

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

CIV-2011-488-000652

BETWEEN COLIN AUSTEN PROBST
Appellant/Applicant

AND JAMES MASON
Respondent

Hearing: (On the papers)

Judgment: 2 November 2011 at 5:05 PM

**JUDGMENT OF VENNING J
ON APPLICATION FOR LEAVE TO APPEAL**

This judgment was delivered by me on 2 November 2011 at 5.05 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: COR Eckard Law Office, Whangarei
Urlich McNab Kilpatrick, Whangarei

Introduction

[1] The applicant leased commercial premises from the respondent. They had a falling out. The applicant took legal proceedings against the respondent in the District Court at Whangarei. He claimed for breach of contract and for defamation and/or injurious falsehood. The respondent counterclaimed for rent.

Decision under appeal

[2] In a decision delivered on 6 May this year Judge McElrea awarded the applicant damages for defamation for \$15,000 which, together with interest, amounted to \$16,260. However, he also found the respondent was entitled to rent, which, taken with interest, amounted to \$25,402. The applicant was required to pay the difference between the two, namely \$9,142 to the respondent.

[3] The Judge also ordered that the respondent was entitled to costs against the applicant on a 2B scale to be fixed by the Registrar.

Procedural steps

[4] The judgment including costs was sealed by the respondent in the sum of \$29,338.72. The respondent's solicitors gave the applicant notice of that judgment by letter of 15 June 2011. The applicant also received a sealed judgment from the Registry of the District Court confirming that sum on 18 June 2011.

[5] The applicant filed a notice of appeal and application for special leave to appeal out of time on 5 October 2011.

[6] The file was referred to me as Acting List Judge for Whangarei. Following a telephone conference with counsel it was agreed that the application for leave to

appeal would be dealt with first and on the papers. This is the decision on that application.

Decision

[7] The appeal should have been brought within 20 working days after the decision appealed against: r 20.4(2)(b).

[8] By special leave the Court may extend the time prescribed for appealing. 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: *Commissioner of Inland Revenue v Dick*.¹

[9] Generally the Court will consider the overall interests of justice with particular reference to:²

- the reasons for the failure to file the appeal within time;
- the length of delay;
- prejudice;
- whether there are issues of public importance;
- merits.

Reasons for delay

[10] In the present case Mr Probst has filed two affidavits. He says that as he understood the judgment he was liable for something over \$9,000 but with the additional costs order he finds himself in severe financial difficulties. At about the same time as receiving advice of the judgment he was diagnosed with paralysis of

¹ *Commissioner of Inland Revenue v Dick* (2000) 14 PRNZ 378 (HC).

² *A v B* HC Auckland CIV-2005-404-000496, 1 June 2005.

the left hand hemi-diaphragm with blocked bronchial tubes. He was discharged from hospital on 31 May 2011.

[11] After receiving the notice of the judgment he has corresponded with the Registry and has, as he says, also applied to the ASB for an advance against the security of his house to cover the judgment. On 4 July 2011 he was advised by the ASB it was not prepared to assist. Mr Probst says that in early July he realised time was running to lodge the appeal but could not find a lawyer to assist. He then obtained the services of Mr Eckard who assisted him with making an application for legal aid which was filed on 8 July 2011.

[12] The applicant's reasons for not filing the appeal within time are not convincing. He was discharged from the hospital on 31 May 2011. He was aware of the sum claimed by 18 June 2011 at the latest. He had represented himself in the District Court. He could have, if necessary, filed the appeal before the end of June at the latest.

The length of the delay

[13] Even if time is not taken to run from the date of judgment and instead is taken from 18 June 2011 when the applicant received the sealed judgment from the Court, the appeal should have been lodged by 15 July 2011 at the latest. The appeal was not lodged until 5 October 2011, some 58 working days (at least) out of time.

Prejudice

[14] The respondent is prejudiced to the extent that the differential in the judgment sum of \$9,000 has not been paid. Delay in the final resolution of Court proceedings by the payment of judgment can of itself be prejudicial.

Public importance

[15] There are no issues of public importance arising.

Merits of the appeal

[16] The appeal is against the exercise of discretion in relation to costs. It is rare for this Court, on appeal, to overturn the exercise of the District Court's discretion in relation to costs.

[17] Although there was only a differential of \$9,000 payable by the applicant to the respondent that result has to be seen against the quantum of the claims pursued by the parties before the District Court. As the Judge calculated it, the applicant's claims were approximately \$105,000 together with unspecified general damages plus interest and costs. The award of \$15,000 (excluding interest) amounted to just over 14 per cent of the amount claimed, whereas the respondent obtained judgment for \$16,420 (excluding GST and interest) out of a sum of \$39,000 (plus GST and interest), which was closer to a 42 per cent recovery of the amount claimed. In the circumstances, and bearing in mind the applicant was also required to pay a net sum to the respondent the Judge was entitled to fix costs in the respondent's favour. The Judge was in the best position to assess the particular merits of the claims, where costs should lie and what the appropriate quantum was. It has to be said the appeal faces a number of substantial difficulties.

Result

[18] In the circumstances and taking into account the above factors I am satisfied leave should not be granted. The application for leave to appeal out of time is dismissed.

Costs

[19] I note Mr Eckard's advice the applicant is legally aided. In the circumstances there will be no order for costs on this application.

Venning J