16/3/82

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IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

No Special Consideration

M.1879

BETWEEN ROBERT JOHN ERWOOD
Appellant

A N D COLIN ALBERT JAMES WIREN
First Respondent

A N D DOBSON REAL ESTATE LIMITED
Second Respondent

M.1851

BETWEEN DOBSON REAL ESTATE LIMITED
Appellant

A N D ROBERT JOHN ERWOOD
Respondent

Hearing: 13 and 17 November 1981

Counsel: R. J. Erwood in person
E. P. McNabb for C.A.J. Wiren
J. M. Fitchett for Dobson Real Estate Ltd.

Judgment: - 4 FEB 1982

JUDGMENT OF HARDIE BOYS J.

Mr Erwood's Appeal M.1879:

When matters came before me on 30 September, 1981, following my judgment dated 22 September, I indicated that I thought it wrong that Mr Erwood should be deprived of interest on his principal in the lengthy time that, for various reasons largely if not entirely beyond his control, elapsed between the date of judgment and the date he was paid. The learned District Court Judge had not dealt with that point in his judgment, although Mr Erwood thought he had done so, and favourably to him. Whilst I recognised that the District Court's power to award interest is a matter requiring consideration and ruling by this Court, I confess that I encouraged Mr Erwood to enable that by lodging an appeal, and, as any appeal would be out of time, an application for leave to

appeal. Mr Erwood needed little encouragement and filed the necessary papers with the assistance of officers of the Christchurch Registry.

The second respondent to the appeal, through its Counsel Mr Fitchett, has now submitted that leave cannot be granted. I fear he is right. Not only has security not been given, but the application for leave was not filed within one month after the expiration of 21 days from the date on which the lower Court decision was given (s 73(1) of the District Courts Act 1947). This is a fatal defect which this Court cannot regularise, for the requirements of the statute are clearly mandatory. (See for example Clouston v Motor Sales (Dunedin) Ltd /1973/ 1 NZLR 542). I therefore hold, with great reluctance, that I am unable to grant Mr Erwood leave to bring his appeal. The motion is therefore dismissed. For the reason given below, I make no order as to costs.

Dobson Real Estate Ltd's Appeal M.1851:

As the judgment obtained by Mr Erwood has been satisfied by Mr Wiren, Mr Fitchett saw no point in proceeding with his client's appeal. Nonetheless, he made no concession on the merits and suggested that I should reflect my view on those by not awarding costs against his client on the abandonment of its appeal. I am not prepared to deal with the matter in that way for the merits of the appeal were not fully argued.

Mr Erwood has already had all the compensation this Court can give him by way of costs on Mr Wiren's appeal. It is that appeal which has really occupied his time and caused him expense. I think that justice will be done by making no order for costs either on this appeal by Dobson Real Estate or on Mr Erwood's own appeal.

Mr Fitchett's client unsuccessfully applied for a rehearing of the original action. The District Court Judge reserved costs. Mr Fitchett asked and Mr Erwood agreed, that I should deal with the matter now, as one properly arising on this appeal.

The application involved two appearances by counsel on Mr Erwood's behalf, and, I understand, considerable travelling expenses were incurred by Mr Erwood. His attendance however was strictly unnecessary. His legal costs were $153, well in excess of the amount usually awarded as party and party costs. Mr Fitchett submitted that there should be set off against whatever was properly payable in this regard the costs of his appearance on 19 June 1981 when his appeal was set down but Mr Erwood did not appear. I am far from clear as to what went wrong that day, and as to the extent to which Mr Erwood was at fault. Matters such as this - or perhaps I should say litigants such as Mr Erwood - attract problems and difficulties like a magnet, and their solution requires a robust approach that is influenced as little as is possible yet proper by legal and procedural niceties. Adopting such an approach, I fix Mr Erwood's costs at $150 inclusive of disbursements. That will satisfy neither party, but there has to be an end to this matter, and that is it.

Finally, I record that I gave anxious consideration to whether I should under s 74 of the District Courts Act treat Mr Erwood's notice of appeal as notice of cross-appeal on the Dobson Real Estate appeal. In view of the course that appeal has taken, I have concluded that that would be unjust.

Solicitors:

Hunter Smith & Co, Nelson, for First Respondent M.1879.
Rout Milner & Fitchett, Nelson, for Appellant M.1851, and Second Respondent M.1879.

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NELSON REGISTRY

M.1879

BETWEEN	ROBERT JOHN ERWOOD Appellant
A N D	COLIN ALBERT JAMES WIREN First Respondent
A N D	DOBSON REAL ESTATE LIMITED Second Respondent

M.1851

BETWEEN	DOBSON REAL ESTATE LIMITED Appellant
A N D	ROBERT JOHN ERWOOD Respondent

JUDGMENT OF HARDIE BOYS J.