IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA672/2023
[2024] NZCA 409

BETWEEN	SAIJAD ALI MAQBOOL First Applicant	
	JALAL KHAN MAQBOOL Second Applicant	
AND	TOWER LIMITED Respondent	

Court:	French and Katz JJ
Counsel:	Applicants in person R P Coltman and V A Ma for Respondent
Judgment: (On the papers)	27 August 2024 at 11.00 am

JUDGMENT OF THE COURT

A The application for an extension of time to appeal against the judgment of Lang J delivered on 28 March 2023 ([2023] NZHC 632) is declined.

B The application for an extension of time to appeal against the judgment of Lang J delivered on 30 June 2023 ([2023] NZHC 1665) is granted.

C The notice of appeal in respect of the judgment of Lang J delivered on 30 June 2023 must be filed in this Court within 15 working days of this judgment.

D The applicants must pay one set of costs to the respondent for a standard interlocutory application on a Band A basis, together with usual disbursements.

REASONS OF THE COURT

(Given by Katz J)

Introduction

[1] The applicants, Saijad Ali Maqbool (Saijad) and Jalal Khan Maqbool (Jalal), apply for an extension of time to appeal against two High Court judgments of Lang J:[1]

(a) a substantive judgment dated 28 March 2023;[2] and

(b) a costs judgment dated 30 June 2023.[3]

Background

[2] Saijad is one of the owners of a property in Papatoetoe. His father is the other owner. Jalal also claims an interest in the property by virtue of funds he contributed to its purchase.[4]

[3] On the property was a wooden bungalow. Saijad and his father insured the bungalow through an ANZ Master Cover House Policy with Tower Ltd (Tower). On 27 October 2013, a fire caused significant damage to the house. Saijad and his father lodged an insurance claim with Tower. A specialist fire investigator determined the fire was most probably caused by a power outlet overheating in a kitchen. Tower appointed a private investigator to investigate the wider circumstances. The investigation concluded that the tenants who occupied the dwelling in 2010 had altered the dwelling (with the consent of the owners) to enable two families to live in separate areas of the dwelling. On 19 March 2014, Tower avoided the policy on the basis that Saijad and his father failed to disclose this alteration.[5]

[4] In the High Court, Saijad and Jalal (who were self-represented) sought a declaration that they were entitled to indemnity under the policy. Tower's position

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1 Court of Appeal (Civil) Rules 2005, r 29A.
2 *Maqbool v Tower Insurance Ltd* [2023] NZHC 632 [substantive judgment].
3 *Maqbool v Tower Insurance Ltd* [2023] NZHC 1665 [costs judgment].
4 Substantive judgment, above n 2, at [1].
5 At [2]–[5].

was that it was entitled to avoid the policy because Saijad and his father breached their common law duties as well as contractual obligations they owed to Tower under the policy. Tower argued that Saijad and his father were required to disclose the fact they had converted the dwelling into two separate residences, as this increased the risk profile of the property, but that they had failed to do so.[6]

[5] In the substantive judgment, Lang J found that the alterations resulted in a material change of circumstances that potentially affected the level of risk Tower would be required to assume under the policy.[7] He found that Tower had not been informed of the alterations, namely that that the single dwelling had been converted into two self-contained living units, each of which had its own kitchen. Further, the work had been carried out without obtaining the necessary regulatory consents and compliance certifications. The Judge found that the fact of the alterations would have been material to Tower's decision to provide insurance cover for the property. Tower had therefore established on the balance of probabilities that it was entitled to avoid the policy for non-disclosure of material facts.[8] Saijad and Jalal's application for a declaration was accordingly dismissed.[9]

[6] Tower sought a costs award of $250,000 on the basis that two settlement offers it had made prior to trial had been rejected.[10] The claimed sum was approximately five times scale costs.[11] Although it incorporated a modest discount from the costs Tower had actually incurred,[12] the Judge considered that Tower was claiming, in effect, indemnity costs.[13] He found that the high threshold for an award of indemnity costs was not met.[14] The Judge found, however, that an order for increased costs was justified, because Saijad and Jalal had failed, without reasonable justification, to accept the second pre-trial settlement offer.[15] Specifically, on 11 June 2021, Tower had offered to pay the sum of $220,000 in full settlement of the claim. This offer,

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6 At [6].
7 At [51].
8 At [52] and [54].
9 At [55].
10 Costs judgment, above n 3, at [4] and [9].
11 At [6].
12 Tower had incurred costs amounting to $306,055.70, inclusive of disbursements: at [4].
13 At [6].
14 At [8].
15 At [13].

