

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA73/2024
[2025] NZCA 108

BETWEEN EDUARDO SEQUEIROS GARATE AND
 GABRIEL SEQUEIROS
 Appellants

AND JORGE SEQUEIROS GARATE
 Respondent

CA319/2024

BETWEEN EDUARDO SEQUEIROS GARATE
 Appellant

AND JORGE SEQUEIROS GARATE
 Respondent

Court: Katz and Campbell JJ

Counsel: Appellants in person
 C R Goode for Respondent

Judgment: 10 April 2025 at 11.00 am
(On the papers)

JUDGMENT OF THE COURT

- A The application for an extension of time in CA73/2024 is declined.**
- B The first-named appellant in CA73/2024 must pay the respondent costs of \$1,673 and usual disbursements.**
- C The appellant in CA319/2024 must pay the respondent costs of \$2,390 and usual disbursements.**
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REASONS OF THE COURT

(Given by Campbell J)

[1] This judgment determines two applications in these related appeals. The first is an application by the first-named appellant in CA73/2024, Eduardo Sequeiros Garate, for an extension of time to apply for the allocation of a hearing date and to file the case on appeal. The second is an application by the respondent in CA319/2024, Jorge Sequeiros Garate, for costs following the abandonment by Eduardo of that appeal.

Background

[2] Both appeals arise out of a High Court proceeding commenced in March 2018 by Eduardo and his brother, Gabriel Sequeiros, acting as litigation guardians for their parents, Cirilo and Flor Sequeiros. The proceeding challenged the lawfulness of two transactions concluded in 2010 and 2013 in respect of a Mt Roskill property. Ownership of that property was transferred by Cirilo and Flor to Jorge, who is Eduardo and Gabriel's brother. Purporting to act in the interests of their parents, Eduardo and Gabriel claimed that:

- (a) Cirilo did not have the mental capacity to enter into either transaction, which Jorge should have known;
- (b) Cirilo and Flor placed their trust and confidence in Jorge and were subject to his undue influence; and
- (c) Jorge's undue influence caused Cirilo and Flor to enter into the transactions, which were unconscionable bargains.

[3] Flor died in May 2022. As a result, Gabriel could no longer act as her litigation guardian. The proceeding was continued by Eduardo as Cirilo's litigation guardian. Cirilo died in May 2023, some months after the High Court hearing, but before the judgment was delivered.

[4] Van Bohemen J considered that, despite Cirilo's death, it was appropriate to deliver judgment. On 18 December 2023, van Bohemen J delivered a judgment dismissing all claims brought by Eduardo on behalf of Cirilo.¹ The Judge set a timetable for costs memoranda, should they be sought by Jorge (who was legally aided).²

[5] Jorge sought costs. On 10 May 2024, van Bohemen J issued a costs judgment.³ He was satisfied that Eduardo and Gabriel had "behaved poorly and unreasonably and, in terms of r 14.6(4) [of the High Court Rules 2016], acted improperly and unnecessarily in commencing and continuing the proceeding".⁴ For those reasons, he was satisfied that Eduardo, as the remaining protagonist following Flor's death, should pay the full costs of Jorge as assessed by the Legal Services Commissioner: \$153,527.⁵

Eduardo's application for an extension of time in CA73/2024

Background to application

[6] On 7 February 2024, Eduardo and Gabriel, purportedly as executors of Cirilo's estate, filed an appeal (CA73/2024) against van Bohemen J's substantive decision of 18 December 2023.

[7] Under r 43(1) of the Court of Appeal (Civil) Rules 2005 (the Rules), Eduardo and Gabriel had to apply for the allocation of a hearing date and file the case on appeal within three months after their appeal was brought (namely, by 7 May 2024). If they did not do so, their appeal would be treated as abandoned. However, they could make an interlocutory application to the Court under r 43(2) for an extension of that three-month period. By virtue of r 43(3), such an application could be made either before the period ended or within three months of the period ending.

