

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA777/2023
[2025] NZCA 126**

BETWEEN VIN TOMAR
 Applicant

AND MONIKA KHATRI
 Respondent

Court: Katz and Cooke JJ

Counsel: Applicant in person
 Respondent in person
 S P Jerebine as counsel to assist the Court

Judgment: 30 April 2025 at 9.00 am
(On the papers)

JUDGMENT OF THE COURT

- A The application for stay is declined.**
- B We make no order as to costs.**
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REASONS OF THE COURT

(Given by Katz J)

Introduction

[1] Mr Tomar has filed an appeal in respect of a High Court judgment of Downs J dated 18 November 2021 (the Judgment).¹ Specifically, the Judge made an order prohibiting Mr Tomar from continuing existing litigation, bringing new proceedings, or filing applications against the respondent, Ms Khatri, in the High Court unless he

¹ *Khatri v Tomar* [2021] NZHC 3091.

first pays outstanding costs awards in Ms Khatri’s favour, totalling \$98,998.15 (the Order).²

[2] Mr Tomar has applied for the Order to be stayed pending the outcome of his appeal, to enable him to pursue litigation against Ms Khatri in the interim, without first having to pay the outstanding costs awards.

Background

[3] There has been protracted litigation between Mr Tomar and Ms Khatri, his former wife, primarily in the Family Court. Ms Khatri applied to the High Court to restrain Mr Tomar from commencing or continuing civil proceedings against her under s 166 of the Senior Courts Act 2016. That application was declined because, although Mr Tomar had pursued numerous unsuccessful applications against Ms Khatri, none of these constituted “proceedings” as defined by s 166; rather, they consisted of interlocutory applications, appeals, and other types of legal challenges.³ The Judge therefore dismissed the restraint application. However, in the exercise of the High Court’s inherent power, the Judge made the Order.⁴

[4] Mr Tomar’s first attempt at appealing the Judgment was deemed abandoned due to his failure to file a case on appeal.⁵ Subsequently, however, Mr Tomar obtained an extension of time to appeal.⁶ Pending the determination of his appeal, Mr Tomar applied to the High Court for a stay of the Order. The Judge dismissed that application on 27 February 2025, primarily on the basis that the prejudice Mr Tomar identified related to his bankruptcy (which the Order did not cause); a stay would risk further harassment of Ms Khatri through litigation; and there had been a considerable delay in seeking the stay.⁷

[5] Mr Tomar now seeks a stay from this Court.

² At [63].

³ At [55].

⁴ At [61].

⁵ *Tomar v Khatri* [2024] NZCA 301 [*Tomar v Khatri (CA)*] at [3].

⁶ At [10].

⁷ *Tomar v Khatri* [2025] NZHC 327 at [5].

Stays pending determination of an appeal — legal principles

[6] This Court may order a stay of proceedings and execution pending the determination of an appeal, provided a stay application has first been made to the lower Court, and declined by that Court (as in this case).⁸ In determining whether to grant a stay, the Court is guided by the factors outlined in *Keung v GBR Investment Ltd*, namely:⁹

- (a) whether the appeal would be rendered nugatory without a stay;
- (b) the bona fides of the applicant in prosecuting the appeal;
- (c) whether the successful party would be injuriously affected by a stay;
- (d) the effect on third parties;
- (e) the novelty and importance of the questions involved;
- (f) the public interest in the proceeding; and
- (g) the overall balance of convenience.

Should the stay application be granted?

[7] Applying the above principles to Mr Tomar's application it is clear, in our view, that the Judge was correct to decline to stay the Order pending the outcome of Mr Tomar's appeal. We endorse the Judge's reasons for declining a stay and make the following additional comments.

[8] First, we acknowledge Mr Tomar's further submissions regarding the alleged link between the Order and his subsequent bankruptcy. Even with the benefit of those submissions, however, the link is not clear and appears tenuous at best. It is also not clear how allowing Mr Tomar to continue to litigate against Ms Khatri would assist him to challenge his bankruptcy. Even if he were able to overturn the specific costs

⁸ Court of Appeal (Civil) Rules 2005, r 12(3) and (5).

⁹ *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].

award that apparently founded the bankruptcy application, Mr Tomar has a number of other outstanding unpaid costs awards, any of which could likely found a bankruptcy application. Ultimately, Mr Tomar's bankruptcy is due to his failure to pay Ms Khatri the costs he owes her, not the Order. We also note that the Family Court costs order that Mr Tomar says resulted in his bankruptcy post-dated the Order.¹⁰ Those costs are therefore presumably additional to the \$98,998.15 in costs that were owing at the time of the Order.

[9] Mr Tomar's appeal will not be rendered nugatory if a stay is not granted. If his appeal is successful, Mr Tomar will be able to resume litigating against Ms Khatri without first paying the outstanding costs orders.

[10] The stay has been in place for over three years now. Mr Tomar's lengthy delay in bringing and pursuing an appeal, and in seeking a stay pending the outcome of that appeal, suggests that a further (much more limited) period of delay until the appeal is heard and determined is unlikely to unduly prejudice him. On the other hand, Ms Khatri, as the successful party in the High Court, would clearly be prejudiced by a stay if Mr Tomar were ultimately unsuccessful in his appeal. She has already had to defend extensive and costly litigation initiated by Mr Tomar, resulting in significant unpaid costs awards in her favour. Granting a stay would allow Mr Tomar to pursue further litigation against her, adding to her burden of time and expense. There is little prospect of Ms Khatri recovering any further costs awards, given Mr Tomar's bankruptcy.

[11] While the substantive appeal raises important questions regarding the High Court's inherent powers to prevent parties from continuing or commencing litigation until outstanding costs awards have been paid, this does not automatically warrant a stay of the Order.¹¹ These broader legal issues can, and will, be addressed in the substantive appeal.

[12] In conclusion, we are satisfied that the overall balance of convenience favours dismissing the stay application.

¹⁰ *Khatri v Tomar* [2022] NZFC 423.

¹¹ As acknowledged by this Court in granting the extension of time to appeal: *Tomar v Khatri (CA)*, above n 5, at [9].

The role of counsel to assist

[13] Mr Tomar has raised concerns regarding the conduct of counsel to assist the Court, Ms Jerebine. He suggests that she has failed to act impartially, as she filed written submissions to the effect that a stay does not appear to be justified with reference to the criteria in *Keung v GBR Investment Ltd* (set out above at [6]). Mr Tomar requests that Ms Jerebine be replaced as counsel to assist.

[14] The role of counsel to assist, in the context of this appeal, is to provide independent, impartial assistance to the Court. Impartiality in this context, however, does not equate to “neutrality” in the sense of having no position at all. If counsel to assist was unable to express her view on an issue before the Court, she would be unable to provide any meaningful assistance at all. Counsel to assist is entitled (and indeed required) to set out her own views and analysis in respect of any issue before the Court in respect of which she can provide meaningful assistance. Her responsibility is not to avoid adopting a stance, but to ensure that any stance taken is guided by objective legal analysis, to assist the court effectively.

[15] Therefore, Mr Tomar’s complaint — that counsel to assist’s recommendation against granting a stay indicates a lack of impartiality — misunderstands the nature of her role. An impartial counsel to assist can legitimately take a position contrary to one or indeed both parties if their independent assessment of the facts and law reasonably supports such a position.

[16] Mr Tomar also makes various other allegations regarding counsel to assist, including allegations of conflict of interest. We have considered those allegations and are satisfied that they are completely unfounded, and do not disclose any matter that would justify counsel to assist being replaced.

Result

[17] The application for stay is declined.

[18] We make no order as to costs.