IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

AP NO 5/01

BETWEEN CLAUDIO RONCELLI

Appellant

556

AND JAMES DESMOND PATRICK WALL

Respondent

Date of Hearing: 23 April 2001

Judgment Released: 18 May 2001

Counsel: P H B Hall for the Appellant
P M James for the Respondent

RESERVED JUDGMENT OF YOUNG J

Solicitors:
Loughnans, Christchurch for Appellant
Saunders & Co, Christchurch for Respondent

Introduction

[1] This is an application for leave to appeal out of time against a judgment of the District Court.

[2] It raises an interesting and difficult issue, on which there are conflicting authorities, as to whether an appeal against an interlocutory order of the District Court which has been filed without leave (and therefore in breach of s 71A (2), District Courts Act 1947) but within the period provided for by s 71A (5) seeking leave to appeal from the High Court can be treated as if it were an application for leave to appeal.

Background

[3] The underlying proceedings were commenced on 18 October 2000 by Mr Claudio Roncelli against Mr James Wall. The statement of claim was in handwriting and was laconic:-

> I sue the defendant for:
>
> 1. Being responsible for the failure of Gruppo Bacco N.Z. Ltd, the company that I created. $100,000
>
> 2. Causing irreparable damage to my reputation in New Zealand and in Italy. $60,000
>
> 3. Causing my family and me to suffer humiliation and severe stress. $39,950

[4] The response was an application by Mr Wall for orders that the statement of claim be struck out and for costs or, in the alternative, for security for costs. The basis of the strike out application was that the proceedings were barred by the Limitation Act.

[5] From the affidavit filed by Mr Wall, an affidavit filed by Mr Roncelli and an amended statement of claim, it is possible to recreate, at least generally, the background to the litigation.

[6] The case concerns Gruppo Bacco NZ Ltd. This company appears to have been, at least initially, a joint venture between Mr Roncelli and Mr Vittorio Guglietta. Mr Wall became involved with the company in his role as an accountant. Also involved with the company was Dianne Norma Holland (who was originally an unsecured creditor but later a director and shareholder).

[7] From the material which I have seen, it appears that a dispute developed in relation to the company which involved, on one side, Mr Roncelli, and on the other, Mr Guglietta, Mrs Holland and Mr Wall.

[8] Mr Roncelli's complaints about Mr Wall seem to be that he:-

1. Misrepresented Mr Roncelli's position in communications with Mrs Holland;

2. Inappropriately, and contrary to his instructions, sought to bring Mrs Holland into the company as a member;

3. Generally took the part of Mr Guglietti and Mrs Holland against him in relation to the affairs of the company but then rendered bills for services provided to them to the company;

4. Wrote letters which insinuated that "the Plaintiff was an untrustworthy individual of bad character";

5. Accepted a cheque drawn on the company in payment of disputed accounts but only signed by Mr Guglietta when he knew that Mr Roncelli's signature was required and nonetheless banked the cheque;

6. Participated in meetings of the company (or perhaps its directors) at which Mr Roncelli's shares were forfeited and he was removed as a director;

7. Was a party to the publication of a defamatory letter of 11 February 1993 from a solicitor to Trustbank Canterbury;

8. Spread "the word around the business community including company clients" that the plaintiff was being investigated for fraud (after the execution of a search warrant by the police on 22 February 1993);

9. Contacted suppliers in Italy in a way which involved making false allegations about the plaintiff;

10. Inappropriately charged the company for work carried out; and

11. Generally interfered in the operation of the company and asserted a role in relation to its affairs which he did not legally have.

[9] From this description, it is apparent that many of the complaints which Mr Roncelli has in relation to Mr Wall could not give rise to personal claims against Mr Wall as the wrongs complained of (if wrongs at all) were wrongs vis-à-vis the company and not Mr Roncelli. The amended pleading, however, can be regarded as alleging defamation, that is in respect of the letter of 11 February 1993, the spreading of rumours around the business community following the execution of a search warrant by the police on 22 February 1993 and the contacting of suppliers in Italy in a way which is said to involve the making of false allegations about the plaintiff.

[10] The last specific event pleaded by Mr Roncelli in his amended statement of claim is his receipt of a letter of 19 May 1993 from one of the company's main suppliers indicating that distribution rights had been withdrawn. The pleading goes on to say:-

> At that point the company was put out of business because the product under discussion was the flagship product which had sold extremely well.

[11] All the actions on the part of Mr Wall which are complained of preceded 19 May 1993. Given that and given the weight placed on the 19 May 1993 letter by Mr Roncelli in his amended statement of claim, it is understandable that Mr Wall would see the proceedings as hopeless given the limitation difficulties faced by Mr Roncelli.

