re Latter
NZLR
PO Box 1453
Wellington

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A 1446/82

724

BETWEEN WELLFIT LIMITED

Plaintiff

A N D GRAHAM PETHERICK

Defendant

Hearing: 28 May 1984

Counsel: B M Stainton for Defendant in Support
R J Asher for Plaintiff to Oppose

Judgment: 28 May 1984

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ORAL JUDGMENT OF HILLYER J

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This is a motion for special leave to appeal out of time pursuant to R 27 of the Court of Appeal Rules. The motion is brought by the defendant, Graham Petherick, against the plaintiff, Wellfit Limited.

On 28 October 1983 the parties appeared before me and after hearing evidence I gave an immediate oral decision holding that Wellfit was entitled to judgment against Petherick for the sum of $31,382.82, plus interest and costs.

On 9 November 1983 a judgment was filed in the offices of the High Court at Auckland and duly sealed by the Registrar. A copy of that judgment was not sent to the solicitors for Petherick until 9 December 1983. On 26 January a notice of motion on appeal was duly filed in the High Court and served on Wellfit. On 22 February 1984 a notice of motion for a stay of execution was filed in the Court of Appeal and duly served on the solicitors for Wellfit. On 23 February

1984, however, the Registrar of the High Court in Auckland noted that no security had been given within the time limited by R 34 of the Court of Appeal Rules 1955 and noted that pursuant to R 34(2) the notion of motion on appeal was deemed to be abandoned.

On 1 March 1984 this motion for special leave to appeal was filed. It has not been heard until today because of the congestion of the court lists in Auckland and I take no note of the period between 1 March when the motion for special leave was filed and today's date.

I am advised that the amount of the judgment has been paid to Wellfit and it is said that it was paid on conditions which will result in the amount being repaid if the Court of Appeal allows the appeal by Petherick.

The motion is necessitated by the simple overlooking by the solicitors for Petherick of the necessity to give security within 14 days of the filing of the notice of appeal. Some point was made of the fact that no consultation as to the form of the judgment took place and therefore that there was a delay of a month in the solicitors for Petherick noting that judgment had been sealed.

I do not consider that a significant matter. The solicitors for Petherick knew of the judgment and the reasons for it very shortly after judgment was delivered and there was no necessity for them to wait until the judgment was sealed before taking instructions or taking further action. They had adequate time after they were notified that judgment had been sealed to file the motion on appeal.

Equally it is said that in Wellington the Registrar will fix security without any application being made. That does not appear to be the practice in Auckland. Whatever the practice may be, solicitors for an appellant must know, pursuant to R 34, that security must be given within 14 days of

the appeal being brought and that means that security must not only be fixed within 14 days but security must actually be given.

This is a simple case of solicitors overlooking a time limit. Such things happen in the best regulated families, as Mr Macawber said, and courts are conscious that solicitors are human, the same as the rest of us, and will endeavour to do justice having regard to the weaknesses of human nature.

The matter is covered in the case of Lange v Town and Country Planning Appeal Board [1967] NZLR 915. It is a matter peculiarly within the discretion of the court and no general rules can be laid down as limiting or restricting the wide discretion given to the court under R 27(4):

> " For the purposes of this rule, the power to grant special leave may be exercised in such cases and on such terms as the justice of the case may require: "

Some distinction has been drawn between the cases in which a would-be appellant has deliberately refrained from appealing until change of mind or other influences have persuaded him to appeal. Such cases have been contrasted with the mistake cases in which human error has resulted in a time limit being overlooked. The courts have said that in the latter case they will be more ready to grant leave.

Equally, Mr Asher for Wellfit has submitted that in this case no issue of public importance arises. He said that the matter involved was a short factual issue. Mr Stainton for Petherick on the other hand, points to a series of points on appeal which have been drafted by Wellington counsel and submits that the appeal is a serious one and that Wellfit have been under no doubt from the beginning that the appeal was intended to be pursued.

I am of the view that in all the circumstances it would be proper to grant leave to appeal out of time. In so holding I do not lay down any specific time limits within which

the appeal must be pursued or other steps taken other than those which are set out in the Rules, save to say that the notice of appeal must be filed within ten days of this judgment.

Needness to say, of course, security must be given within 14 days of that notice of appeal being filed and served on Wellfit. If however, there is any delay by Petherick in pursuing the appeal, an application by Wellfit to the Court on those grounds will undoubtedly receive a more sympathetic hearing than would ordinarily be the case having regard to the delay that has already taken place.

It is customary in cases of this nature to grant costs against the would-be appellant since he is asking for an indulgence. In this particular case, however, I do not consider that such costs should be substantial since no real prejudice to Wellfit has been demonstrated and the opposition to the notice of motion for leave to appeal has been on the slightest of grounds.

I allow costs of $50 to Wellfit. Order accordingly.

D M Gallen J

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Solicitors

Kensington Haynes & White, Auckland for Plaintiff
Mason Lawrie & Stainton, Auckland for Defendant