¹ *Mosqueira (by his litigation guardian, Garate) v Garate* [2023] NZHC 3737 [judgment under appeal] at [306].

² At [309].

³ *Mosqueira (by his litigation guardian, Garate) v Garate* [2024] NZHC 1167 [costs judgment].

⁴ At [16].

⁵ At [17]–[19].

[8] On 10 April 2024, Eduardo made an informal application by email for an extension of time for the allocation of a hearing date and filing the case on appeal. Jorge opposed the application.

[9] By 8 May 2024, Eduardo’s informal application for an extension of time had not been determined. On that day, the appeal was treated as abandoned under r 43(1).

[10] On 11 June 2024, the Registrar directed Eduardo to make a formal application for an extension of time. Eduardo did so on 18 July 2024.⁶ Jorge opposed the application.

[11] In a minute dated 12 September 2024, Cooke J directed that the parties’ submissions should address whether, given the death of Cirilo, Eduardo “is authorised to pursue the application and/or the appeal given that his death brings to an end the ability of a litigation guardian to pursue proceedings”.⁷ Cooke J observed that “the pursuit of any proceedings would likely now vest with the executor of the estate” and directed that if Eduardo contended he was the executor he should file affidavit evidence proving that he was.⁸

Grounds of application

[12] In his application for an extension of time, Eduardo says he was unable to apply for the allocation of a hearing date and file the case on appeal because of the oppositions that Jorge’s counsel raised to other applications made by Eduardo (his informal application for an extension, his application for a fee waiver, and his application for dispensation from the requirement to pay security for costs). Eduardo says that Jorge’s counsel acted “vexatiously and frivolously” in opposing his applications, and that this was an “unethical strategy to obstruct, delay and block [his] ability to apply for a hearing date”.

⁶ Eduardo filed the formal application with the Registrar on 8 July 2024, but he did not serve the application on Jorge until 18 July 2024. As such, the application was not brought until 18 July 2024 pursuant to r 27B(2)(b) of the Court of Appeal (Civil) Rules 2005.

⁷ *Garate v Garate* CA73/2024, 12 September 2024 (Minute of Cooke J) at [2].

⁸ At [2].

[13] In his submissions, Eduardo focuses on alleged errors in the High Court judgment. He filed an affidavit with his submissions, appending his parents' wills. These show that Eduardo, Gabriel and Jorge were appointed executors and trustees of the estates of their parents.

Should an extension of time be granted?

[14] The principles in *Almond v Read* apply to Eduardo's application for an extension of time.⁹ The ultimate question in considering the exercise of the discretion to extend time is what the interests of justice require.¹⁰ *Almond v Read* identified several factors that are likely to require consideration.¹¹ Here, all these factors weigh against exercising the discretion to extend time:

- (a) Eduardo's delay in progressing his appeal is significant. By the time he made his interlocutory application for an extension of time on 18 July 2024, he was more than two months late in applying for a hearing date and filing the case on appeal.
- (b) There is no good reason for Eduardo's delay. Jorge and his counsel did not act vexatiously or frivolously in opposing Eduardo's other applications. To the contrary, there was merit in Jorge's opposition: the Deputy Registrar declined Eduardo's application for dispensation from the requirement to pay security for costs. Further, Jorge's opposition to those applications did not hinder Eduardo from applying for the allocation of a hearing date or filing the case on appeal.
- (c) Eduardo has generally been dilatory in the conduct of this appeal (and the related costs appeal). He has made multiple applications, formal and informal, and has filed "notices of objection" when Jorge has opposed those applications. Eduardo has seldom filed affidavits in support of his applications. On 27 March 2024, the Deputy Registrar

⁹ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801; and *Yarrow v Westpac New Zealand Ltd* [2018] NZCA 601 at [4].

¹⁰ *Almond v Read*, above n 9, at [38].

¹¹ At [38].

declined Eduardo's application to dispense with security for costs and set a deadline for payment of 26 April 2024. Eduardo has never paid that security.

