

**IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY**

CIV 2004-419-001366

BETWEEN

MARGARET TENNANT

Appellant

AND

DOUGLAS GILBERT SHAW SIMES

Respondent

Hearing: 10 November 2004

Appearances: S J Kos for appellant
C Y Simes for respondent

Judgment: 11 November 2004

JUDGMENT OF POTTER J

Solicitors: Russell McVeagh, P.O. Box 10-214, Wellington
Purnell Creighton, P.O. Box 13-376, Armagh, Christchurch

Copy to: C Y Simes, P.O. Box 4265, Hamilton

Introduction

[1] The appellant seeks leave to file its notice of appeal out of time. The appeal filed on 24 September 2004 is against a judgment as to costs delivered by His Honour Judge Wolff following resolution of the substantive proceeding.

[2] The respondent opposes the application for leave to file out of time.

Background

[3] The respondent issued proceedings against the appellant who is the second defendant in the District Court proceedings, and the University of Waikato, the first defendant in the District Court proceedings, claiming defamation and breach of confidence. The proceedings were discontinued, in the case of the defamation claim after undertakings had been provided to the Court by the defendants. Written submissions on the matter of costs were filed, following which Judge Wolff issued a decision that costs should fall where they lie. The decision of Judge Wolff is undated. Against that decision the appellant has filed her notice of appeal on 24 September 2004.

[4] In support of the application for leave to file out of time an affidavit by Fionnghuala Joy Cuncannon of the Wellington office of Russell McVeagh has been filed. Ms Cuncannon attests that the file was previously handled by Miss Kirsten Massey who had arranged for the notice of appeal to be filed and served on Friday 24 September 2004. Ms Massey was about to depart overseas. On 23 September she asked Ms Cuncannon to check the correct form for the notice of appeal. She believed the appeal would be filed in time if filed on 24 September, but she could not be sure as the costs decision of Judge Wolff was undated, and there was no record of the date on which it was received at the offices of Russell McVeagh. Ms Cuncannon inquired of the High Court at Hamilton as to the date of the judgment, only to find that the copy on the Court file was also undated. She then endeavoured to establish from the firm's records the date of receipt, but the closest she could get was an indication from the time records that it may have been received on 25 August 2004.

[5] An affidavit by Mr Peter Gorringer of Hamilton, Barrister, was filed in support of the notice of opposition. Mr Gorringer represented Mr Simes in relation to

the matter of costs. He states that he received the costs decision from the District Court, that it was undated and there was no accompanying document which indicated the date of the judgment. He apparently made no note as to when he received it, but on 24 August 2004 he forwarded a copy of the judgment to Mr Simes. He concludes that he received the judgment on the morning of 24 August since his diary showed that he was in the office on Monday 23 August and he is confident that he would have sent the judgment to Mr Simes on that day, had he received it on that day.

[6] If the assumption is made on the basis of the above evidence that the costs decision was issued on 23 August 2004, then the appellant was 4 days late in filing her appeal because r 704 of the High Court Rules requires that where a party has a right of appeal to the High Court (which in this case arises under s 72 of the District Courts Act 1947) then the appeal must be brought within 20 working days after the decision appealed against is given. Mr Kós for the appellant, calculated the notice of appeal to be late by 3 days, no doubt on the basis of the best information available from Russell McVeagh that indicated likely receipt on 25 August 2004.

Appellant's submissions

[7] Mr Kós submitted –

- [a] The notice of appeal was late by only 3 days (his calculation);
- [b] That there were extenuating circumstances and a proper explanation provided. The judgment was not dated and neither party took a clear note of when it was received. In this respect neither party performed to the “ordinary practice and prudent practice” advocated in an affidavit filed by David Edward Murphy of Wellington, solicitor in support of the respondent;
- [c] There is no prejudice to the respondent and the affidavit by Mr Simes filed in support of the notice of opposition does not demonstrate any prejudice as the result of the late filing;
- [d] The appellant has good grounds for the appeal. The plaintiff discontinued the proceedings. Costs should normally follow the

event. It is clearly arguable that the District Court Judge was wrong to determine that costs should fall as they lie;

- [e] The circumstances of this case are well within the discretion of the Court. This was a genuine oversight and properly explicable in the circumstances: *State Insurance Limited v Brooker* [2003] 15 PRNZ 493;
- [f] The first defendant in the District Court proceeding, University of Waikato, is not affected by the appeal. It is not a party “directly affected by the appeal” in terms of s 706(1)(c) of the High Court Rules. The issue is whether the respondent (plaintiff in the District Court) should pay the costs of the appellant (second defendant in the District Court). The first defendant is the respondent’s employer and abides by the decision of the District Court. While the appellant has notified the University of Waikato of her appeal and has discussed the situation with that party, the first defendant in the District Court is not affected by the issue of the liability of the respondent for the appellant’s costs in the District Court proceeding;
- [g] The sealing of the judgment is not a prerequisite to appeal.

