

IN THE SUPREME COURT OF NEW ZEALAND

SC 3/2013
[2013] NZSC 29

BETWEEN TAYLOR JADE SCHMIDT AND
ANTHONY MIKHAL SCHMIDT
Applicants

AND PEPPER NEW ZEALAND
(CUSTODIANS) LTD
First Respondent

AND EBADA PROPERTY INVESTMENTS
LTD
Second Respondent

AND BRIAN PATRICK GARRITY
Third Respondent

AND TEA CUSTODIANS (PACIFIC) LTD
Fourth Respondent

Court: William Young, Chambers and Glazebrook JJ

Counsel: Applicants in Person
E M S Cox for First Respondent
I Razak for Second and Third Respondents

Judgment: 12 April 2013

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicants must pay costs of \$2,000 to the second and third respondents and \$750 to the first respondent, in each case together with reasonable disbursements to be determined, if necessary, by the Registrar. The liability of the applicants is joint and several.**
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REASONS

[1] The applicants sought interim relief to restrain a mortgagee sale of two properties in Pokeno in which they claimed a beneficial ownership interest. The properties had been transferred on their initiative from Schmidt Trustee Ltd to Ebada Property Investments Ltd. The applicants claimed that a director of Ebada, Mr Garrity, had fraudulently executed a mortgage in favour of TEA Custodians (Pacific) Ltd. That company, which was said to be complicit in the alleged fraud, later transferred the mortgage to another company, which in turn had transferred it to Pepper New Zealand (Custodians) Ltd. When Ebada defaulted, Pepper sought to enforce the mortgage. The applicants issued proceedings to restrain enforcement and sought interim relief.

[2] Heath J rejected the claim for interim relief.¹ He held that, even assuming that an inference of fraudulent activity by Ebada could be drawn, there was no evidence linking TEA Custodians or Pepper to Ebada's alleged actions, through having knowledge of the alleged defect in title or otherwise.² The applicants' claim was too speculative to support the applicants' caveats or to warrant their receiving interim relief.³ They had not shown they had a serious case to be tried and both the balance of convenience and overall interests of justice favoured Pepper.⁴ Accordingly, Heath J dismissed the application.

[3] The applicants appealed but failed to prosecute their appeal in a timely way, with the consequence their appeal was deemed abandoned under r 43(1) of the Court of Appeal (Civil) Rules 2005. The applicants applied for an extension of time under r 43(2) but the Court of Appeal declined it.⁵ It applied conventional principles on a r 43(2) application. It held the applicants had not adequately explained the reasons for the delay and that the proposed appeal appeared to have no merit.⁶

¹ *Pepper New Zealand (Custodians) Ltd v Schmidt* HC Auckland CIV-2011-404-5497, 15 November 2011.

² At [47]–[53].

³ At [48].

⁴ At [53].

⁵ *Schmidt v Pepper New Zealand (Custodians) Ltd* [2012] NZCA 565.

⁶ At [6] and [9].

[4] The applicants now seek leave to appeal to this Court. They do not challenge the principles applicable to an application for extension of time under r 43(2). What they challenge is the Court of Appeal's weighing of the various relevant factors. They do not attempt to explain how the proposed appeal meets the leave criteria set out in s 13 of the Supreme Court Act 2003. It does not come close to meeting them. The proposed appeal involves no matter of general or public importance. There is no risk of a substantial miscarriage of justice if the proposed appeal is not heard.

[5] The applicants also assert bias on the part of the Court of Appeal. They purport to quote what a member or members of the panel said about their submissions during oral argument. That is not bias: any judge is entitled to reject, robustly if necessary, oral submissions and to move oral argument on, especially in circumstances where time limits on oral argument are imposed by relevant court rules (as here).

[6] The applicants do not deal with the Court of Appeal's independent finding that one of them (Mr Schmidt) is bankrupt and accordingly has no standing to bring the proceeding in the first place.⁷

[7] It should also be noted that neither Heath J's decision nor the Court of Appeal's prevents Mrs Schmidt from proceeding with a claim for substantive relief in the High Court, albeit some of the remedies sought would require amendment.

[8] The application for leave to appeal to this Court is dismissed. The applicants must pay costs of \$2,000 to the second and third respondents and \$750 to the first respondent, in each case together with reasonable disbursements to be determined, if necessary, by the Registrar. The order of costs in favour of the second and third respondents is higher as their lawyers filed the substantive submissions in opposition to the application for leave. We have specified that the applicants' liability for costs is joint and several. This means the respondents can look, if they choose, to

⁷ At [23]–[24].

Mrs Schmidt alone for payment of the costs. We emphasise that as Mr Schmidt, being bankrupt, will almost certainly not be in a position to pay.

Solicitors:

Gibson Sheat, Wellington for First Respondent

Smith and Partners, Auckland for Second and Third Respondents