A.No.6/84

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

1148

BETWEEN MONSANTO COMPANY

First Plaintiff

AND MONSANTO NEW ZEALAND LIMITED

Second Plaintiff

AND STAUFFER CHEMICAL COMPANY

First Defendant

AND STAUFFER CHEMICAL COMPANY (NEW ZEALAND) LIMITED

Second Defendant

Hearing: 29 August 1984

Counsel: T M Gault QC and W D Howie for Plaintiffs
J G Miles and P C D Thrush for Defendants

Judgment: 29 August 1984

ORAL JUDGMENT OF EICHELBAUM J

The fixture today was obtained primarily to deal with a notice of motion by Stauffer for a partial stay in respect of the interim injunction granted in this Court on 6 June 1984. However, yesterday it was discovered that owing to the failure to lodge security for appeal in Court within the time required by the rules, the appeal was in fact deemed to have lapsed. Accordingly a motion was filed yesterday seeking special leave to appeal and that matter has been argued this morning. I should mention that the respondent consents to the necessary abridgment of time to enable the motion to be dealt with immediately.

In this case the solicitors acting for the applicant are instructed by patent agents. The latter

instructed the solicitors to lodge an appeal on or about 27 June and the necessary notice of motion was in fact filed the following day. In terms of the Court rules security had to be lodged within 14 days after the bringing of the appeal. The member of the firm of patent attorneys attending to the matter agreed the amount of security with respondent's counsel and attended the Court registry on or about 10 July with a consent motion. He then discovered that security had already been fixed by the registrar in a different amount and, perhaps understandably, assumed that the solicitors were attending to payment. In fact until yesterday it was thought on all sides that everything was in order and the appeal proceeding; that is evidenced by the fact that Stauffer also filed a motion for partial stay for which by arrangement with counsel for the respondent a fixture was arranged for today as mentioned earlier.

Where an appeal is out of time this Court is empowered by Rule 27 of the Court of Appeal Rules to grant special leave in such cases and on such terms as the justice of the case may require. The exercise of the discretion has been considered in a number of reported cases in the Court of Appeal, and this morning I have been referred to two in particular, Lange v Town and Country Planning Appeal Board 1967 NZLR 915 and Avery v No 2 PSA Board 1973 2 NZLR 86. On the authorities, it is now clear that an error on the part of legal advisers may be sufficient cause for exercise of the discretion. I emphasise"may"because clearly the existence of such an error is not decisive. As was said in Avery when an appellant allows the time for appealing to go by his position suffers a radical change; whereas previously he had an appeal as of right he now becomes an applicant for a grant of indulgence. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires he be given an opportunity to attack the judgment from which he wishes to appeal. In fact

in Avery's case although the abandonment of the appeal was caused by error on the part of the appellant's advisers and there was only a short delay, leave was refused. In exercising its discretion the Court has to have regard to the whole history of the matter including the conduct of the parties, the nature of the litigation and the need of the applicant on one hand for leave to be granted, together with the effect the granting of leave would have on other persons involved.

Lange's case has some factual similarity with the present. The solicitors were at fault in that they made an error of one day in calculating the time allowed for lodging of security. In the result security was in fact furnished but one day late. There was no personal fault or error on the part of the appellant. The Court asked whether justice required their application to be refused because of the impact of the solicitor's mistake upon the respondent. The Court noted that it was almost impossible to contend that the respondent was misled to its disadvantage by any act or omission of the applicants or their solicitor and having regard to the fact that here the error was discovered only yesterday, the same can be said in regard to the present case. In Lange's case no delay of any significance was caused and here if leave is granted there will be none. Mr Gault has argued on behalf of Monsanto that the appellant's actions show no sense of urgency. It is true that while so far the appeal has not exactly proceeded at white heat nor on the other hand could it be said everything has been left to the last moment. At the time of the visit of the patent attorney to Court with his consent motion there were two days remaining and what still had to be done was the merest formality. The appeal obviously is of great importance to the parties and notwithstanding the submissions for Monsanto I do not think I should accept the view that it has been brought merely to gain time and without

any genuine intention that it be prosecuted. After all the corresponding proceedings in the United Kingdom were halted only when the House of Lords refused special leave to appeal.

I think Mr Miles is right to say that it would be an extraordinary denial of justice if this slip which involved merely the paying in of a sum of money which in the context of what is involved in this appeal can truly be described as nominal, should deprive Stauffer of what otherwise would have been an unqualified right to appeal. Further, it cannot be suggested that the actions of Monsanto have in any way been prejudiced or even influenced by the error which as I say was not discovered until yesterday. Accordingly having regard to the interests of justice as a whole I am quite satisfied that the application for special leave should be granted. I make an order accordingly.

/After discussion with counsel/By way of condition I direct that the notice of motion on appeal is to be filed, lodged and served no later than 30 August 1984. As the applicant has sought an indulgence I award costs to the respondent in the sum of $150.

Solicitors :
A.J. Park & Son (Wellington) for Plaintiffs
Bell Gully Buddle Weir (Auckland) for Defendants