

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 1/2022
[2022] NZSC 28

BETWEEN CAOPING DING AND BARRY BAI
Applicants

AND THOMAS EDMUND WILLIAM JAMES
First Respondent

KEATON PRONK, IAIN MCLENNAN
AND MCDONALD VAGUE LIMITED
Second Respondents

Court: William Young, Glazebrook and O'Regan JJ

Counsel: Applicants in person
B M K Pamatatau for First Respondent
B L Martelli for Second Respondents

Judgment: 25 March 2022

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicants must pay two sets of costs of \$2,500, one to the first respondent and the other to the second respondents.**
-

REASONS

[1] The proposed appeals arise out of a dispute between NZSouthpole Team Ltd, a company with which the applicants were associated, and a customer in relation to bricklaying work. This was resolved by the Disputes Tribunal in favour of the customer. The customer later assigned the judgment debt to the first respondent. NZSouthpole is now in liquidation and the second respondents are the liquidators.

[2] In issue before us are two judgments of the Court of Appeal, the first delivered on 3 November 2021, declining an application for leave to appeal¹ against a refusal by Moore J in the High Court to add Ms Ding as a party to the liquidation proceedings.² The second was delivered on 3 December 2021, declining an application for an extension of time³ to appeal against a costs order made in the High Court.⁴

[3] This Court lacking jurisdiction to hear an appeal against a Court of Appeal decision refusing leave to appeal,⁵ the application in relation to the judgment of 3 November 2021 is dismissed for want of jurisdiction.

[4] The convoluted background to the costs order is reviewed in the Court of Appeal judgment of 3 December 2021⁶ and more elaborately in the judgments of Moore J.⁷ Under the order that is challenged, the applicants are to pay indemnity costs to the first respondent and NZSouthpole.⁸

[5] The application for an extension of time was filed on 16 August 2021, at which point the proposed appeal was out of time, but not by much. As well, there were indications of an unsuccessful attempt to file an appeal in time. There was also found to be no prejudice to the respondents associated with the delay.⁹ The delay itself was thus of no substantial moment in terms of whether an extension ought to have been granted.

[6] The Court of Appeal's refusal to grant an extension of time was based on its assessment of the conduct of the applicants and the associated absence of merit in the proposed appeal.¹⁰ This conduct involved repeated refusals to follow appropriate process and the making of unsubstantiated but serious allegations against others.¹¹

¹ *Ding v James* [2021] NZCA 578 (Brown and Courtney JJ) [first CA judgment]. Moore J had earlier also declined an application for leave to appeal the first High Court judgment: *Ding v James* [2021] NZHC 1189 [second HC judgment].

² *James v NZSouthpole Team Ltd (in liq)* [2021] NZHC 657 [first HC judgment].

³ *Bai v James* [2021] NZCA 652 (French and Collins JJ) [second CA judgment].

⁴ *James v NZSouthpole Team Ltd (in liq)* [2021] NZHC 1682 (Moore J) [third HC judgment].

⁵ Senior Courts Act 2016, s 68(b). See also *Basnyat v New Zealand Police* [2019] NZSC 21 at [2].

⁶ Second CA judgment, above n 3, at [2]–[12].

⁷ See, for instance, the first HC judgment, above n 2, at [4]–[52].

⁸ Third HC judgment, above n 4, at [43].

⁹ Second CA judgment, above n 3, at [19].

¹⁰ At [23].

¹¹ At [20]–[21].

The Court of Appeal saw this conduct as providing a basis for an award of indemnity costs.¹² The Court also dismissed as meritless other complaints about the order: that Mr Bai should not be subject to the order as he had only been helping Ms Ding,¹³ a submission that Moore J had not considered the substantive issues between the parties¹⁴ and allegations of bias against the Judge and misconduct by counsel.¹⁵

[7] The applicants' proposed appeal appears to be premised on the contention that the Court of Appeal (and the High Court) did not engage with the substance of their case. This complaint assumes that the substance of their case extends to the whole dispute, starting with what happened in the Disputes Tribunal and encompassing all the subsequent litigation. This assumption, however, is wrong. The issue before Moore J when he dealt with costs was confined to the extent of the first respondent and NZSouthpole's entitlement to costs. This issue was carefully addressed in his judgment. The issue before the Court of Appeal in relation to the 3 December 2021 judgment was whether an extension of time should be granted. The Court likewise carefully dealt with that issue. There is no appearance of a miscarriage of justice in respect of these judgments.¹⁶ As well, the proposed appeal does not give rise to a matter of general or public importance.¹⁷

[8] The application for leave to appeal is dismissed. The applicants must pay two sets of costs of \$2,500, one to the first respondent and the other to the second respondents.

Solicitors:
Alden Ho, Auckland for First Respondent
HC Legal Ltd, Auckland for Second Respondents

¹² At [22(a)].

¹³ At [22(b)].

¹⁴ At [22(c)].

¹⁵ At [22(d)].

¹⁶ Senior Courts Act, s 74(2)(b).

¹⁷ Section 74(2)(a).