

IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT AUCKLAND, NEW ZEALAND
(LAND DIVISION)

CA14/2003
AITUTAKI NO.
6/2003
JP APPEAL 2/2003

BETWEEN KATHY BEN

Applicant

AND NGATOKORUA AND TEOKOTAI STRICKLAND

Respondents

Hearing: 12 November 2004

Coram: Barker JA (Presiding)
Henry JA
Smellie JA

Counsel: Mr N George for the Applicant
Mrs T Browne for the Respondent

Judgment: 12 November 2004

JUDGMENT OF THE COURT

*Solicitors: Norman George for Respondents
Browne Gibson Harvey for Appellant*

~~[1] This appeal was originally placed in the fixture list at the request of the~~
respondent but was withdrawn at the request of counsel for the appellant. The
application for a fixture and the failure of the case to be listed for the current sittings
produced an application from the respondent for an order dismissing the appeal. In
particular, it was stated that the respondent, believing that the appeal was to be
heard, purchased non-refundable air fares for herself and her dependant
granddaughter to come to Auckland for the hearing at a cost of \$1,378.

[2] The appeal is against a decision of Smith J in the Land Division of the High
Court at Aitutaki, given on 25 August 2003. Subsequent to that judgment, the
respondent obtained leave to appeal to this Court. However, we are informed by Mr
George, who was not then acting for the respondent, that no appeal book has been
prepared and it would seem therefore, unless there is an order for extension from the
Court, that, under r 30 of the Court of Appeal Rules, the appeal is deemed to have
been abandoned.

[3] On 25 October 2004, the respondents applied pursuant to r 221 of the Code
of Civil Procedure for a rehearing of the Judge's decision of 25 August 2003. This
application was well outside the time limit provided in the rule. Of course, the Judge
will have to determine whether he will entertain the application.

[4] There is also an application for partition in respect of the relevant land made
by the appellant. That was adjourned by the High Court at Aitutaki on 16 August
2004 on the grounds that an appeal was pending in respect of the Judge's previous
order.

[5] Mr George, for the respondents, seeks to prosecute the application for
rehearing before Smith J. He is happy for the appellant's application for partition to
be disposed of at the same time, at the same sitting of the High Court in its Land
jurisdiction at Aitutaki, thought to occur next March.

[6] After discussion, it seemed to us that the justice of the case required the current appeal (14/2003) to continue in existence because, in the event that the respondent is unsuccessful on the application for rehearing, the only extant appeal right then available to them would be against the decision of the Judge refusing a rehearing. In that event, they would want to be able to challenge the original judgment by way of appeal.

[7] Consequently, it seems that the justice of the case requires that appeal 14/2003 be not dismissed. However, it will not be necessary for the respondent to file the appeal book until the disposition of the rehearing application is known. If that rehearing application is unsuccessful, then the requisite documents for the appeal book must be filed in the period of five weeks of the date of judgment.

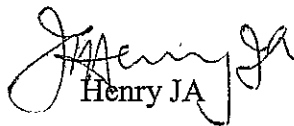
[8] Counsel should prosecute the application for rehearing diligently and have it heard as soon as possible, given that it is to be heard on the Island of Aitutaki. The application before the Court, which is to dismiss the appeal 14/2003, is not granted. However, we do make an order that costs be paid.

[9] Accordingly, costs, in any event, in the present application are ordered against the respondents to be paid to the appellant in the sum of \$1,378 for air fares and solicitors' costs of \$650. These costs are to be paid within 28 days.

[10] Liberty to apply is reserved to either party for any further procedural order in respect of the appeal, particularly if the appeal is not prosecuted diligently, once the result of the rehearing application is known.



Barker JA



Henry JA



Smellie JA