

NOT
RECOMMENDED

IN THE COURT OF APPEAL OF NEW ZEALAND 413 C.A.292/89

BETWEEN WESTPAC BANKING CORPORATION

Appellant

164

AND P N ALCOCK

First Respondent

AND L P ALLEN

Second Respondent

AND D R MILLER

Third Respondent

Coram: Richardson J
Gault J
McKay J

Hearing: 23 February 1994

Counsel: Ms Sheila McCabe for Third Respondent in support
T G Stapleton for Appellant to oppose

Judgment: 23 February 1994

JUDGMENT OF THE COURT DELIVERED BY GAULT J

The respondent Mr Miller applies for an order striking out this appeal or declaring it to be abandoned essentially on the ground of delay.

Mr Miller initially was one of three defendants sued by the appellant bank on guarantees of indebtedness of a company Aerospeed Customs Services Ltd. The bank applied for summary judgment in September 1986. That application was heard by McGechan J on 26 February 1987. He delivered an oral judgment

ordering the entry of summary judgment as to liability only against all three defendants. It was quantum that was disputed. In respect of that the Judge indicated that "the amount seems uncertain" and he adjourned the application to be brought on on 21 days notice.

It may be that the bank elected to wait to see what would be recovered in the company receivership before pursuing its summary judgment application against Mr Miller and the other guarantors as it related to quantum. Whatever the reason, the matter was not brought back before the High Court for almost three years. At a hearing before Master Gambrell on 16 November 1989 counsel for the bank sought an adjournment to file affidavit evidence in reply to an affidavit by Mr Miller filed some ten days before. That was refused. The Master issued a minute indicating that the issue of quantum would have to go to trial and giving directions to that end. She did not expressly dismiss the summary judgment application as to quantum. The appeal to this Court primarily rests on the ground that that course was procedurally incorrect.

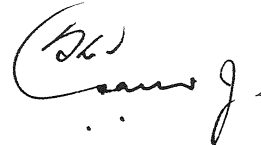
The appeal was filed on 13 December 1989 and security for costs was fixed and paid within the prescribed time. Thereafter for a lengthy period no steps were taken to prosecute either the appeal to this Court or the substantive proceeding in the High Court. On 27 June 1991 a notice of change of the appellant's solicitors was filed but that was not served until after the present application to strike out was filed.

The case on appeal was filed in this Court on 11 December 1992 but was not served on Mr Miller's solicitors until 10 November 1993. A notice of grounds of appeal was filed on 9 November 1993.

judgment procedure act in conformity with its purpose. We are satisfied that this is a clear case in which the respondent should no longer have the appeal held over him. The bank must be held to have relinquished any right to summary judgment for want of prosecution.

Accordingly there will be an order that the appeal be struck out.

The respondent is entitled to costs which we fix at \$1,500 together with disbursements including the travelling expenses of counsel as fixed by the Registrar.

A handwritten signature in black ink, appearing to read "C. G. J.", with a large, stylized initial "C" and "G" and a trailing "J".

Solicitors

Simpson Grierson Butler White, Auckland, for Appellant

McCabe McMahon, Auckland, for Third Respondent