

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA506/2021
[2021] NZCA 652**

BETWEEN BARRY BAI AND CAOPING DING
 Applicants

AND THOMAS EDMUND WILLIAM JAMES
 First Respondent

 IAIN MCLENNAN, KEATON PRONK
 AND MCDONALD VAGUE LIMITED
 Second Respondents

Court: French and Collins JJ

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

Judgment: 3 December 2021 at 10.30 am
(On the papers)

JUDGMENT OF THE COURT

- A The application for an extension of time to appeal is declined.**
- B The applicants must pay the respondents costs for a standard application
 on a band A basis and usual disbursements.**
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REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] Mr Bai and Ms Ding, and purportedly NZSouthpole Team Ltd (Southpole),¹ apply under r 29A of the Court of Appeal (Civil) Rules 2005 for an extension of time to appeal a High Court costs order.²

Background

[2] Ms Ding is the sole director of Southpole, and Mr Bai is the manager.³

[3] On 2 March 2017, Southpole was hired to do bricklaying by a Mr Sidorov. The bricklaying was done by Mr Bai, and it was of such poor quality that it failed a council inspection. Mr Bai had his licence cancelled.⁴

[4] On 26 June 2018, the Disputes Tribunal ordered Southpole to pay Mr Sidorov compensation of \$13,556.25 (the judgment debt).

[5] Southpole applied to the Disputes Tribunal for a rehearing, but its application was out of time, and the Disputes Tribunal declined a rehearing. Southpole appealed to the District Court, which rejected the appeal (District Court decision).

[6] In February 2020, Mr Sidorov assigned the judgment debt to Mr James, the first respondent. On Mr James' application, the High Court ordered that Southpole be liquidated (High Court liquidation order). Mr McLennan and Mr Pronk, the second respondents, were appointed as Southpole's liquidators.

¹ NZSouthpole Team Ltd (Southpole) is in liquidation, and Mr Bai and Ms Ding do not have authority to act on its behalf.

² *James v NZSouthpole Team Ltd (in liq)* [2021] NZHC 1682 [High Court costs order].

³ This case has a complex background. The following summary is taken from the High Court's substantive judgment to which the costs order relates: *James v NZSouthpole Team Ltd (in liq)* [2021] NZHC 657 [High Court substantive judgment].

⁴ Mr Bai's appeal against the decision to cancel his licence was dismissed. See *Bai v Registrar of Licensed Building Practitioners* [2019] NZDC 6246.

[7] Mr Bai and Ms Ding, purportedly acting for Southpole, attempted to appeal the High Court liquidation order to the Court of Appeal. However, Clifford J issued a minute saying that they had no authority to act for Southpole in liquidation, and that they needed to apply to the High Court to be joined as a party.⁵

[8] This was followed by further applications and appeals to the High Court. On 30 March 2021, the High Court dealt with all of these matters together (High Court substantive judgment).⁶ The Court:

- (a) dismissed an appeal against the District Court decision;
- (b) declined to permit Ms Ding to act for Southpole;
- (c) declined to recall the High Court liquidation order;
- (d) declined to terminate the liquidation; and
- (e) declined to join Ms Ding as a party to the liquidation proceedings.

[9] Mr Bai and Ms Ding then applied for leave to appeal the High Court's refusal to join Ms Ding as a party to the liquidation proceedings. The High Court declined leave to appeal,⁷ and this Court also declined leave to appeal.⁸

[10] On 7 July 2021, the High Court ordered Mr Bai and Ms Ding to pay non-party indemnity costs to Mr James and Southpole (High Court costs order).⁹

[11] On 16 August 2021, Mr Bai and Ms Ding applied for an extension of time to appeal the High Court costs order to this Court. That application is the focus of this decision.

⁵ *NZSouthpole Team Ltd v James* CA392/2020, 21 August 2020.

⁶ High Court substantive judgment, above n 3.

⁷ *Ding v James* [2021] NZHC 1189.

⁸ *Ding v James* [2021] NZCA 578.

⁹ High Court costs order, above n 2.

[12] Mr Bai and Ms Ding have also listed Southpole as an applicant. However, they do not have authority to act for Southpole.

Extension of time principles

[13] When considering an exercise of the discretion to extend time, the ultimate question is what the interests of justice require. Factors include:¹⁰

- (a) the length of the delay;
- (b) the reasons for the delay;
- (c) the conduct of the parties, particularly the applicant;
- (d) any prejudice or hardship to the respondent or others;
- (e) the significance of the issues raised by the proposed appeal; and
- (f) the merits of the proposed appeal (though this requires caution).