which the Judge considered to be generous in the circumstances, had not been accepted.[16]

[7] On the issue of the appropriate quantum of costs, the Judge considered the sum sought by Tower to be "much too high", particularly given the offer of settlement was not made until June 2021, when the proceeding was well advanced (three months before the original trial date).[17] Instead, the Judge made the following costs order:

> [14] I therefore direct that the plaintiffs are to pay [Tower] costs on a category 2B basis on all steps taken up until 11 June 2021. [Tower] is entitled to an award of costs uplifted by 150 per cent on all steps taken after that date. This means increased costs will be payable on all steps taken after the case management conference that was held on 22 October 2020. In addition, the plaintiffs will be required to pay [Tower] disbursements, including expert witnesses' expenses, amounting to $17,453.79.

[8] A costs order in the amount of $116,161 was subsequently sealed by the Registrar.

Principles to be applied

[9] An application for an extension of time to appeal must be determined in accordance with the approach settled by the Supreme Court in *Almond v Read*.[18] The court has a discretion as to whether to grant the application, which is ultimately to be determined by assessing what the interests of justice require.[19] Relevant factors for the court to consider when assessing an extension application include the length of the delay, the reasons for it, the conduct of the parties (particularly the applicant), any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome, and the significance of the issues raised by the proposed appeal (to the parties and more generally).[20] The merits of the appeal may be relevant, but consideration of the merits must, however, be relatively superficial.[21] A decision to refuse an extension of time based substantially on lack of merit should only be made where the appeal is clearly hopeless.[22]

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16 At [10].
17 At [13].
18 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.
19 At [38].
20 At [38].
21 At [39].
22 At [39(c)].

Should an extension of time be granted to appeal against the costs judgment?

[10] The applicants say that they have made progress in paying off their debt to Tower (namely, the costs award) and that they have been trying to obtain a loan to do so. They have found "living and looking after the welfare and the wellbeing of [their] families" while making payments on the debt "very difficult" and contend that "with this debt over [their] heads [they] could not approach this [C]ourt with the appeal matter any time sooner or during the time allowed by the rules and regulation[s]". They say they would have lodged an appeal, but that they were not in a position to do so due to being stretched with financial commitments and other household problems.

[11] Further, the applicants say that a significant reason they did not immediately appeal the costs award is that following delivery of the judgment they had no reason to believe that the Judge had erred. They are tradesmen, not lawyers, and were therefore unfamiliar with the law of costs. However, some time after the costs judgment was delivered, the applicants came across an article in an old trade magazine that referred to this Court's decision in *Holdfast NZ Ltd v Selleys Pty Ltd*.[23] The applicants obtained a copy of that case from the library and, on reading it, concluded that they had been "hard done by", and that the costs award "was not just or fair" because *Holdfast* suggested that the uplift should not have been more than 50 per cent. The applicants wish to argue on appeal that the costs award is well outside the guidance given by this Court in *Holdfast.* The applicants say that as soon as the *Holdfast* decision came to their attention, they promptly filed an application for an extension of time to appeal the costs decision.

[12] Tower submits that the conduct of the applicants weighs against granting an extension. Specifically, they gave no indication of their intention to appeal. On the contrary, their conduct indicated that they accepted both judgments and they made arrangement to pay the costs award (and have so far made four payments totalling $17,000). On the issue of prejudice, Tower says that it should be entitled to rely on the finality of the judgment, and the applicants have not established there will be no prejudice to Tower if the application is granted. Further, while the applicants have a clear personal interest in the appeal, there is no public significance. Finally, Tower

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[23] *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA) at [43]–[48].

submits that the costs judgment was appropriate (from which we infer that their position is that the merits of the appeal are weak).

[13] In our view, the application for an extension of time to appeal the costs judgment should be granted. Although a delay of some four months is significant, it is not inordinate. Further, a reasonable explanation has been given for the delay. In particular, we refer to the applicants' initial belief that they did not have ground for appeal, and their subsequent discovery of the *Holdfast* decision which alerted them to a potential ground of appeal. The part payments made by the applicants to date must be seen in this context. In any event, in the absence of a stay of the costs judgment, the applicants were legally required to take steps to pay the costs award.

[14] Tower has not pointed to any prejudice that it will suffer if an extension is granted. Rather, it submits that *the applicants* have not established that there will be no prejudice to Tower if the application is granted. It is difficult to see, however, how the applicants could prove this negative. If an extension will cause prejudice to Tower, the onus is on Tower to explain to the Court the nature of that prejudice.

