IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

LOW PRIORITY

M 812/87

BETWEEN RONALD EVERDELL of Pukekohe, Building Contractor

Applicant

A N D ROBERT JOHN HOGG of Whangaparaoa, Company Director

Respondent

Hearing: 12 October 1987

Counsel: G A Keene for applicant
C B Cato for respondent

Judgment: 28 October 1987

---

RESERVED JUDGMENT OF GREIG J

---

This is an application for extension of time to bring an appeal from the District Court. The application is made pursuant to s 73 (1) of the District Courts Act 1947, which reads as follows:

> "Subject to any directions given under section 71A (6) of this Act, every appeal shall be brought within 21 days after -
>
> (a) The date of the final order, in the case of an appeal under subsection (1) (a) of section 71A of this Act; or
>
> (b) The date on which leave or special leave was granted, in the case of an appeal under subsection (1) (b) or subsection (2) of that section, -
>
> or within such further time as may be allowed by the High Court on an application made to it within 1 month after the expiration of that period of 21 days."

That section gives a wide discretion to the Court which, like the discretion exercised on appeals to the Court of Appeal under R 27 of the Court of Appeal Rules 1955, is not to be limited by any rules or principles except such as may be required by the justice of the case. That the discretion has been a wide one and to be exercised in the same way as does the Court of Appeal in granting special leave has long been recognised: see Darroch v Carroll [1955] NZLR 131. It is, I think, in accordance with the plain meaning of the section that the discretion is an unfettered one. It seems to me, moreover, that there should be no distinction in principle as to the application of the discretion on appeals from District Court to High Court or from High Court to Court of Appeal. Indeed, it could be argued that a more lenient application of the discretion on applications under s 73 is justified because the time limits allowed in appeals from a District Court are very much shorter than the relatively generous time allowed in appeals from the High Court to the Court of Appeal.

In Thompson v Turbott [1963] NZLR 71, in delivering the judgment of the Court of Appeal, Turner J, at p 80, said:

> "The discretion given by the Rule as it now stands is in the widest terms. Where such a discretion is given, it is not desirable for the Court to attempt to lay down any general rules which will tend to fetter the discretion in other cases."

That was repeated in Lange v Town and Country Planning Appeal Board (No 2) [1967] NZLR 915, when Turner J, again giving the judgment of the Court of Appeal, said, at p 920:

> "We do not wish to lay down any general rules which can be read as limiting or restricting, in future cases, the very wide discretion which the provisions of R 27 wisely give to the Court."

Similarly, that has been repeated again in Avery v No 2 Public Service Appeal Board [1973] 2 NZLR 86.

It is in the light of those clear and repeated statements that one must consider other remarks which are made in respect to the particular circumstances of the case. So it was that in Thompson v Turbott where the applicant had deliberately allowed the time for leave to expire but some weeks later sought leave to appeal because of some subsequent events, the Court, at p 82 of that report, said:

> "Where an unsuccessful party deliberately allows the time to expire, with a full knowledge of all the relevant facts as they then are, he cannot, at least in the absence of some consideration which does not appear in the present case, invoke a subsequent event, even if that event is brought about by the successful party, if he should have foreseen the reasonable possibility of the event which actually occurred. To hold otherwise is, in our opinion, to stultify the provisions of R 27 (1)."

That, in my opinion, is not to be taken as a general principle to be applicable in all cases, which would then limit the discretion to be exercised when the case is one of deliberately allowing the time to expire. There must be room for allowing such a party an opportunity to change his mind even after the time has expired. It cannot be the case that the only or the principal circumstances for granting leave or extending the time is in those cases where there has been some inadvertence or other mistake or difficulty which has prevented, without voluntary intention, the bringing of the appeal within the due time. With respect, I think that the principle, if there is a principle, is expressed by Richmond J in Avery's case, at p 91, in this way:

> "When once an appellant allows the time for appealing to go by then his position suffers a radical change.

> Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal."

In this case the applicant, who was the plaintiff in the Court below, commenced proceedings alleging breach of contract and misrepresentation in respect of a contract made on 11 February 1985. The contract form purported to be made between the plaintiff on the one hand and a company named Southland Stone & Marble Co Ltd. At the relevant time there was no such company, although a company then in existence of which the respondent, the defendant in the Court below was a principal, had resolved to change its name and that name change was duly registered some months later.

The claim in the District Court was heard on 26 September 1985, 17 February and 24 April 1986. The reserved decision was given on 2 July 1987. In that decision the learned District Court Judge, while not accepting all the claims of misrepresentation, did find some and concluded that if the company had been a party to the proceedings would have ordered it to pay to the plaintiff the sum of $7,000 with costs and interest. However, founding himself on the principles described and explained in Hawke's Bay Milk Corporation Ltd v Watson [1974] 1 NZLR 236, and in Marblestone Industries v Fairchild [1975] 1 NZLR 529, he concluded that the defendant was not liable.

The judgment in the District Court was not delivered in open Court but appears to have been delivered in purported compliance with R 211 of the District Court Rules 1948. The Registrar, however, did not in pursuance of R 211 (3) make any appointment for the delivery because it may have seemed there

was no need to settle costs, the District Judge having decided in his judgment that, notwithstanding that there was judgment for the defendant, no costs were to be awarded. The Registrar merely sent the judgment out by post under a letter dated 3 July 1987. That was received by the applicant's solicitors on 7 July 1987. It was sent on to the applicant and he received it on 10 July 1987.

It may be noted in passing that this constituted an irregularity in the delivery of the judgment and there may be some difficulty in fixing a time as the date of delivery of the judgment from which the period runs: see Taylor v Taylor [1981] 1 NZLR 437.

After receiving the judgment the applicant took instructions and advice from counsel but was in some doubt as to whether he should or could afford to appeal. According to the applicant's second affidavit sworn in support of this application for leave he stated that on 22 July he had decided, reluctantly, not to appeal and so advised his counsel but on 28 July he then decided that he would appeal and so instructed counsel. Thereafter there was a delay which was the fault of the solicitors and a form of appeal was not lodged until 10 August 1987.

Having regard to the difficulty and doubts as to fixing the time of delivery of judgment in this case and the statements made by the applicant in his affidavit this is not a case where it can be said that there has been any deliberate inaction on the part of the applicant letting the time lapse and then changing his mind. Certainly within 21 days of notice to him of the decision he had made up his mind to appeal and any delay thereafter was the fault of his solicitors. There is, in any event, a short period of delay beyond the 21 day period and that is fully explained.

The applicant on the merits appears to have been

successful but has lost his judgment because of a technical rule. He wishes to challenge that rule and its application in this case. He wishes to attack the judgment and, if he is successful, he will be entitled to judgment against the respondent.

There has been a considerable lapse of time in this matter but that is not the fault of the plaintiff. There will be a further lapse of time before this matter will be concluded. That will mean that the respondent will continue to have hanging over his head the possibility of a judgment against him. It is not, however, a matter which can prejudice his business operations or the conduct of his life. It is simply a money judgment which he may have to meet if the appeal is successful.

Having regard to the whole of the circumstances of this case I think that the justice of the case requires that the applicant should be granted the indulgence he seeks and should be allowed to exercise his rights of appeal. Leave is granted accordingly extending the time to the date upon which the appeal was filed and the security paid. As the applicant is obtaining an indulgence in this matter I make no order as to costs.

Solicitors for the applicant: Tetley-Jones & Partners (Auckland)

Solicitors for the respondent: J T H Buxton Esq (Auckland)