

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 5/2020
[2021] NZSC 62

BETWEEN LESLIE NORMAN AUSTIN
 Applicant

AND ROCHE PRODUCTS (NEW ZEALAND)
 LIMITED
 Respondent

Court: Glazebrook, O'Regan, Ellen France, Williams and Arnold JJ

Counsel: G J Thwaite for Applicant
 J A MacGillivray for Respondent
 J B Orpin-Dowell for Accident Compensation Corporation as
 Intervener

Judgment: 16 June 2021

Reissued: 22 February 2022

JUDGMENT OF THE COURT

- A This Court's decision in *Austin v Roche Products (New Zealand) Ltd* [2021] NZSC 30 is stayed until further order of this Court.**
- B Either the respondent or ACC may apply to discharge the stay on the ground that the applicant has not continued to pursue his appeal before the Accident Compensation Appeal Authority diligently or on any other ground.**
- C Costs are reserved.**
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REASONS
(Given by Williams J)

[1] On 31 March 2021, this Court dismissed Mr Austin’s appeal against the striking out of his claim for damages for personal injury.¹ But the Court provided him a brief opportunity before the decision took effect in which to apply to the Accident Compensation Corporation (ACC) to review its decision to grant him coverage.² Mr Austin has taken advantage of that opportunity although he is well out of time.³ He now applies for a stay of this proceeding while ACC considers his review application, so that he does not lose the placeholder effect of the current proceeding for the purposes of limitations.

[2] Mr Austin seeks a stay “until further notice”. The respondent opposes the application. ACC abides.

[3] In support of his application, Mr Austin points to the long history of this litigation and its burden on him; the unfair effect in relation to limitations if this proceeding is struck out; the late introduction of the issue in relation to s 133(5) of the Accident Compensation Act 2001, which in the end proved decisive; the prompt manner in which he commenced the ACC review; and the continued relevance of the punitive damages component of his claim. Mr Austin’s preference would be to remit the matter back to the High Court to consider his stay application. Finally, Mr Austin submits that his security for costs should be returned.

[4] The respondent submits that a stay is inappropriate primarily because the application for review is without merit. The respondent argues that Mr Austin’s primary motivation is protection against a limitation defence when the delay in commencing proceedings is a result of his own decisions. The respondent accepts that a stay would not cause it specific prejudice, but points out that it will encourage Mr Austin to pursue further appeals in the (in its view) likely event that the application for review is rejected by ACC.

¹ *Austin v Roche Products (New Zealand) Ltd* [2021] NZSC 30 [substantive decision].

² At [36]–[37].

³ Accident Compensation Act 2001, s 135(3).

[5] On balance, we consider that a limited stay is justified. This strikes an appropriate balance between the interests of the respondent, which responsibly accepts the absence of any immediate prejudice, and that of Mr Austin in not being denied an opportunity to submit to ACC that his delay in seeking review was due to “extenuating circumstances”.⁴

[6] Remitting the matter back to the High Court would not be appropriate. Nor would the release of any funds held as security for costs.

[7] This Court’s decision in *Austin v Roche Products (New Zealand) Ltd*⁵ is stayed until further order of this Court.

[8] Either the respondent or ACC may apply to discharge the stay on the ground that the applicant has not continued to pursue his appeal before the Accident Compensation Appeal Authority diligently or on any other ground.

[9] Costs are reserved.

Solicitors:

Tompkins Wake, Hamilton for Respondent

S Cohen-Ronen, Accident Compensation Corporation, Wellington for Intervener

⁴ Section 135(3).

⁵ Substantive decision, above n 1.