[15] We accept that there is no public significance in this appeal. However, the appeal clearly has a high level of personal significance to the applicants, given that the costs award totals just over $116,000 — a sum they say they are struggling to pay. It has been acknowledged by this Court, in *Bradbury v Westpac Banking Corporation*, that departure from scale costs can raise access to justice issues.[24]

[16] Although any assessment of the merits of the appeal can only be very superficial at this preliminary stage,[25] we will briefly consider them. Rule 14.6(3)(b)(v) of the High Court Rules 2016 provides that increased costs may be awarded where a party has failed, without reasonable justification, to accept an offer of settlement. In *Holdfast*, this Court set out the approach to calculating increased costs. The Court noted that the daily recovery rates set out in the High Court Rules are intended to represent two-thirds of the daily rate considered reasonable in relation

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[24] *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400 at [10], [14] and [28].

[25] *Almond v Read*, above n 19, at [39].

to a proceeding of the relevant category.[26] On that basis, an increase of 50 per cent of scale costs "should therefore grant the costs-claiming party a fair recovery for the step unnecessarily forced on it".[27] The Court further stated that "[a]ny greater recovery than that would mean that the party paying costs is contributing to the other party's choice of special counsel."[28] The Court concluded that:

> [48] We are not to be taken as saying that an uplift of more than 50 [per cent] can never be justified under r 48C(3)(b) [of the High Court Rules], as there may be circumstances where the court considers a higher award to be justified. What we are saying is that the above approach is what is logically required by the scheme of the rules, and in particular by the principles applicable to every determination of costs. Awards of increased costs must comply with the general principles in r 47, except to the extent that the specific requirements of r 48C dictate otherwise. The principles in r 47(c) and (d) are clearly modified by r 48C(3)(b), but r 47(e) is not so modified. Where increased costs (as opposed to indemnity costs) are being considered, the focus remains on the notional solicitor or counsel appropriate for the category of proceeding, not the actual solicitor or counsel involved or the costs actually incurred by the party claiming costs.

[17] Here, the applicants wish to argue on appeal that an uplift of 150 per cent on scale costs for the period following the 11 June 2021 *Calderbank* offer was not justified.[29] We accept that this proposed ground of appeal is arguable.

[18] It appears that the applicants also wish to argue on appeal that they did not fail, without reasonable justification, to accept the 11 June 2021 *Calderbank* offer. We are not able to assess the merits of this ground of appeal, which appears to rely to a significant extent on material that was not admitted in evidence in the High Court. We note that if the applicants wish to adduce new evidence to support this ground of appeal, they cannot simply file it in this Court (as they have purported to do). Rather, they must file an application seeking leave to file further evidence, together with an affidavit setting out the proposed further evidence. For further evidence to be admissible it must be credible, fresh and cogent.[30]

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26 *Holdfast v NZ Ltd v Selleys Pty Ltd*, above n 23, at [46].
27 At [47].
28 At [47]
29 The *Calderbank* offer procedure owes its name to a case decided by the Court of Appeal of England and Wales: *Calderbank v Calderbank* [1975] 3 All ER 33. Rules 14.10 and 14.11 of the High Court Rules govern *Calderbank* offers.
30 Court of Appeal (Civil) Rules, r 45(1); and *Erceg v Balenia Ltd* [2009] NZCA 48, [2009] NZCCLR 32 at [15].

[19] In conclusion, in our view it is in the interests of justice to grant an extension of time to appeal the costs decision.

Should an extension of time be granted to appeal against the substantive judgment?

[20] The delay in seeking leave to appeal the substantive judgment is approximately seven months, which is significantly longer than the delay in seeking leave to appeal the costs judgment. Further, the applicants have provided little or no explanation for delay in relation to their proposed appeal of the substantive judgment.

[21] The applicants' conduct prior to filing their application for an extension indicates that they did not intend to appeal the substantive decision. While their discovery of the article referring to the *Holdfast* decision explains their belated application for an extension to appeal the costs decision, it has no relevance to the substantive appeal. Rather, it appears that the likely explanation for the delay in seeking an extension of time to appeal the substantive decision is that the applicants simply changed their mind, possibly prompted by their decision to seek to appeal the costs decision.