The strike out application in the District Court

[12] The applications by Mr Wall to strike out the proceedings and/or for security for costs came to be heard in the District Court at Christchurch on 23 January 2001. Mr Roncelli appeared in person. The judge, in an oral judgment, delivered that day, struck the proceedings out and ordered Mr Roncelli to pay costs. His reasoning was as follows:-

1. The only personal claim, ie the only claim which could be advanced by Mr Roncelli as opposed to the company, which was disclosed in the pleading was in defamation.

2. Section 55, Defamation Act 1992 which provides that defamation proceedings may be brought without leave within two years from the date of the cause of action arising and, with leave, within six years, barred the proceedings because the claim was not commenced without two years of the cause of action arising and leave to commence the proceedings could not be granted because such leave had not been sought within six years of the cause of action arising.

Procedural steps taken subsequently to the judgment delivered in the District Court

[13] Mr Wall's solicitors sealed the judgment on 25 January and a copy was sent to Mr Roncelli under cover of a letter dated 25 January.

[14] Mr Roncelli did not recognise the sealed judgment for what it was. It seems that he regarded it primarily as being, in effect, an account for the costs which had been ordered against him by the District Court judge.

[15] When Mr Roncelli took legal advice a few days later his lawyer pointed out, accurately, that the time for filing an appeal ran from the date the judgment was sealed. The time limit of 21 days was also noted although, as will be apparent, it

appears that Mr Roncelli and his lawyers regarded the decision of the District Court judge as a final order rather than as an interlocutory order and therefore overlooked the necessity to obtain leave from the District Court before an appeal was filed. More significantly, Mr Roncelli and the lawyer both assumed that the judgment had not been sealed and both, therefore, were of the view that time was not running.

[16] Mr Roncelli, according to his affidavit, then made a number of inquiries with the District Court with a view to ascertaining whether the judgment had been sealed. As I have indicated, his position is that he had not understood that the document which was sent to him under cover of the letter of 25 January was, indeed, a sealed judgment. Further, on his evidence, the staff of the District Court erroneously told him on each occasion that he approached the court that no judgment had been sealed.

[17] Notice of appeal was finally filed on 2 March this year.

[18] The case was called before Panckhurst J on 21 March. In his minute as to that hearing, that judge said:-

> [1] In a judgment delivered on 23 January 2001 Judge Doherty struck out the appellant's then claim in the District Court. The present appeal is against that decision. More accurately, it is now acknowledged it is an application for leave to appeal out of time since the judgment was sealed soon after 23 January and this appeal not filed until 27 February.
>
> [2] The matter is adjourned for argument of the special leave application before Young J on Monday, 23 April at 10 am.

[19] An application for leave to appeal out of time was formally made on 26 March.

The relevant statutory provisions

[20] At this point I should refer to the relevant provisions of District Courts Act 1947.

[21] Section 71 provides:-

In this Part of this Act, unless the context otherwise requires,—

"Final order", in relation to a District Court, means any non-suit or final determination or direction of the Court:

"Interlocutory order", in relation to a District Court,—

(a) Means a decision or order made by the Court in relation to an interlocutory application; but

(b) Does not include—

(i) A judgment or order dismissing an application for a new trial; or

(ii) A judgment granting summary judgment under any provision of the rules.

[22] Section 71A provides:-

(1) Subject to subsection (3) of this section, any party to any proceedings in a District Court may appeal in accordance with the provisions of this Part of this Act to the High Court against the whole or any part of any final order of the District Court—

(a) Without the leave of the District Court where—

(i) The amount of the claim or the value of the property or relief claimed or in issue exceeds $500 ...

(2) Subject to subsection (3) of this section, any party to any proceedings in a District Court may, with the leave of the Court, appeal to the High Court against the whole or any part of any interlocutory order made by the District Court in those proceedings. ...

(4) Every application to a District Court under this section for leave to appeal shall be filed in the prescribed manner within 21 days after the date on which the final order or the interlocutory order is sealed.

(5) Where an application to a District Court under this section for leave to appeal is refused, or no such application is made within the period of 21 days prescribed by subsection (4) of this section, the High Court may, on application made to it within one month after the expiry of that period, grant special leave to appeal.

[23] Section 73 provides:-

> (1) Subject to any directions given under section 71A(6) of this Act, every appeal shall be brought within 21 days after—
>
> (a) The date on which the final order is sealed, in the case of an appeal under subsection (1)(a) of section 71A of this Act; or
>
> (b) The date on which leave or special leave was granted, in the case of an appeal under subsection (1)(b) or subsection (2) of that section,— or within such further time as may be allowed by the High Court on an application made to it within one month after the expiration of that period of 21 days.

