicitors:
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