

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

15/9

A 32/95

**NOT
RECOMMENDED**

1197

BETWEEN FARMERS' MUTUAL INSURANCE
LIMITED

Appellant

AND ANTHONY NICKOLAS SLAVICH

Respondent

Hearing: 30 August 1995

Counsel: T G A Manktelow for the Appellant
 S E Hilda for the Respondent

Judgment: 30 August 1995

ORAL JUDGMENT OF HAMMOND J

SOLICITORS:

Fitzherbert Rowe (Palmerston North) for the Appellant
Swarbrick Dixon (Hamilton) for the Respondent

This is an application to proceed with a civil appeal from the District Court to this Court. I will explain what I mean by that in a moment. The underlying proceedings concern an insurance dispute. The amount involved was approximately \$150,000.00. Judgment went in favour of the plaintiff in the Court below. The defendant seeks to appeal to this Court. There is no dispute that the substantive appeal was lodged in time; the present problem is that the notice of appeal was not served until about ten days after it should have been served.

The application for leave to appeal, as lodged, is in two parts. First, there is an application for what really amounts to a declaration that the notice was served immediately, or with sufficient immediacy, in terms of s 72 of the District Courts Act 1947; and secondly, in the alternative there is an application for leave to appeal out of time. That is made under s 73(1) of the District Courts Act 1947. Miss Hilda, in the circumstances I think quite appropriately, indicated that the second application is not opposed. It is therefore really a technical matter as to how the matter is dealt with at this stage. Essentially the respondent does not oppose the present application to advance the appeal to this Court.

I think it sufficient to deal with that part of what is before me this morning by saying that if it were necessary, I am inclined to the view that there may have been (just) sufficient immediacy for the purposes of s 72 of the District Courts Act 1947. But in any event, the case is clearly one in which leave could and should be granted under s 73(1). The matter should be dealt with on a practical basis. For present purposes I think it sufficient to specifically grant leave to proceed out of time pursuant to s 73(1) of the District Courts Act 1947. So the order as actually made, is in terms of the second part of the application, and I do not express a final view on the first part.

As to costs, Miss Hilda sought \$250.00 costs on the usual footing that an indulgence is being sought and that her client had been put to expense in considering the papers. I think there is some force in that. The initial papers would have had to have been considered in any event, and Miss Hilda's interests were entitled to look to see whether this was an application which could properly be opposed. However, having reached the view that the second limb of the application was not going to be opposed, in my view advice could and should have been given much earlier to Mr Manktelow's interests. They have been put to the expense of his travelling from Palmerston North today and preparing for this hearing on the footing that it would be defended. In those circumstances, I think the justice of the case in a broad way is met by ordering that in any event, Miss Hilda's interests have a sum of \$125.00 in costs, and it is a condition of the granting of leave that such be paid prior to the appeal coming on for hearing.

Having reached that point, I have also taken it upon myself as the Civil List Judge to treat the present appearances also as being a setting down conference under the usual practice in this Registry. I have done so to avoid the costs of further appearances to the parties. It is plain that the appeal to this Court involves mixed questions of law and fact in an insurance dispute. The transcript in the Court below and the briefs of evidence then given are available, and Mr Manktelow has helpfully been able to assist me with the nature of the underlying dispute and appeal. I appreciate that Mr Taylor is not before me and that Miss Hilda has had to struggle to deal with that matter without as full instructions as she might normally have. But I do not think that any injustice is likely to be done to either party in my dealing with the matter in the way in which I have in fact adopted. My appreciation of the situation is that this is a normal sort of civil appeal in an insurance dispute to this Court, and that it is likely to take one half day to dispose of, utilising the record from the Court below.

In the circumstances, I give the following further directions:

1. The appellant's points on appeal are to be filed and served within 21 days of today's date.
2. The respondent is to have 14 days to file and serve points in reply.
3. The Registrar, without further appearance of counsel at a callover or otherwise, is to allocate a half day fixture for this appeal so soon as same can conveniently be reached. I have indicated to counsel that the matter might be reached in the fourth quarter this year, otherwise it would be reached in the first quarter next year. The Deputy Registrar should check the availability of counsel by telephone before allocating a fixture.

Orders accordingly.

A handwritten signature in black ink, appearing to read 'R G Hammond J'. The signature is written in a cursive, flowing style with a large initial 'R'.

R G Hammond J