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(3)

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

NOT RECOMMENDED

987

M 692/84

BETWEEN MALCOLM ROBERT HILL Management Consultant of Wellington

First Appellant

A N D MALCOLM ROBERT HILL of Wellington Management Consultant, PATRICIA SARA LEWIS of Wellington Management Consultant, BARBARA ANNE CALDOW of Wellington Management Consultant, trading under the title LEWIS CALDOW PARTNERS

Second Appellant

A N D WESTPAC BANKING CORPORATION Bankers whose registered office is at 318/324 Lambton Quay Wellington

First Respondent

A N D BANK OF NEW ZEALAND Bankers whose registered office is at the corner of Lambton Quay and Customhouse Quay Wellington

Second Respondent

Hearing: 8 July 1986

Counsel M R Hill in person
C F Finlayson for first respondent
C S Chapman for second respondent

Judgment: 24 July 1986

RESERVED JUDGMENT OF GREIG J

In these proceedings the applicants for the second time apply for leave to appeal out of time against the decision in the District Court given on 31 July 1984. As before, the

first-named appellant appears and conducts the application in person. On this occasion, however, the respondents, instead of opposing the application, have applied separately to have the application struck out on the grounds that it is an abuse of process and vexatious.

On the previous occasion the application for leave to appeal the District Court Judge's decision came before me. I gave a reserved judgment on 5 November 1984 dismissing the motion and setting out the background of the matter. I think, however, that it is necessary that I should set out the background again so that a proper understanding of this matter can be made.

The matter arises out of a long-standing dispute which Mr Hill has been involved in about a taxi licence in the name of his deceased mother. Separate and independent proceedings have been dealt with in this Court and the Court of Appeal on previous occasions and there are some associated proceedings about the taxi licence still being dealt with in this Court. On an earlier occasion Mr Hill, as a principal of a partnership (not the second appellant) and as one of the three executors in the estate of his mother, undertook proceedings for the review of a decision of the Wellington Transport District Licensing Authority which had resulted in the cancellation of the taxi licence in October 1978. At the end of his substantive decision dismissing the application for review Jeffries J allowed the respondent, the Wellington Transport District Licensing Authority, costs of $600 plus disbursements. These later were fixed at $70. That judgment was given on 25 June 1982 and on 25 August 1982 a cheque was drawn by the second appellant for $670 and sent to Mr Keesing, Crown counsel, who had appeared for the Transport Licensing Authority in the review of the proceedings. The cheque was drawn payable to the Wellington Transport District Licensing Authority and was specially crossed "Not Negotiable Account Payee Only". Receipt

of the cheque was acknowledged by Mr Keesing and was forwarded by him to the Ministry of Transport. The cheque was collected on behalf of the Ministry of Transport by the second-named respondent, the Bank of New Zealand, and was later paid by the first-named respondent, Westpac, on which bank the cheque was drawn.

Mr Hill complained that this payment was made in breach of the directions of the drawer of the cheque and was not paid in compliance with the order made by Jeffries J for payment of costs to the respondent. Mr Hill expressed his fear that the payment and dealing with that cheque might mean that he would be held in contempt of the High Court order, notwithstanding the fact that he, or at least the partnership (the second appellant) which had drawn the cheque, had done so precisely in accordance with the terms of that Court order. Mr Hill would not accept the assurances that were given to him that the Ministry of Transport in providing the administrative services for the Transport Licensing Authority had appropriately and correctly dealt with the cheque, nor did he accept the assurances given that the receipt and payment of the cheque did discharge any obligation that the applicants had under the review procedures by the High Court order.

So the above named applicants issued proceedings in the District Court claiming damages against the two banks, alleging breach of contract, negligence and breach of statutory duty. The damages claimed exceeded the jurisdiction of the District Court but Mr Hill abandoned the excess beyond $12,000. It may be observed that there is no evidence whatsoever to show that anybody apart from Mr Hill has claimed or suggested that there has been any failure to comply with the obligation for payment of costs in the judgment of Jeffries J.

The banks moved to strike out the applicants' statement of claim as being vexatious or in abuse of process or as disclosing no cause of action. On 31 July 1984, after

hearing the parties, the statement of claim was dismissed and struck out.

Mr Hill had appeared personally throughout. He was present on 31 July 1984 when the learned District Court Judge gave his oral judgment. I think there could have been little doubt about the result of that order which is plainly expressed to be an order striking out the statement of claim, as disclosing no cause of action and allowing costs and disbursements to the defendants as fixed by the registrar of the Court. However, Mr Hill deposed in an affidavit sworn on 19 September 1984 in support of his first motion for leave to appeal that he had some difficulty in hearing the decision and that in any event he wished to see the decision in writing to confirm the grounds which he intended to present for his appeal. He wrote to the registrar to obtain a copy of the decision but, as I concluded in my earlier judgment, it seems likely that he did not receive the decision until Monday, 10 September 1984. His motion for leave to appeal was filed on 19 September 1984.

When the matter was dealt with by me it was assumed on both sides that the period for appeal had long expired before the motion had been filed. I concluded on the material before me that it was plain throughout that Mr Hill had intended to appeal but that his delay by seeking to see the judgment itself was not sufficient or special reason to give any further time. I was reinforced in my decision by my view, wihout hearing any argument on it, that there could be little merit in the claim made by the applicants.

