

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA632/2017
[2020] NZCA 267**

BETWEEN TYRONE WAYNE UNDERHILL
First Appellant

KANE JOSEPH UNDERHILL
Second Appellant

AND COCA-COLA AMATIL (NZ) LIMITED
Respondent

Court: Cooper and Goddard JJ

Counsel: Appellants in person
B A Smith and T P Oldfield for Respondent

Judgment: 30 June 2020 at 10 am
(On the papers)

JUDGMENT OF THE COURT

The appeal is struck out under r 44A(1)(a) and (b) of the Court of Appeal (Civil) Rules 2005.

REASONS OF THE COURT

(Given by Cooper J)

[1] In a judgment delivered on 19 November 2019 we granted an application made by the appellants to extend the time for filing an appeal subject to conditions, which we said must be strictly observed.¹

¹ *Underhill v Coca-Cola Amatil (NZ) Ltd* [2019] NZCA 566 [Judgment of 19 November 2019].

[2] The conditions were as follows:²

- (a) The applicants must bring their appeal by filing and serving a notice of appeal on or before Wednesday 18 December 2019.
- (b) The applicants must apply for the allocation of a hearing date and file and serve the case on appeal on or before Friday 28 February 2020.
- (c) By the same date, the applicants must file in writing the submissions they intend to make on the questions approved for consideration by this Court in the judgment of 22 November 2018 ([2018] NZCA 521).
- (d) All documents filed pursuant to the above directions must be immediately served on the respondent.
- (e) The respondent's submissions in reply must be filed and served three weeks prior to the hearing of the appeal.

[3] The orders made at paras (b) and (c) were not complied with.

[4] Our judgment of 19 November 2019 summarised the history of this matter. We do not repeat it here. It is sufficient for present purposes to state that we found the appellants had not proceeded with diligence since being granted, on 22 November 2018, leave to appeal from a decision of the Employment Court.³ The appellants obtained an order extending the time for filing an application for leave to appeal.⁴ The Employment Court's judgment had been delivered on 29 September 2017.⁵

[5] In the judgment of 19 November 2019, we recorded that the appellants were laypeople, acting without the benefit of legal advice and noted that their papers reflected that.⁶ For the reasons we gave we concluded that there had been a lengthy delay in pursuing the appeal, which had not been satisfactorily explained.⁷ We were also critical of the appellants' failure to serve relevant documents on the respondent. Nevertheless, we granted the extension of time subject to the conditions that we have set out above. The requirement that the conditions be strictly observed was a reflection of the unsatisfactory delays to that point.

² At [21].

³ *Underhill v Coca-Cola Amatil (NZ) Ltd* [2018] NZCA 521.

⁴ Court of Appeal (Civil) Rules 2005, r 29A.

⁵ *Underhill v Coca-Cola Amatil (NZ) Ltd* [2017] NZEmpC 117, [2017] ERNZ 693.

⁶ Judgment of 19 November 2019, above n 1, at [3].

⁷ At [11].

[6] At our direction, the Registrar wrote to the appellants on 29 April 2020 giving notice that the Court intended to consider making an order under r 44A(1)(a) and (b) of the Court of Appeal (Civil) Rules 2005 (the Rules), because of continuing default in compliance with the procedural orders made in the judgment of 19 November 2019 and failure to prosecute the appeal with due diligence and dispatch. Her letter gave the appellants until 13 May 2020 to file submissions as to why the Court should not strike the matter out.

[7] In response, an email was received on 3 May 2020 in which the appellants claimed that they had “previously filed this information with a deputy registrar of the Court” and had not understood that they were required to file anything further. They admitted that there had been an oversight on their part which was not intentional. The email included a claim that they had understood that the reference to a date of 18 February 2020 was “information for the Court”.

[8] There was no reference to 18 February 2020 in the Court’s judgment, and it is quite plain from the orders made at the front of the judgment that the appellants were required to take the listed steps.

[9] The Registrar’s email of 29 April 2020 advised the appellants to take legal advice if they required assistance or were unsure of any steps that should be taken. The email response from the appellants does not justify noncompliance with the orders made. Perhaps more importantly, orders (b) and (c) have still not been complied with.

[10] In submissions dated 15 May 2020 counsel for the respondent submitted that the appeal should be struck out under r 44A(1)(a) and (b) of the Rules. Under the former, an order may be made striking out an appeal if the appellant is in continuing default in compliance with the Rules or any procedural direction or order made by a judge. Under the latter an appeal may also be struck out where the appellant has failed to prosecute an appeal with due diligence and dispatch. Counsel submitted the appeal should be struck out because the appellants have a history of failing to observe time limits. There has now been a delay of two and a half years since the application for leave to appeal out of time was filed, and no hearing date has been applied for, a delay attributable solely to the appellants. Finally, counsel notes that

there has been no adequate excuse for failing to comply with the procedural orders of this Court which were required to be strictly observed.

[11] Those points are well made. The appellants' ongoing defaults are such that allowing the matter to proceed would not be appropriate: there could be no guarantee that the matter would ever be ready for hearing.

[12] The appeal is struck out under r 44A(1)(a) and (b) of the Rules.

Solicitors:
SBM Legal, Auckland for Respondent