- (d) Jorge has suffered prejudice from the delay and from the way in which Eduardo has conducted the appeal. Jorge is not legally aided for the steps he has taken to respond to Eduardo's multiple applications.
- (e) While the issues raised by the appeal are of significance to the parties, there is no public interest in those issues.

[15] These factors point so clearly towards declining to exercise the discretion to extend time that it is unnecessary to address the merits of the proposed appeal.

[16] There is another reason for declining to extend time. All three of Eduardo, Gabriel and Jorge are executors and trustees of Cirilo's estate. Executors and trustees must act unanimously.¹² The appeal was purportedly brought by Eduardo and Gabriel as executors of Cirilo's estate. Jorge did not agree to the appeal. Consequently, Eduardo and Gabriel were not authorised to bring the appeal as executors, and Eduardo is not authorised to seek an extension as executor.

[17] For these reasons, we decline Eduardo's application for an extension of time.

Costs

[18] Jorge is entitled to costs on the application, which we calculate as \$1,673 (for steps 9 and 11 of sch 2 to the Rules).¹³

Jorge's application for costs in CA319/2024

[19] On 23 May 2024, Eduardo filed an appeal (CA319/2024) against van Bohemen J's costs decision. Eduardo applied for a fee waiver and for dispensation from the requirement to pay security for costs. The Deputy Registrar

¹² Trusts Act 2019, s 38; and *Rodney Aero Club Inc v Moore* [1998] 2 NZLR 192 (HC) at 195.

¹³ Despite Eduardo not being authorised to bring the appeal or seek an extension of time, a costs order against Eduardo is available: see *Mills v Dalzell* [2024] NZCA 675 at [35].

granted the fee waiver but declined the application to dispense with security for costs on 30 July 2024. On 14 August 2024, Eduardo abandoned his appeal under r 44 of the Rules.

[20] Jorge seeks costs of \$3,824 on the abandoned appeal. Jorge claims for steps 4, 6 and 9 in sch 2 to the Rules.

[21] Eduardo opposes any award of costs. He says he was forced to abandon his appeal because of impecuniosity. His costs submissions otherwise focus on the merits of the underlying High Court proceeding.

[22] Rule 44(3) says that an abandonment of an appeal does not affect the power of the Court to make any order as to costs in respect of the appeal. The primary costs principle, set out in r 53A(1)(a), is that a party who fails with respect to an appeal should pay costs to the party who succeeds. Generally, an appellant who abandons an appeal has failed with respect to that appeal and should pay costs to the respondent.¹⁴ The points made by Eduardo in his submissions do not detract from that general approach. Eduardo should therefore pay costs to Jorge.

[23] As to quantum, steps 4 and 6 are for preparation and appearance (respectively) for a hearing of a defended application for leave to appeal. There was no such application in CA319/2024, so these steps are inapplicable. Step 9 is for preparing a memorandum in opposition to an interlocutory application. Eduardo did not make any interlocutory application in CA319/2024, so step 9 is also inapplicable.

[24] The only steps that Jorge took in CA319/2024 were to file a notice of appearance under r 33A, file a notice of opposition to Eduardo's application to the Deputy Registrar regarding fees and security for costs, and file a memorandum and submissions on costs. Schedule 2 does not apply to these steps. Where sch 2 does not apply, r 53D(1)(b) says that a reasonable time for a step is the time assessed as likely to be required. For these steps in this appeal, we allow a total of one day.

[25] This means that Eduardo must pay costs of \$2,390 to Jorge.

¹⁴ See *Chen v Yang* [2009] NZCA 458, (2009) 19 PRNZ 810 at [6].

Result

[26] The application for an extension of time in CA73/2024 is declined.

[27] The first-named appellant in CA73/2024 must pay the respondent costs of \$1,673 and usual disbursements.

[28] The appellant in CA319/2024 must pay the respondent costs of \$2,390 and usual disbursements.

Solicitors:
Chambers Craig Jarvis, Auckland for Respondent