Applicants' submissions

[14] In Mr Bai and Ms Ding's notice of application for an extension of time, they give no explanation for why they did not appeal in time. Instead, they make several criticisms of the High Court costs order. Broadly, they say:

- (a) The case did not meet the high threshold for indemnity costs.
- (b) Mr Bai should not have to pay non-party costs as he was not part of the proceedings and was only helping Ms Ding.
- (c) The High Court did not consider the substantive issues.
- (d) The High Court Judge was biased in favour of the respondents.

¹⁰ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38]–[39].

- (e) The respondents' counsel misled the High Court.

[15] In a subsequent memo, Mr Bai and Ms Ding gave an explanation for their delay. They say that they did attempt to appeal in time, but they were unsuccessful. In particular, they say that:

- (a) On 2 August 2021, they attempted to appeal to the High Court by mistake.
- (b) On 3 August 2021, they attempted to appeal to the Court of Appeal, but this was unsuccessful.

[16] Mr Bai and Ms Ding have provided a receipt showing that they attempted to file something with the Court of Appeal on 3 August 2021. However, they have not explained what this was or why it was unsuccessful. In all likelihood, it appears that they did attempt to appeal but did not file the correct documents.

Respondents' submissions

[17] Mr James, the first respondent, submits that an extension of time should be declined because:

- (a) He was not served with the application.
- (b) Mr Bai and Ms Ding have not provided any good reason for the delay. Even given the receipt from 3 August 2021, they have not explained what this was for.
- (c) Mr Bai and Ms Ding have acted vexatiously, disregarded correct procedure, made unsubstantiated allegations about other parties and misled the court.
- (d) He is prejudiced by the cost of the proposed appeal, especially as Mr Bai and Ms Ding have so far not paid anything under the High Court costs order.

- (e) The proposed appeal raises no issues of significance and is meritless. It is a delaying tactic and an abuse of process.

[18] Mr McLennan and Mr Pronk adopt Mr James' submissions. They further submit that they should not be parties to this proposed appeal, because they were not parties in the High Court and were therefore not awarded costs under the High Court costs order.

Analysis

[19] The delay in this case was not long, being eight working days. Mr Bai and Ms Ding also have a reason for the delay, as they attempted to appeal to the wrong court and filed the wrong documents in this Court. The respondents have also not shown any prejudice from the delay itself, only prejudice from the appeal.

[20] Against this, however, is Mr Bai and Ms Ding's conduct. Throughout the proceedings, they have repeatedly refused to follow correct procedure and have made unsubstantiated allegations against others.

[21] On one occasion, Mr Bai and Ms Ding were asked to file an application in the High Court. When the Court later told Mr Bai and Ms Ding that no such application had been filed, Mr Bai claimed that the application had been filed but that court staff had lost it because they were engaged in a criminal conspiracy against him. This accusation was rejected by the Judge.¹¹

[22] Additionally, Mr Bai and Ms Ding's proposed appeal does not appear to raise any issues of significance or have any merit. In particular:

- (a) The first ground is that the case did not meet the high threshold for indemnity costs. However, Mr Bai and Ms Ding's repeated refusals to follow correct procedure and their unsubstantiated allegations are clearly capable of justifying indemnity costs.

¹¹ High Court substantive judgment, above n 3, at [50]–[52].

- (b) The second ground is that Mr Bai should not have to pay non-party costs as he was not part of the proceedings and was only helping Ms Ding. However, it is clear that Mr Bai was actively involved in making applications and appearing at hearings.
- (c) The third ground is that the High Court did not consider the substantive issues. However, the High Court's substantive judgment shows that it considered the issues in detail, and in any event, this is outside the scope of an appeal against the High Court costs order.
- (d) The fourth and fifth grounds are that the High Court Judge was biased and that the respondents' counsel misled the High Court. However, these allegations are again unsubstantiated. Furthermore, a reading of the High Court's decision shows that the Judge considered each side's evidence, but ultimately preferred that of the respondents.

[23] Given Mr Bai and Ms Ding's conduct and the lack of any significant issues or merit in the proposed appeal, the interests of justice favour declining the application for an extension of time.

Result

[24] The application for an extension of time to appeal is declined.

[25] The applicants must pay the respondents costs for a standard application on a band A basis and usual disbursements.

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