IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA807/2023
[2024] NZCA 7

BETWEEN	QUENTIN STOBART HAINES First applicant
	BPE TRUSTEES (NO 1) LTD Second applicant
	QUENTIN HAINES PROPERTIES LIMITED Third applicant
AND	HARRY MEMELINK AND CISCA FORSTER (AS TRUSTEES OF THE LINK TRUST (NO. 1)) (in receivership) Respondents

Counsel: J D Dallas for Applicants
R Williams for Respondents

Judgment: (On the papers) 2 February 2024 at 4 pm

JUDGMENT OF MALLON J

A The application for a stay of the High Court proceeding is declined.

B The applicants must pay costs for a standard application on a band A basis together with usual disbursements.

REASONS

[1] On 3 August 2021 Grice J in the High Court granted summary judgment on liability against the applicants (the liability judgment).[1] A three-day hearing

[1] *Memelink v Haines* [2021] NZHC 1992.

commencing on 12 February 2024 has been set down in the High Court to determine quantum (the February hearing).

[2] On 14 December 2023 the applicants applied to the High Court for an adjournment of the February hearing. On 22 December 2023 the applicants filed in this Court an application for an extension of time to appeal the liability judgment. On 24 January 2024 Grice J issued a minute declining the application to adjourn the February hearing.

[3] On 31 January 2024 the applicants applied to this Court for an order "staying the February hearing". This decision concerns that application.

Background

[4] For some years the first applicant, Mr Haines, had business dealings with Mr Memelink. The other applicants are entities that Mr Haines controlled.

[5] The respondents are the trustees of the Link Trust No. 1 (the Link Trust). The Link Trust was effectively controlled by Mr Memelink and was used as a vehicle for his business ventures. The Link Trust was put into receivership in May 2022 and this proceeding is now being conducted by the receivers but, at the time of the liability hearing, the litigation was undertaken by Mr Memelink.

[6] This proceeding concerns three commercial loans (the loans): two from Fico Finance Ltd (Fico) and one from Bright Enterprises Ltd (Bright). Entities associated with Mr Haines were the borrowers under these loans. They were guaranteed by Mr Haines and Mr Memelink, or entities associated with them, and the Link Trust.

[7] By March 2018 the loans were in default and demands were served. The respondents subsequently paid the debts to Fico and Bright and claimed that it had taken assignment of the loans from Fico and Bright. The respondents brought a claim for breach of contract and sought summary judgment on liability based on the rights it claimed it had acquired under the loans. The applicants contended that there was no valid assignment.

[8] The Judge found that there had been a valid assignment of the loan[2] and the applicants were therefore liable to the Link Trust for the outstanding loans.

Adjournment application

[9] In support of an adjournment of the quantum hearing it was submitted that the respondents had misled the Court about the assignment of the loans. It was claimed that the receivers had disclosed documents subsequent to the liability hearing. It was also claimed that there was fresh evidence from Mr Gilman (a director of Bright) that the loans were repaid by the respondents before they were assigned so there was in fact nothing left to assign. It was claimed that Mr Gilman would not give evidence earlier nor provide assistance to the applicants due to a fear that Mr Memelink would litigate against him. The late application for an adjournment was said to be because proper disclosure of the financial documents that led the applicants to make inquiries only occurred in September 2023. It was said there was a further delay while Mr Gilman obtained files from his lawyers and while he was overseas for "several weeks".

[10] The Judge declined the adjournment application. The Judge considered the application was not made in a timely manner as it was made three months after the applicants said they became aware of the possibility of further evidence. The Judge considered the applicants had not sufficiently explained why the application was made immediately before the Christmas break when the quantum hearing was scheduled for three days immediately after the break. The Judge considered the Court was unlikely to be able to use the time for other hearings on such short notice and that therefore the interest of other litigants and the public was not served by an adjournment. The Judge also considered that the applicants faced an "uphill task" in relation to the proposed appeal in this Court.

[11] The Judge also treated the proposed evidence of Mr Gilman with some caution. The evidence contradicted the sealed Deed of Assignment executed by Bright which, in its express terms, recorded that the loan remained outstanding and that the consideration for the assignment was repayment of the loan with that repayment and

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2 At [112].

the assignment occurring on the same day. That the witness now claimed the opposite despite the sealed Deed was to be treated with "considerable caution" in the Judge's view.