Is the case governed by s 71A or s 73?

[24] The first issue which arises, at least on my appreciation of the case, is whether the judgment delivered on 23 January 2001 should be regarded as being a "final order" or an "interlocutory order" within the meaning of s 71. On a purely literal approach to the section, the order would appear to be both as it was a "decision or order made by the Court in relation to an interlocutory application" and thus apparently an "interlocutory order" but also a "final determination" in respect of the proceedings. But, of course, the scheme of the legislation is that the definitions of "final order" and "interlocutory order" are intended to be mutually exclusive. The order in question here must therefore be either a final order or an interlocutory order.

[25] The authorities show that an order striking out a proceeding is an interlocutory order for the purposes of these sections, see *Matthews Corporation Ltd* v *Edward Lumley and Sons (NZ) Ltd* [1994] 7 PRNZ 591 and *Wilkins* v *Concept Innovation Ltd* (1995) 9 PRNZ 337.

[26] On this view of the law, Mr Roncelli was only entitled to appeal if he had first obtained the leave of the District Court, see s 71A (2). Such application for leave would have required to have been made within 21 days after the sealing of the judgment, see s 71A (4). There is an entitlement to seek special leave from the High

Court within a further one month period (that is one month after the expiry of the primary period of 21 days).

[27] The position would be very much the same if the order of the District Court judge is treated as a final order. On that basis, there would have been 21 days available for the filing of an appeal and, if an appeal was not filed in a timely way, a further period of one month within which leave to appeal out of time could be sought from this court.

Identification of the time difficulty faced by Mr Roncelli

[28] The problem Mr Roncelli faces is that he did not comply with the requirements of s71A (4) in that he did not apply to the District Court for leave to appeal within 21 days after the date of the sealing of the order. He was required to do so by 16 February. Further, although he has filed what purports to be a notice of appeal against the decision of the District Court, and did so within the period of time within which he could seek leave to appeal under s 71A (5) he did not, expressly anyway, seek leave to appeal. His application for leave to appeal on 26 March is out of time and there is no jurisdiction for me to make an order in relation to that particular application.

[29] Mr Roncelli's position can, therefore, only be salvaged if the appeal which he filed on 2 March (that is within the period during which, pursuant to s71A (5) an application may be made for leave to appeal) can be treated as an application for leave to appeal.

Can the filing of a notice of appeal be treated as an application for leave to appeal?

[30] There is authority which supports the proposition that the filing of a notice of appeal in this court in a situation where leave to appeal has not been obtained from the District Court can be treated as comprehending an application for leave to appeal on the basis that the greater (meaning the notice of appeal) includes the lesser (an application for leave to appeal), see *Carver* v *Carver*, High Court, Auckland, AP 58SW/99, judgment of Baragwanath J delivered 23 July 1999).

[31] If the *Carver* v *Carver* approach is right, it would be open to me to treat the notice of appeal filed on 2 March as including an application to this court for special leave to appeal under s 71A (5).

[32] *Carver* is not, however, the only authority on this point. For instance, in *Anderson* v *Jim Hunt and Co Ltd* [1986] 1 NZLR 625, the then Eichelbaum J struck out an appeal against an interlocutory judgment where the appeal had been filed outside the 21 day period but within the following one month period provided for by s 71A. It is clear enough that the judge in that case did not see the appeal which had been filed without the leave of the District Court having first been obtained as including or importing an application for special leave under s 71A (5).

[33] I note that an analogous issue can arise under s 4 (7), Limitation Act 1950 which provides for a primary limitation period of two years in respect of actions in respect of bodily injury but for such actions, as well, to be able to be brought before the expiration of six years from the cause of action with the consent of the intended defendant or pursuant to leave of the court pursuant to an application if made within six years from the date on which the cause of action accrued. In a case where proceedings were issued after the expiry of the primary two year limitation period but before the expiry of the long-stop six year period, the commencement of the proceedings is not, itself, treated as being an application for leave, see for instance *A* v *D* (1996) 10 PRNZ 68 and *Owen* v *Residual Health Management Unit* (unreported, CA267/99, judgment delivered 14 August 2000). Although the analogy between the present situation and the situation involving s 4 (7), Limitation Act 1950, is not exact, the cases to which I have referred support the view that proceedings seeking substantive relief which are filed in error without necessary leave having been first obtained, are not ordinarily treated as including an implied application for leave (on a *nunc pro tunc* basis) if it be later held that leave is necessary.

