IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-005500

BETWEEN	GRACE HADEN First Appellant
AND	VERISURE INVESTIGATIONS LTD Second Appellant
AND	NEIL EDWARD WELLS Respondent

Hearing: 24 November 2008

Appearances: P D Finnigan for the Appellants
N D Wright for the Respondent

Judgment: 4 December 2008

JUDGMENT OF JOHN HANSEN J

This judgment was delivered by me on 5 December 2008 at 3:30 pm pursuant to Rule 540(4) of the High Court Rules.

Registrar/Deputy Registrar

Date: ……

Solicitors/Counsel:
Brookfields, PO Box 240, Auckland
St Lukes Legal Services, PO Box 4118, St Lukes

P T Finnigan, PO Box 2697, Auckland

The application for special leave is dismissed.

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[1] By way of notice dated 7 October 2008 the appellants sought special leave to extend the time for bringing appeals. The appeals relate to costs judgments of her Honour District Court Judge Sharp delivered on 19 March and 10 May 2007; the unless order made by her Honour District Court Judge Sharp on 28 June 2007; and the judgment of his Honour District Court Judge Joyce QC refusing a review of such orders.

[2] It can be seen that the first orders that leave is sought for are very significantly out of time. Even the latter order is significantly out of time.

[3] In her affidavit in support of the application, Ms Haden states that a critical and substantial part of the notice of appeal filed on 26 August 2008 relates to the costs judgments and unless orders. It is suggested in the affidavit that they denied the appellants' right of a fair trial and leave should be granted so they can be considered.

[4] The first point to make is that when special leave extending time is sought, a proper explanation of the delay should be provided. As the authors of *McGechan* state at 704.02:

> An extension of time is an indulgence, and is within the discretion of the Court. It cannot be expected that an extension will be granted as a matter of course. A proper explanation should be provided on affidavit as to the circumstances surrounding the failure to appeal in time: see *CIR v Dick* (2000) 14 PRNZ 378, where there was confusion surrounding the appropriate procedure to be followed.

[5] In this case, there is no explanation at all for the delay. It is apparent that in the District Court the appellants were self-represented but that was clearly the choice of the first appellant who, on her own evidence in bankruptcy proceedings in this Court has access to funds that would have allowed her to employ a lawyer.

[6] In cases where some development has occurred that has engendered a change of mind, the Court of Appeal stated in *Thompson v Turbett* [1963] NZLR 71, p 82, line 26:

> Where an unsuccessful party, with full knowledge of the facts as they then are, deliberately, and with eyes open, allows the time for appeal to expire, it must be but rarely that he will later be allowed to revive his rights of appeal because of subsequent circumstances.

[7] In this case, a review of what occurred in the District Court makes it plain that Mrs Haden was familiar with the District Court rules and it must be assumed was aware of appeal rights and chose not to exercise them.

[8] In relation to the refusal to review by Judge Joyce, she states in her affidavit she "overlooked" sending these to her counsel.

[9] Mr Wright properly responds to this by pointing out that counsel for the applicant had in his possession a copy of the reasons at the costs hearing before Judge Joyce on 2 September 2008. Furthermore, the decision refusing review was incorporated into the primary judgment delivered on 30 July 2008 which was timeously appealed.

[10] This application for special leave is hopelessly out of time (c/f with *Belling v Belling* (1996) 9 PRNZ 469 (CA) and *Langridge v Wilson* (1989) 3 PRNZ 341 (CA) where delays of seven months and six weeks respectively proved fatal). In the absence of explanation this application must fail on the grounds of delay and is dismissed.

[11] In any event, despite this insurmountable factor, and setting aside for a moment the unless order, there seems to me no need to apply for special leave. Mr Wright referred the Court, and counsel for the appellants, to s 76 of the District Courts Act 1947. That section deals with the powers of this Court on appeal. Section 76(5) states as follows:

> Even if an interlocutory decision made in the proceedings concerned has not been appealed against, the High Court:
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> (a) may act under subs (1); and

(b) may set the interlocutory decision aside; and

(c) if it sets the interlocutory decision aside, may make in its place any interlocutory decision or decisions the District Court could have made.