[22] Turning to the other *Almond v Read* considerations, Tower has not pointed to any specific prejudice that will arise if the application is granted. The proposed appeal raises no issues of public significance, although the applicants obviously have a strong personal interest in the outcome of the appeal. As for the merits, the proposed grounds of appeal which appear to relate to the substantive decision are that:

> (iv) The appellants who had a valid claim for the loss they suffered was simply dismissed by his Honour but the defence of the respondents was upheld and accepted where the terms of the policy was misconstrued and made deceptive, whereby it changed the whole context of the terms of the policy agreement hence the respondents capitalised on this alteration in its defences and were successful in misleading the court below and got rewarded for it.
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> (v) The entire respondents case was based on Hearsay evidence
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> …
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> (x) The court below had been unfair and unjust when dealing with ordinary citizens of the country with such kind of judgements which has given rise to grievous miscarriage of justice. The plaintiffs went

> to the honourable High Court in seek of justice, but not to be found there.

[23] The argument that the terms of the policy were misconstrued appears unlikely to succeed and, in any event, this issue was not determinative of the outcome at trial. The relevant insurance policy stated that the applicants were required to disclose to Tower all relevant information, and stated further that:[31]

> This means that **you** must tell **us** *everything **you** know,* or could reasonably be expected to know, *that may influence **our** decision to insure **you***. If any circumstances change or may change during the time **we** provide **your** insurance you must tell **us**. *Examples* of a change in circumstances or any other information *may include:*
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> ….
>
> - if any structural alteration or addition is made to the house;
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> …

[24] The letter from Tower that declined cover under the policy incorrectly quoted this clause by substituting the words "structure or" for structural (which Tower says was a typographical error). The applicants appear to assert that this error led to Tower wrongly declining cover. However, Tower's witnesses at trial gave evidence with reference to the correct policy wording and that wording was also relied on by the Judge. Ultimately, however, the issue of whether there had been a structural alteration to the dwelling was not determinative. Indeed, the Judge acknowledged that there was some force in the applicants' argument that the partition that had been installed did not compromise or adversely affect the structural integrity of the dwelling. He stated that:[32]

> Had the partition been the only alteration or addition to the dwelling Tower would not have been entitled to avoid the policy. However, that is not the case.

[25] The material change of circumstances that the Judge found should have been disclosed to Tower was not that a structural alteration or addition had been made to the dwelling, but that the *nature* of the dwelling was fundamentally altered when the

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31 Italic emphasis added.

32 Substantive judgment, above n 2, at [29].

original dining room was converted to a second kitchen (without any building consents having been obtained):[33]

> This meant that, once the partition was installed, the house was physically divided into two self-contained units regardless of the fact that there was a doorway between the two kitchens. Furthermore, that is how the dwelling was used from that point on.

[26] The Judge found that this material change in circumstances increased the risk to Tower in several respects and should therefore have been disclosed.[34]

[27] The other proposed ground of appeal is that the respondent's entire case was based on hearsay evidence. However, this assertion is incorrect. It appears that the applicants may not understand the intricacies of the law relating to hearsay, which is (of course) not surprising, given that they are self-represented. There is no substance to this ground of appeal and it falls into the "hopeless" category.[35]

[28] Taking the above matters into account, it is our view that the overall interests of justice do not favour granting an extension of time to bring an appeal from the substantive decision. The delay in seeking leave is significant and has not been adequately explained. The applicants' conduct prior to their belated application for an extension indicated that they accepted the substantive judgment and did not intend to appeal it. The appeal raises no matters of wider public interest. Finally, the first proposed ground of appeal appears very weak and, in any event, relates to an issue that was not determinative of the outcome at trial. The second ground falls into the "hopeless" category.[36]

Costs

[29] As the need for an application for an extension of time arises from a default on the applicants' part, Tower is entitled to costs in respect of the application unless its opposition to the application was unreasonable in the circumstances.[37] Tower's

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33 At [30]
34 At [54].
35 *Almond v Read*, above n 19, at [39].
36 At [39].
37 Court of Appeal (Civil) Rules, r 53G(2).

opposition to the application was not unreasonable, and it is therefore entitled to an award of costs.

Result

[30] The application for an extension of time to appeal against the judgment of Lang J delivered on 28 March 2023 ([2023] NZHC 632) is declined.

[31] The application for an extension of time to appeal against the judgment of Lang J delivered on 30 June 2023 ([2023] NZHC 1665) is granted.

[32] The notice of appeal in respect of the judgment of Lang J delivered on 30 June 2023, must be filed in this Court within 15 working days of this judgment.

[33] The applicants must pay one set of costs to the respondent for a standard interlocutory application on a band A basis, together with usual disbursements.

Solicitors:
Duncan Cotterill, Auckland for Respondent