

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA703/2008
[2009] NZCA 136**

BETWEEN TANNADYCE INVESTMENTS
LIMITED
Appellant

AND COMMISSIONER OF INLAND
REVENUE
Respondent

Hearing: 7 April 2009

Court: Chambers, Arnold and Baragwanath JJ

Counsel: A J Forbes QC for Appellant
K L Clark QC for Respondent

Judgment: 8 April 2009 at 4.30 pm

JUDGMENT OF THE COURT

A The respondent's application to strike out the appeal is dismissed.

B The appellant must:

- (a) on or before 1 May 2009 file and serve the case on appeal;**
 - (b) on or before 1 May 2009 pay the respondent costs of \$4,320, plus usual disbursements;**
 - (c) on or before 11 May 2009 apply for a fixture and pay the setting down fee.**
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REASONS OF THE COURT

(Given by Chambers J)

[1] On 11 November last year, Tannadyce Investments Limited filed a notice of appeal against a judgment given by Associate Judge Christiansen. But Tannadyce failed to pay security for costs as fixed by the registrar of this court. As a consequence, the Commissioner of Inland Revenue, the respondent on the appeal, filed an application under r 37(1) of the Court of Appeal (Civil) Rules 2005 seeking an order striking out the appeal. That prompted Tannadyce to pay the security, though not until 26 March, more than three months late.

[2] Ms Clark QC appeared in support of that application. Realistically, however, she accepted that, in view of Tannadyce's having belatedly paid the security, we would probably want to leave the appeal on foot, but put in place a timetable to ensure that this appeal is promptly prosecuted in future. We think that is the fair course in the circumstances of this case.

[3] Accordingly, we dismiss the Commissioner's application to strike out the appeal. But we do put in place a timetable.

[4] Mr Forbes QC, for Tannadyce, said that the case on appeal could be filed and served within 15 working days. Accordingly, we fix 1 May as the date by which the case must be filed and served.

[5] Secondly, 11 May is the date by which, under r 43(1), Tannadyce must apply for the allocation of a hearing date. We accordingly fix that date as the date by which Tannadyce must apply for a fixture and pay the setting down fee.

[6] Mr Forbes also accepted that Tannadyce must pay costs on this application, which, although unsuccessful, was properly brought. Schedule 2 of the Court of Appeal (Civil) Rules does not expressly deal with applications to strike out. Accordingly, in terms of r 53D(1)(b), it is necessary for us to assess the time likely

to be required for the steps the Commissioner had to take. We assess those times as follows:

Commencement of application	.5
Preparation for hearing	1.0
Hearing	.3
Total	1.8 days

[7] This is clearly a standard appeal: see r 53B(1). The daily rate is currently \$1,600. That gives a total of \$2,880. We consider, however, that Tannadyce should have to pay increased costs, as the Commissioner's application was a direct consequence of Tannadyce's failure to comply with the rules: see r 53E(2)(b)(i). There should be a 50% uplift: see *Holdfast NZ Limited v Selleys Pty Limited* (2005) 17 PRNZ 897 (CA). That means the Commissioner should recover what we consider a notional "standard appeal" lawyer would have charged in respect of this application. Total costs come to, therefore, \$4,320. In addition, Tannadyce should have to pay usual disbursements incurred by the Commissioner with respect to this particular application.

[8] We order that those costs must be paid on or before 1 May 2009.

[9] Ms Clark sought an "unless" order. We are not prepared to make such an order, but we can indicate that, if Tannadyce breaches any part of order B, it should assume this court will look very favourably on any subsequent application to strike out the appeal.

Solicitors:
Cousins & Associates, Christchurch, for Appellant
Crown Law Office, Wellington, for Respondent