

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA337/07  
[2007] NZCA 377**

BETWEEN	CLIVE JOHN COUSINS Applicant
AND	JOSEPH ROGER HESLOP AND JENNIFER ROBERTA HESLOP First Respondents
AND	JENNIFER ROBERTA HESLOP AND LINDSAY DONALD SMITH AS TRUSTEES OF THE ROGER HESLOP FAMILY TRUST Second Respondents

Hearing: 20 August 2007

Court: Hammond, Robertson and Ellen France JJ

Counsel: C R Johnstone for Applicant  
D J S Parker and M H Cooke for Respondents

Judgment: 30 August 2007 at 10 am

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**JUDGMENT OF THE COURT**

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- A The application is dismissed.**
- B The respondents will have costs of \$1,500 and usual disbursements.**

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**REASONS OF THE COURT**

(Given by Hammond J)

## **Introduction**

[1] The respondents (“the Heslop interests”) succeeded in the High Court at Christchurch before Chisholm J in an action against the applicant, a solicitor, that resulted in an award of \$1,515,491 plus costs against Mr Cousins (CIV 2005-409-2833 15 June 2007).

[2] Chisholm J stayed the execution of most of that award, pending an appeal to this Court in relation to the substantive judgment. However, a sum of \$572,618.13, representing legal costs, was ordered by the Judge to be paid immediately to the Heslop interests.

[3] Mr Cousins has not appealed against that decision as such; instead he now seeks a “variation” of that order by requiring that the total award be stayed pending the disposition of the appeal.

[4] The jurisdiction for this Court to make such a variance arises by virtue of r 12(6) of the Court of Appeal (Civil) Rules 2005.

## **Background**

[5] It is necessary to add a little more detail as to how this application has come about.

[6] The Heslop interests’ proceedings against Mr Cousins arose out of deficiencies in the performance of his duties as their solicitor. The proceedings were for breach of contract of retainer; negligence; breach of fiduciary duties; and breach of trust.

[7] In an extensive judgment, Chisholm J found that there were multiple failures on Mr Cousins’ part, which we need not detail here. The Heslop interests recovered monies for wasted legal expenses, general damages, and the substantial part of the judgment was made up of damages for the loss of an option to purchase an orchard block.

[8] Mr Cousins appealed timeously against Chisholm J's judgment, on 12 July 2007. The following day he sought a stay of execution under r 12(3) of the Court of Appeal (Civil) Rules 2005. Chisholm J delivered a reasoned judgment on that application on 20 July 2007. The parties had consented to the amount of the judgment plus agreed interests being placed with a nominated law firm as stakeholder. The Heslop interests, however, said that a sum of \$573,618.13 should be released from the stakeholder fund for outstanding legal and other fees and expenses which had to be paid by them. A high rate of interest is running on that sum. The Judge declined to release an additional \$150,000, given an assurance that the solicitors would continue to represent the Heslop interests whatever the outcome of the stay application.

### **Mr Cousins' concerns**

[9] Mr Cousins' application rests on two propositions. First, Mr Johnstone maintains there is a very respectable possibility that Mr Cousins will win his appeal. Second, he says that in such an eventuality the Heslop interests will not be able to pay Mr Cousins back the monies which will be released to them. Nor, he says, do they have any assets to secure the amount they will receive to pay to their solicitors.

### **The applicable principles**

[10] There is no dispute that the principles relating to a stay, pending an appeal, are well settled: see *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) and 58 (CA) and, more recently, *Siemer v Stiassny* CA150/06 25 September 2006 (CA) at [14] (holding that the fact that an appeal may be rendered "nugatory" by the lack of a stay is not, in and of itself, determinative).

[11] If a party is dissatisfied as to the exercise of that discretion, that party can appeal, although such an appeal is subject to the distinct burden on an appellant in respect of an appeal against a discretionary decision.

[12] Rule 12(6) of the civil rules of this Court introduces a complication. It provides: “If the Court appealed from makes [a stay order, the Court of Appeal] may, on application, vary or rescind that order.”

[13] There is thus also what might be termed a “stand alone” jurisdiction under this rule. The question then arises: on what basis should that jurisdiction be exercised?

[14] In a number of other areas of the law, applications for a “variation” of an unappealed subsisting order will not be entertained unless there has been a material change of circumstances from the time the subsisting order was made. This is to preclude variation applications which are really nothing more than appeals in disguise. This has been a feature of, for instance, the bail jurisdiction.

[15] That said, the Court of Appeal rule is cast in wide terms, and we consider that whether there has been a change of circumstances should not be a distinct precondition of relief under the rule. Rather, the rule turns on what the justice of the case requires, and whether it can be shown that the judge appealed from was wrong in the view he or she took in the particular case. Whether there has been a relevant change of circumstances is an element in that enquiry, but it is not dispositive of the application.

### **This instance**

[16] Here, as Mr Johnstone candidly conceded, there has been no change of circumstances since Chisholm J’s judgment. The issue is, therefore, whether it can be shown that the course the Judge took was wrong.

[17] First, the appeal in relation to the substantive judgment is necessarily one against the factual findings of Chisholm J. Mr Johnstone agreed there are no distinct legal points. That is a stiff burden for an appellant to surmount. Second, Chisholm J took the view that the respondents have been able to pay something over \$300,000 to date on this litigation. In his view, the Heslop interests would, if required, be able to pay further monies, not in a lump sum, but on a continuous basis over a period of

time. Third, the Judge held that on a balancing exercise, the rights of the successful respondents to at least part of the fruits of their forensic success “decisively outweighs any risk that [Mr Cousins] might not receive repayment if his appeal succeeds” (at [10]).

[18] We cannot say the Judge was wrong, in terms of the usual appellate standard. He had all the relevant considerations before him, and he balanced them according to the justice of the case. It is not a question of what this Court might have done; it has to be shown the Judge was wrong.

[19] We also note that on our own preliminary analysis, what the position might be on a successful appeal is problematic for the applicant. It appears to us that, realistically, and without rehearsing all the figures here, what is really at issue quantum-wise is only part of the judgment appealed from. Thus, the applicant is likely to have to pay a portion of the award, in any event, so in reality the repayment issue is not likely to ever arise.

## **Conclusion**

[20] The application is dismissed.

[21] The respondents will have costs of \$1,500 together with usual disbursements.

Solicitors:  
Wynn Williams & Co, Christchurch for Applicant  
Dan Parker, Wellington for Respondents