[34] In light of the cases referred to in paragraphs [32] and [33] it is obviously well arguable that it is not open to me to amend the purported notice of appeal or otherwise treat it as including an application for leave to appeal under s 71A (5).

[35] I note that I have looked at authorities from other jurisdictions and, in particular, England. I have not, however, found authority dealing with the point which is precisely on all fours with the present situation. The overseas authorities which I have looked at are of limited assistance and I see no need to refer to them.

[36] In this area where there is a conflict of authority, I have a choice as to which approach to take. I conclude that it is open to me to treat the notice of appeal as an application for leave to appeal and that I should do so. I say this for the following reasons:-

1. Rule11 of the High Court Rules is apposite. It provides:-

> (1) The Court may, either before, at, or after the trial of any proceeding, amend any defects and errors in the pleadings or procedure in the proceeding, whether or not there is anything in writing to amend, and whether or not the defect or error is that of the party (if any) applying to amend.
>
> (2) The Court may, at any stage of a proceeding, make, either of its own motion or on the application of any party to the proceedings, such amendments to any pleading or the procedure in the proceeding as are necessary for determining the real controversy between the parties.
>
> (3) All amendments made under subclause (1) or subclause 2 shall be made with or without costs and on such terms as the Court thinks fit.

   This provision perhaps points to the issue which I must resolve as being one of discretion rather than jurisdiction – that is that I have discretion to treat the failure to include in the notice of appeal words apposite to an application for leave to appeal as within the concept of "defects and errors in the pleadings or procedure in the proceeding".

2. Conventional practice in the courts (albeit one which has not left much mark on the law reports) is for notices of appeal to be treated, where necessary, as applications for leave to appeal; this in situations where the relevant statutory provision confers a right to seek leave to appeal rather than a right of appeal.

3. A litigant in the position of Mr Wall is entitled to know, under the District Courts Act, that a favourable judgment is unassailable after a period one month and 21 days following sealing. By filing the notice of appeal within that period, Mr Roncelli put Mr Wall on notice that the judgment was under challenge within the period within which steps can be taken to challenge a District Court judgment. In that context, the complaint that Mr Roncelli used the form of words which is appropriate for an appeal, as opposed to an application for leave to appeal, is very technical.

4. If Mr Wall's general argument is right, it could lead to an injustice. For instance, if it were the case that an appellant had filed what purported to be an appeal just out of time and the respondent, knowing of the error, did nothing to alert the appellant to the problem until after the time for applying for leave to appeal had expired, the merits might strongly warrant treating the appeal as including an application for leave to appeal if necessary. I hasten to add that this is not what happened here. Mr Wall's solicitors did notify Mr Roncelli's solicitors of the time problem as soon as the notice of appeal was served. This example, however, does point to the difficulties which could arise if an overly strict approach is taken.

[37] In those circumstances, I propose to address the issues raised by Mr Roncelli on their merits.

Consideration of the application for leave to appeal on its merits

[38] In my experience, a strike out based on a limitation defence is rare. The principles are discussed in *Ronex Properties Ltd* v *John Laing Construction Ltd* [1982] 3 All ER 961. As defendants now have a right to seek summary judgment, I would expect that a defendant who claims to have a cast iron Limitation Act defence would seek summary judgment rather than a strike out.

[39] In the District Court, counsel for the defendant and the Judge did not address the particular difficulties which arise where a defendant seeks to have proceedings struck out on the basis of a limitation defence. This was of some concern to me at

the hearing of the appeal and, viewed in isolation, it could be taken as suggesting that the proposed appeal by Mr Roncelli may have some merits.

[40] The situation, however, must be looked at in a broader context.

[41] Since the application to strike out the proceedings must be regarded, in this respect, as being based on the contention that the proceedings were frivolous and vexatious (given that there was, on Mr Wall's argument, an irrefutable Limitation Act defence), it was open to the parties to put in evidence associated with their respective contentions (*cf Ronex*). This they did, albeit, only to a limited extent.

[42] In a situation where proceedings appear to have been commenced outside the relevant limitation periods, a plaintiff who seeks to persist with them can fairly be expected to point, in a specific way, to a reason why the limitation defence, *prima facie* applicable, might be held not to apply. Mr Roncelli did not do so in the District Court. I emphasize that, given the nature of the application to strike out, it was open to Mr Roncelli to put to the District Court judge detailed evidence as to the basis upon which he contended that the limitation defences raised by Mr Wall did not apply.

