

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2009-404-005462

BETWEEN JOHN MCLEAN
 Applicant

AND JFK IMPORTS LIMITED
 Respondent

Hearing: 29 September 2009

Appearances: C A Blucher for Applicant
 B Harper for Respondent

Judgment: 30 September 2009 at 4.30 p.m.

JUDGMENT OF VENNING J

This judgment was delivered by me on 30 September 2009 at 4.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Kumeu-Huapai Law Centre, Kumeu
 Corban Revell, Waitakere

Introduction

[1] In a decision delivered on 2 July 2009 in the District Court at Waitakere Judge Recordon entered summary judgment for the respondent against the applicant in the sum of \$9,250 together with costs. The applicant seeks to appeal against that decision.

Procedural issues

[2] Leave of the Court is required to bring the appeal as the appeal documents were filed out of time. The judgment was delivered on 2 July 2009. The time for appealing as of right expired on 30 July 2009.

[3] The applicant did not bring an appeal within time. Instead, he made an application for leave to extend the time to appeal. But that application was not filed until 26 August, some 19 working days after the time to appeal had expired. The affidavit to support the application was not filed until 8 September, some 28 working days outside the time for appealing.

[4] The issue of whether leave to appeal out of time should be granted is an exercise of discretion: *A v B* HC AK CIV-2005-404-496 1 June 2005 Rodney Hansen J. It requires the Court to consider the overall interests of justice with particular reference to:

- the reasons for the failure to file the appeal within time;
- the length of the delay;
- prejudice to either party;
- whether there are issues of public importance;
- the merits of the appeal.

Reasons for the failure to file within time

[5] The applicant has filed two affidavits. In his first affidavit he says on the day following the issue of the judgment his counsel rang him and advised him of the result and asked him to come in and see him if he wished to appeal. At the time the applicant was on a cruise ship in Vanuatu. On his return to New Zealand on 17 July 2009 he was advised by counsel the appeal needed to be filed within 20 days of the District Court decision and that a filing fee would be required. The appellant says that he did not have the filing fee at that time but he attended on 29 July with the filing fee when "I was advised that I was outside the time for filing the appeal and leave would need to be sought". The appellant does not explain why the appeal was not lodged on 30 July nor does he explain why it took until 26 August, almost another month, before the application for an extension of time was filed. Nor is there any explanation for the further delay in filing the affidavit in support.

[6] The reasons for the failure to file within time are not particularly convincing. The applicant left it to the last minute to provide his solicitors with the filing fee even though he was made aware of the decision and his appeal rights in a timely way.

The length of the delay

[7] In the context of a time period of 20 working days to file the appeal a delay of a further 19 working days to file an application for leave and 28 working days to file an affidavit to explain the delay is a long delay.

Prejudice

[8] The delay to date and the further delay associated with the appeal if leave is granted will prejudice the respondent. If the application is granted it is unlikely an appeal date could be allocated this year. The principal sum of the judgment, excluding interest and costs, is only \$9,250. As from 1 August 2009 that would be within the jurisdiction of the Disputes Tribunal. The respondent would incur legal

costs in seeking to uphold the decision on appeal and enforcing the judgment. Realistically those costs will exceed the amount of the judgment. Given the applicant's reasons for failure to appeal within time, namely strained financial circumstances, there must also be a major issue as to whether the respondent would be able to successfully enforce the judgment in the event the application was allowed and the appeal subsequently dismissed.

[9] Balanced against that is the prejudice to the applicant of missing out on his opportunity to challenge the judgment of the District Court.

Public importance

[10] There are no issues of public importance. As noted the amount involved is modest.

The merits of the appeal

[11] In support of the application Ms Blucher sought to refer to affidavit evidence, namely a further affidavit by Mr McLean and an affidavit of Ms Bowers, a former director of Mercury Motors Limited (now in liquidation) and an affidavit of Mr Lawn, former counsel for the appellant. The affidavits of Mr McLean and Ms Bowers were purportedly filed to address the issue of the merits of the appeal.

[12] In a minute of 8 September this Court noted that there was no indication of the merits of the appeal in the papers before it at that time and directed that the merits could be put before the Court either by way of a draft notice of appeal with detailed grounds of appeal or by the applicant filing a further affidavit setting out the proposed basis for the appeal. The affidavits of the applicant and Ms Bowers go far beyond what was contemplated by that grant of leave. The affidavits contain fresh evidence of a nature which would only be admissible if an extension of time to appeal was granted and leave was also granted to file fresh evidence. On its face the evidence was available at the time of the initial hearing. It is not fresh evidence. Further, Mr Lawn's affidavit was filed outside the time directed by the Court.

[13] The applicant approached the respondent on or about 8 January 2008 and sought its services to import a truck the applicant had seen advertised for sale on an American website named www.racingjunk.com. The respondent said the price was agreed at \$22,750 including fumigation costs. The applicant says the agreed price was \$12,500 and further the respondent had misrepresented that the condition and quality of the truck meant it would have a market value of between \$45,000 and \$50,000 in New Zealand. The Judge rejected the applicant's evidence as to the price and misrepresentation as not credible.

[14] In the course of her submissions Ms Blucher identified three grounds the appellant wished to raise on appeal:

- a) the poor condition of the truck when imported, as compared to the representation;
- b) the identity of the truck;
- c) the evidence from Ms Bowers as to the state of the truck.

Points a) and c) to a degree overlap. There is nothing in the identity point. Ms Blucher submitted that the applicant should be granted leave to appeal because the respondent had not proved that the vehicle imported was the same vehicle identified on the website. Mr Lawn's affidavit was directed at that issue. That was not a point taken by the defendant in its notice of opposition. To the extent it was raised orally before the District Court it was answered in any event by the affidavit filed by Ms Sarich for the purposes of the summary judgment hearing. There was no need for the Judge to refer to the matter in his decision.

[15] The other issues that the applicant seeks to raise really relate to the condition of the vehicle when imported. The applicant's complaints about the quality of the vehicle do not get off to a promising start when the website the vehicle was advertised on, was entitled www.racingjunk.com. It is apparent that the applicant identified the vehicle that he wanted imported. The respondent's involvement was limited to importing the vehicle on his behalf. The applicant chose the vehicle

himself. There was no reason for the respondent to make representations about the vehicle which it had never seen either.

[16] The Judge took a robust attitude towards the issue of misrepresentation on the basis of the evidence before him but he was quite entitled to do so in light of the Court's comments in *Eng Mee Yong v Letchumanan* [1980] AC 331 and particularly the evidence of an independent person, Mr Monschau. It can hardly be said the applicant has a strong case on appeal.

Result

[17] Balancing the relevant factors the Court is left with the clear impression the interests of justice do not support the grant of an extension of time for the applicant to bring his appeal out of time.

[18] The application is dismissed.

Costs

[19] The respondent is to have costs on a 2B basis for steps taken on the file to date in this Court.

Venning J