[12] Subsection (1) empowers this Court as follows:

(1) Having heard an appeal under s 72, the High Court may:

(a) Make any decision or decisions it thinks should have been made:

(b) Direct the District Court in which the decision appealed against was made –

(i) To rehear the proceedings concerned; or

(ii) To consider or determine (whether for the first time or again) any matters the High Court directs; or

(iii) To enter judgment for any party to the proceedings concerned the High Court directs:

(c) make any further or other orders it thinks fit (including any orders as to costs).

[13] Mr Finnigan argues that the costs orders are not interlocutory in nature. However, it is apparent that the costs awards that the appellants seek leave to appeal were made in the context of interlocutory applications.

[14] It is clear from r 45 of the District Court Rules 1992 that matters relating to costs are at "the discretion of the Court and include the costs incidental to a proceeding or a step in a proceeding". In this case, specific orders for costs were made on the interlocutory applications and would presumably be included in the sealed interlocutory orders. I am satisfied that the costs orders made on interlocutory applications fit within the definition of interlocutory decision in s 76(5). It would seem illogical in the extreme if the Court could overturn the interlocutory order itself under s 76(5) but was fettered in its discretion to deal with the costs order. That cannot be the intention of the section. Therefore, in so far as they are relevant in the substantive appeal, this Court has jurisdiction to deal with them.

[15] That leaves the unless order. This was made by Judge Sharp in a minute of 28 June 2007 that stated:

Timetabling

1. Within 14 days the defendants, or one of them, shall pay outstanding costs award payable to the plaintiffs failing which the defendants will be debarred from further defending the claims against them and statement of defence shall be struck out.

[16] It is clear that although conducted by a telephone conference, this was a directions hearing. The plaintiffs had filed a memorandum addressing issues such as the settlement conference, interlocutory applications, how evidence was to be adduced, trial duration and the need for further conferences.

[17] Rule 433 reads that in the course of a directions conference the Court may:

> (7) In particular, but without limiting the powers of the Court or the Registrar under this rule, the Court or the Registrar may:
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> (a) make any order that the Court or the Registrar, as the case may be, is empowered to make upon any interlocutory application for a specific order; or
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> (b) give such directions as the Court or the Registrar thinks fit as to the future course of the proceedings as may best secure the just, expeditious, and economical disposal thereof; or
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> (c) give such directions as the Court or the Registrar thinks fit for the completion of all necessary steps in the proceedings; or
>
> (d) fix a time within which any steps shall or may be taken by any party; or
>
> (e) where any party is in default in complying with these rules or any order made thereunder, order that the proceedings if commenced by that party be stayed, or that the pleading of the party and default be struck out either at the time when the order is made or at such time thereafter and subject to such terms and conditions as may be specified in the order.

[18] Under 433(6) the Court is empowered to make such orders as it thinks fit whether or not any such order or direction has been sought by any party.

[19] Given the way in which these proceedings had been conducted by the appellants, in particular Mrs Haden, it is clear that Judge Sharp considered it was necessary to make orders ensuring that earlier orders made by the Court were complied with. In my view, r 433 clearly empowers the Judge to make the unless order that she did and I do not accept Mr Finnigan's submission that the only course

available to a party in whose favour a costs order has been made is to pursue it as a civil debt.

[20] Given the power invested in the District Court Judges by r 433, there was, in my view, clear jurisdiction to make an unless order.

[21] There is one further matter to address. It is clear that the cost order made against Verisure with respect to the strike-out of the counterclaim was in error. Mr Wright said that no effort has been made to enforce against Verisure. No effort has been made to correct this. I do not consider leave is warranted in the existing circumstances. Again, it can be dealt with under s 76(5).

[22] It follows that the application for special leave in respect of the unless order is also dismissed.

[23] Memoranda as to costs on the special leave application are to be filed within five working days of the handing down of this decision.

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John Hansen J