Respondent’s submissions

[8] Ms Simes for the respondent filed detailed written submissions but emphasised the following matters in oral submissions:

- [a] The appeal has not been properly “brought” in terms of r 706 because it has not been served on the University of Waikato, a party to the costs judgment;
- [b] The basis of appeal has not been specified. It seeks simply to “undo” the District Court Judge’s decision and the merits of the intended appeal cannot be assessed;
- [c] Prejudice to the respondent is not the only test. The Court has a wide discretion and should have regard to the whole history of the matter and the affect that granting leave would have on other persons

involved (*Avery v No. 2 Public Service Appeal Board & Ors* [1973] 2 NZLR 86, at [15]);

[d] The appellant needs to demonstrate a “special circumstance” that warrants the indulgence of the Court and none has here been demonstrated. The explanation provided by the appellant is not a proper explanation. The appellant should have filed her appeal “sooner rather than later”;

[e] As regards the first defendant in the District Court it is insufficient for the appellant to refer to having had extensive discussions in relation to the appeal. The University of Waikato is necessarily a party directly affected by the appeal and is required to be served under r 706(1)(c).

[9] In the written submissions Ms Simes also referred to *Vodafone New Zealand Limited v Commerce Commission* (High Court Wellington, CIV 2004-404-911, 28 April 2004, Williams J), submitting that if the overall interests of justice are a decisive factor then the judgment in *Vodafone* supports application for special leave being declined. The parties have moved on. Other parties have ordered their commercial affairs in reliance on the costs judgment being final and here, as in the *Vodafone* case, a major law firm whether by negligence or inadvertence, has failed to file within the correct appeal period.

Discussion

[10] The failure to file in time was clearly the result of a mistake or oversight by the solicitors for the appellant. There is no evidence that the appellant herself was at fault. If she is denied the opportunity to pursue her appeal she will have been prejudiced by solicitor error. In such circumstances the Court has been influenced towards exercising its discretion in favour of granting leave, especially in the absence of significant prejudice to the other party: *State Insurance v Brooker*; *Grey v Elders Pastoral Holdings Limited* (1999) 13 PRNZ 353 (CA), and other decisions concerned with special leave to appeal to the Court of Appeal.

[11] The respondent has not demonstrated that he has, or will, suffer prejudice if leave to appeal out of time is granted. The affidavit filed by Mr Simes describes effects which he considers will be detrimental to his relationship with the University

of Waikato, his employer, from ongoing legal proceedings. He does not wish to be viewed as “a litigious employee”. However, those effects do not arise from the appeal being filed late by a matter of 3-4 days. Had the appeal been filed in time the effects the respondent perceives could flow to his disadvantage, would have occurred anyway. If they arise, they would not arise from the late filing of the appeal but rather from the appeal itself, and the manner in which the respondent elects to oppose it. Accordingly I do not accept that the respondent has established prejudice that would arise if the Court were to grant leave for the late filing by 3-4 days, of the notice of appeal.

[12] I accept that the appellant is entitled to appeal against the costs decision independently of the first defendant in the District Court proceeding and that the issue of liability as between the respondent and the appellant for costs in the District Court need not, and does not, impact directly on the University of Waikato which under the costs judgment carries its own costs. Mr Kós is correct in submitting that if the respondent had wished to challenge the costs decision in relation to the first defendant’s liability for his costs then he needed to appeal.

[13] Sealing of the judgment does not govern the time within which the appeal must be brought. This is governed by High Court Rules 704 and 705 which make it abundantly clear that the time for filing an appeal runs from the time the decision appealed against is given:

... whether or not – formal steps, such as entering or sealing the decision are necessary or are taken after the decision is given. (r 705)

[14] In summary, I consider that this is a situation of mistake or oversight by the solicitors for the appellant which, while not to their credit, have been adequately explained. The delay in filing the notice of appeal is not significant and the respondent is not prejudiced by that delay. In all the circumstances I consider that this is an appropriate case for the Court to exercise its discretion to extend the time for filing the appeal so as to permit the filing of the appeal on 24 September 2004.

Result

[15] The appellant’s application for leave to file its notice of appeal out of time is granted.

Costs

[16] The appellant is to pay the respondent's costs on the application for leave to file out of time on a 2B basis. The appellant is also to pay disbursements as fixed by the Registrar. I direct that the disbursements are to include the account of Tripe Matthews & Feist dated 22 October 2004 for \$337.50, it being a disbursement I consider reasonably incurred by the respondent in opposing the appellant's application.

Delivered at 10.30 a.m. on 12 November 2004.