It now transpires that the assumption made that the time for appeal had long expired before 19 September 1984 was in error. The reason for that is that at that time the costs and disbursements had not been fixed and the judgment was not made or perfected. In the result the time for appeal had not then expired. This position is accepted by counsel and by Mr Hill

on the principles expressed in Inglis v Duthie [1914] 33 NZLR 1336, and Thompson v Real Estate Institute NZ (Inc) [1977] 1 NZLR 135. Indeed it appears that the costs were not fixed until 8 November 1984 when a certificate of judgment in the District Court was completed and issued under the signature of a deputy registrar on that day. The amount of the costs was fixed at $747 and the disbursements of $10 were added as the costs of the certificate. The certificate signed by the deputy registrar and under the seal of the District Court was sent to Mr Hill in an envelope postmarked 29 November 1984 and received by him on 30 November 1984. Mr Hill deposes that until he received that document he had had no communication about the fixing of the costs either from the Court or the solicitors for the respondents. He challenges the amount of the costs and that is now included in his application for leave to appeal which he filed in the Court on 4 December 1984.

Assuming the costs were so fixed on 8 November 1984 the 21 day period would have commenced to run from that day. The period would have expired on 30 November which was the day that he received the document. There can be little question that Mr Hill then acted promptly thereafter in issuing and filing the present application by 4 December.

It is accepted by the parties in this matter, in reliance on the judgment of Eichelbaum J in Anderson v Jim Hunt & Co (High Court, Wellington, M 49/85, 3 May 1985), that the order striking out the statement of claim was an interlocutory order. Therefore, the provisions of subss (2) (4) and (5) of s 71A of the District Courts Act 1947 apply. In summary of those provisions there is a right of appeal to the High Court against an interlocutory order with the leave of the District Court, such leave to be sought within 21 days after the day on which the interlocutory order was made. If an application for such leave is refused or no application is made within the period of 21 days the High Court may grant special leave to

appeal. Application for that special leave must be made within one month after the expiry of the earlier 21 day period.

For the sake of completeness, I record my conclusion that the principle which I have mentioned as set out in Inglis v Duthie must apply equally to an interlocutory order as to a final order, so that the interlocutory order in this case was not made until the costs were settled on 8 November 1984.

I should deal with an ancillary matter which was raised by Mr Hill in his submissions. He claimed that the judgment had still not been perfected because the amount of the costs had not been incorporated as part of the judgment. He referred to R 316 (2) of the District Court Rules 1948. I reject that submission. I am satisfied that the certificate issued by the deputy registrar on 8 November does complete or conclude the matter and that the interlocutory order was made then.

The situation is then that the previous application with which I dealt on a wrong assumption of the basic facts was to all intents and purposes of no effect at all. At that time the time for applying for leave or special leave to appeal against the interlocutory order had not expired. No application was therefore necessary and my purported dismissal of the application can have no effect. The time for applying for leave to appeal did not expire until 30 November 1984. No application was made to the District Court within that time but an application for leave is now made to this Court within the additional period of one month.

A point was made by the respondents that Mr Hill's application is not in terms one for special leave. I think he may well not have realised that such an application was required. It is, however, an application for leave to this Court and I would not dismiss the application simply because it does not contain the word "special" in the document filed in Court. It would not be right, in my view, to dispose of an

application on such a technical ground when the effect and tenor of the application is clearly one for leave of this Court.

This application then is not simply a second application relitigating what was dealt with before. Not only was the first application a nullity proceeded with on a wrong assumption, but there is now in addition the challenge of the amount of the costs. In reality it is for the first time that Mr Hill comes to the Court seeking leave to take the matter on appeal. Moreover, instead of making an application long after the expiry of the time the application is now made very soon after the expiry of the time and in circumstances which are at least excusable since in respect of the costs issue Mr Hill was not aware of it and could not be aware of it until too late.

One of the matters which influenced me in coming to my conclusion on the previous occasion was my tentative view that there could be little merit in the appeal. There have been no further submissions which would alter my view on that except to the extent that there is now a further matter of appeal relating to the costs.

The substantial factor on the previous occasion was that in light of the assumed lapse of time and the failure by Mr Hill to take any steps to appeal, although clearly he had always intended to appeal, there were no special grounds or reasons for granting leave. There has been no change in Mr Hill's attitude and it is clear that he has known all along that he could appeal. In an affidavit sworn on 18 October 1984 and filed in support of Mr Hill's present application he makes it clear that then he was aware that the time for appealing had not then expired. It seems that Mr Hill prefers to wait until leave has to be sought rather than to exercise his rights within the period before special leave is required. That in itself is not a sufficient reason to refuse leave, especially in the present circumstances where the final delay is excusable.

In the result I have come to the conclusion that Mr Hill's application is not vexatious or an abuse of the process and I think that he ought to be allowed to appeal the decision as he wishes. Pursuant to s 71A (5) I grant special leave to appeal the decision of the District Court on 31 July 1984 under Wellington Plaint No 6614/83. Pursuant to s 71A (6) I direct that the notice of motion on appeal, required to be lodged and served pursuant to s 72, shall be filed in the High Court at Wellington and served on the first and second respondent within 21 days after the date of this judgment. The applicant will have to ensure that he deals with security for appeal and other matters in accordance wih the Act and the District Court Rules.

As the applicant seeks an indulgence in this matter I do not think that there should be any order of costs in his favour. Each party should bear its own costs.

Solicitors for the first respondent: Brandon Brookfield (Wellington)
Solicitors for the second respondent: Buddle Findlay (Wellington)

Copy to Mr M R Hill