[43] Given that Mr Roncelli was, in the District Court, a litigant in person, I would not wish to be thought to making too much of procedural failures on his part. So it is only right to add that, leaving aside Mr Roncelli's procedural failures, I have no doubt that Mr Roncelli would be hard pressed to succeed in a claim against Mr Wall based on defamation. The limitation issues referred to by the Judge are very real. It would, in truth, be very surprising if there was any way around these difficulties. As well, to the limited extent to which it is possible to assess the strength of his contentions against the evidence, there are other problems with the claim. For instance, the allegedly defamatory letter of 11 February 1993 to Trustbank Canterbury has been exhibited to one of the affidavits. I simply do not see this letter as defamatory. Even if it was, there would, in all probability, be a defence of qualified privilege.

[44] Mr Roncelli now recognises the problems with the claims in defamation and I was told by his counsel that these claims would be abandoned and that, rather, it would be alleged that Mr Wall was liable in tort for "negligence and interference with business relations and injurious falsehood" and not "in contract or defamation".

[45] In fairness to Mr Wall, I do not see how either the original statement of claim or the amended statement of claim can be regarded as alleging negligence, interference with business relations and injurious falsehood. If leave to appeal were granted and the appeal was allowed, the result would be that Mr Roncelli would therefore have to amend his pleadings. This was acknowledged by his counsel.

[46] Such amendment of the pleadings would involve, in essence, a reconstitution of the claim. There would be real issues as to whether such reconstitution would be appropriate given Rule 210 of the District Courts Rules which prohibits amendments which add fresh causes of action which are statute barred. I say this because, in all probability, the claims which Mr Roncelli now wishes to argue are subject to limitation defences of broadly the same type as those which were seen in the District Court as being fatal to his defamation claims.

[47] Again, there was no detailed and specific argument put to me as to the basis upon which Mr Roncelli could hope to overcome these limitation defences. Everything which was put to me on this score was at a high level of generality. For instance, reliance was placed on the reasonable discoverability test. Counsel referred to the contention made by Mr Roncelli in his submissions to the District Court as recorded by the Judge that Mr Roncelli had only just "got some of the documentation which enables him to make the claim". Counsel, in his written submissions to me, then went on:-

> If this documentation is the very basis of the claim and he had only recently received it then there may be an argument based upon the proposition that time only commenced to run from the moment he discovered the documentation or at the time he could reasonably have discovered it.

I would find arguments of that sort distinctly more cogent if the particular documents upon which Mr Roncelli was relying were particularised and the arguments as to them set out in a detailed way.

[48] The claim which Mr Roncelli filed in the District Court was treated, understandably, in that court as involving what is now acknowledged to be an unsustainable claim for defamation. Mr Roncelli is seeking to have this court, on appeal, resuscitate the claim. This is not so that he can proceed with the defamation claim which has been struck out but rather to facilitate the filing, some months down the track, of amended pleadings raising different causes of action.

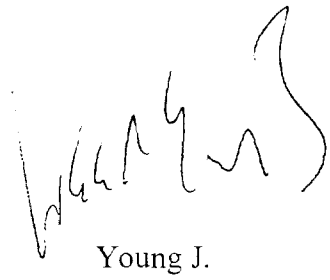
[49] In summary, I have no real difficulty with Mr Roncelli's reasons as to the delay in filing the appeal. It was due to a misunderstanding. But the reality is that the prospects of success in respect of the appeal are bleak. In any event, Mr Roncelli now accepts that the claim which the Judge treated him as making will not be proceeded with. There is a real sense in which this makes the present proceedings hypothetical. So, in those circumstances, I do not think it would be right to grant leave to appeal out of time.

[50] I note that it may be possible for Mr Roncelli to issue further proceedings despite the strike out, see for instance the considerations referred to in my judgment in *Collier* v *Butterworths of NZ Ltd* (1998) 12 PRNZ 38. I mention this not by way of encouragement to Mr Roncelli because I very much suspect that any such proceedings will probably face insurmountable limitation difficulties (and, no doubt, many other major problems as well). But if it is the case that Mr Roncelli wishes to pursue claims along the lines indicated in paragraph [44] of this judgment, the more appropriate course is for further proceedings to be issued in which those claims are clearly and distinctly pleaded rather than seek to have resuscitated the present proceedings which would then be amended to allege the further causes of action.

Disposition

[51] In those circumstances, although I am of the view that there is jurisdiction for me to treat the notice of appeal as including an application for leave to appeal, leave to appeal is declined.

[52] Mr Roncelli is ordered to pay the defendant's costs in the sum of $1,500.



Young J.

Delivered at 9.00 am on 18 May 2001