

## CASE SUMMARY

# Extension of time to appeal to Court of Appeal denied where obvious lack of merit

Decision date: 08-12-2020

CSUM 21/03

## CASE

**Dowden v Commissioner of Inland Revenue [2002] NZCA 630**

## LEGISLATIVE REFERENCES

Court of Appeal (Civil) Rules 2005, r 43(2)

## LEGAL TERMS

Extension of time; interests of justice; length and reasons for delay; conduct of applicant; prejudice to respondent; merits of appeal.

## Summary

The taxpayer's appeal was treated as having been abandoned after he failed to pay the scheduling fee by the required date and failed to consult with the Commissioner when preparing the case on appeal as required by the rules of the Court of Appeal.

The taxpayer applied for an extension of time under r 43(2) of the Court of Appeal (Civil) Rules 2005 for the allocation of a hearing date and to file the case on appeal.

The Court of Appeal accepted that various delays were attributable to the taxpayer's ill health, which was exacerbated by the untimely death of his son but considered that the lack of merit of the proposed appeal meant the requested extension of time was not justified. The application was declined.

## Impact

There is no impact beyond that to the taxpayer in this matter.

## Facts

The taxpayer filed a notice of appeal on 29 November 2019.

He was granted a number of extensions by the Deputy Registrar. However, the taxpayer failed to pay the scheduling fee by 13 July 2020 (when it was due) and he also failed to consult with the Commissioner when preparing the case on appeal (as required).

As a consequence, the taxpayer was precluded from seeking a hearing date and the appeal was treated as having been abandoned. The taxpayer then filed an application for an extension of time under r 43(2) of the Court of Appeal (Civil) Rules 2005.

## Issues

Whether the Court of Appeal should grant the application for an extension of time for the allocation of a hearing date and to file a case on appeal.

## Decision

The Court of Appeal found that the ultimate question when considering the exercise of its discretion to extend time is what the interests of justice require. Factors that influence that determination include: the length of and reasons for the delay; the conduct of the parties, particularly the application; any prejudice or hardship to the respondent; and the significance of the issues raised by the proposed appeal, both to the parties and more generally.

The Court noted that the Supreme Court has accepted that the merits of a proposed appeal may be relevant to the exercise of the discretion to extend time, *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 however it also recognised three qualifications to this principle:

- (1) on occasion the merits or otherwise of a proposed appeal will be overwhelmed by other factors (such as the length of delay or prejudice) and therefore will not require consideration;
- (2) the merits will not generally be relevant in a case where there has been an insignificant delay as a result of a legal advisor's error and the proposed respondents have suffered no prejudice (beyond the fact of an appeal); and
- (3) a decision to refuse an extension of time based substantially on the lack of merit of a proposed appeal should be made only where the lack of merit is readily apparent, and the appeal is clearly hopeless.

The Court found the numerous delays could be attributed mostly to the taxpayer's ill health, which was exacerbated by the untimely death of his son. Therefore, the real issue for determination was whether the proposed appeal had merit.

The Court noted that the Taxation Review Authority (TRA) did not accept the taxpayer's evidence, having heard the taxpayer give evidence and being cross-examined, rather the TRA did not find the taxpayer to be reliable or credible. The TRA considered the contemporaneous evidence showed the taxpayer was liable for the taxes alleged. The Court further noted that the High Court rejected the taxpayer's submission that the TRA did not give proper weight to certain items of evidence. The Court found no apparent error in the High Court decision. For these reasons, the Court found the proposed appeal lacked merit. It found the interests of justice weighed against the granting of the extension.

The application for an extension of time under r 43(2) of the Court of Appeal (Civil) Rules 2005 was declined.

## About this document

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