[12] Finally, the Judge noted that the respondents had offered to agree that any quantum judgment could lie in court pending the hearing of the appeal in this Court as long as the appeal was pursued in timely manner. The Judge considered this agreement would deal with any possible injustice in continuing with the February hearing.

[13] The Judge therefore concluded that the interests of justice did not require an adjournment and the application was accordingly declined.

Stay application

[14] As noted, the applicants filed an extension of time to appeal on 22 December 2023. They sought an "order staying the [February] hearing" on 31 January 2024. The applicants claim that Mr Memelink provided a false affidavit, that the respondents failed to disclose key documents and misled the Court that leave had been granted for the summary judgment application to be heard, and that Mr Memelink filed the proceeding in breach of the Insolvency Act 2006. The applicants submit that the delay is explained by the late disclosure and the witness being overseas. The applicants submit that it is likely that the proposed appeal will be successful.

Analysis

[15] The applicants rely on r 12(3)(a) of the Court of Appeal (Civil) Rules 2005. That rule relevantly provides:

> **12 Stay of proceedings and execution**
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> (3) Pending the determination of an application for leave to appeal or an appeal, the court appealed from or the Court may, on an interlocutory application,—
>
> (a) order a stay of the proceeding in which the decision was given or a stay of the execution of the decision; or
>
> (b) grant any interim relief.
>
> …

> (5) If the court appealed from refuses to make an order under subclause (3), the Court may, on an interlocutory application, make an order under that subclause.

[16] In *Keung v GBR Investment Ltd* this Court described the approach to a stay application under r 12(3):[3]

> [11] The stay application is brought under r 12(3) of the Court of Appeal (Civil) Rules 2005. In determining whether or not to grant a stay, the Court must weigh the factors "in the balance" between the successful litigant's rights to the fruits of a judgment and "the need to preserve the position in case the appeal is successful". Factors to be taken into account in this balancing exercise include:
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> (a) Whether the appeal may be rendered nugatory by the lack of a stay;
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> (b) The bona fides of the applicant as to the prosecution of the appeal;
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> (c) Whether the successful party will be injuriously affected by the stay;
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> (d) The effect on third parties;
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> (e) The novelty and importance of questions involved;
>
> (f) The public interest in the proceeding; and
>
> (g) The overall balance of convenience.
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> That list does not include the apparent strength of the appeal but that has been treated as an additional factor.

[17] There are some procedural difficulties with this application. First, it seems that what the applicants seek in effect is an adjournment of the quantum hearing. This is reflected in the order sought — a stay of the hearing. This application effectively seeks to appeal the interlocutory decision of Grice J to decline the adjournment application, not a stay of the proceeding as a whole. To appeal an interlocutory decision the applicants are first required to apply for leave from the High Court under s 56(3) of the Senior Courts Act 2016. They have not sought to do so. Further it is well-established that an application for a stay pending the determination of an appeal

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[3] *Keung v GBR Investment Ltd* [2010] NZCA 396, [2012] NZAR 17 at [11], citing *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [9].

or application for leave should first be made in the court appealed from, absent special circumstances.[4]

[18] In any event I am satisfied that the application should be declined on its merits. The applicants' proposed appeal would not be rendered nugatory by the failure to grant a stay at this stage. Even if a money judgment is given in the High Court prior to the disposal of the application for an extension of time to appeal (and any appeal), a stay application in the High Court could then be made if necessary (if the respondents' offer for the quantum judgment to lie in court was insufficient protection).

[19] Importantly, there is prejudice to the respondents from delaying the quantum hearing at this late an hour. The reasons given for this delay are not compelling. As the Judge noted in her adjournment decision, there is little chance the vacated hearing could be replaced by another fixture. Further, the application for the extension of time faces the hurdle that it is made some two years out of time. It is not obvious that the proposed fresh evidence and other proposed grounds supporting the application are compelling. The other factors set out in *Keung* do not support a stay.

[20] For the same reasons, adjourning the quantum hearing is not in the interests of justice.

Result

[21] The application for a stay of the High Court proceeding is declined.

[22] The applicants must pay costs for a standard application on a band A basis together with usual disbursements.

Solicitors:
Gibson Sheat, Wellington for Respondents

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4 *Gibson v Official Assignee* [2016] NZCA 93 at [6].