IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-004158

UNDER	the District Courts Act 1947
BETWEEN	HENRY LEVAO Appellant
AND	SOUTHERN FINANCE LIMITED Respondent

Hearing: 5 November 2009

Counsel: Sharon Opai and Kathy Wiltshire for Appellant
D Mitchell for Respondent

Judgment: 11 November 2009 at 4:30pm

RESERVED JUDGMENT OF HUGH WILLIAMS J.

This judgment was delivered by
The Hon. Justice Hugh Williams
on
11 November 2009 at 4:30pm
pursuant to Rule 11.5 of the High Court Rules

……..
Registrar/Deputy Registrar

A. Appeal allowed and matter remitted to Manukau District Court for rehearing of Appellant's application to set aside default judgment of 13May 2008.

B. Costs to be dealt with as per paras [40] and [41] of judgment.

Introduction

[1] As simple and uncomplicated as it must have appeared when launched in 2001, this case has gone wrong at every turn, and the unfortunate result of this judgment is that it must continue. even though the costs to the parties of the proceeding must have already made it uneconomic for both. That can only increase.

Claim and Facts

[2] In its terms, this is an appeal brought by a Mr Levao against Southern Finance alleging that when his application to set aside a default judgment entered against him was heard and dismissed in the Manukau District on 16 June 2009 the Judge who dealt with it, Judge Epati, failed to hear counsel, failed to deal with the Limitation Act 1950 defence raised on Mr Levao's part, and found Mr Levao was the debtor and thus the appropriate defendant – all without reasons.

[3] To Southern Finance, the claim must have seemed straightforward at the outset.

[4] On 27 March 2000 an instrument by way of security over a Ford Fairmont motorcar was prepared in the name of "Henry Levao of 7 Astor Place, Manurewa, Auckland, Bore Tester" as grantor and Southern Finance as grantee. The document appeared to be signed by both parties. The loan was made on 13 April 2000, payments were made under it until 30 August 2000 but then stopped. The vehicle was re-possessed on 10 October 2007 and sold on 31 December 2007.

[5] The advance was $12,122.79 and the amount left owing after crediting the sale proceeds of $2098.94 was $11,368.59.

[6] On 27 March 2001 Southern Finance commenced proceedings against Mr Levao in the Manukau District Court seeking judgment for $11,368.59 plus interest at 35.5% per annum until judgment, plus costs.

[7] What happened between 27 March 2001 and 19 December 2007 - if anything beyond some desultory correspondence in about 2005 - was not in evidence.

[8] However, on 19 December 2007, a Deputy Registrar of the Manukau District Court endorsed the pleading "notice of proceedings renewed for six months" and on 25 January 2008 a Mr Levao was served with the statement of claim and notice of proceeding at 7 Ryan Place, Taupö. The Affidavit of Service appeared to select the option of saying that it was the defendant who was served after he "acknowledged that he/she is the defendant". No statement of defence was filed or other effective action taken to preclude the entry of judgment by default, and such judgment was accordingly sealed in the Manukau District Court on 13 May 2008 for $11,920.59 being the $11,368.59 claimed plus costs but without interest from 27 March 2001. There was nothing before this Court to indicate why interest was not included in the judgment.

[9] On 16 June 2008 Mr Levao applied to set aside the default judgment, supporting that application with an affidavit from Ms Wiltshire, his solicitor and, without opposition, junior counsel on the hearing of the appeal (despite making affidavits both in the District Court and in this Court: *Hutchinson v Davis* [1940] NZLR 490; *Beggs v Attorney-General* [2006] 2 NZLR 129).

[10] Ms Wiltshire's affidavit set out reasons why Mr Levao and counsel had not taken effective action to prevent the entry of judgment by default and said a possible miscarriage of justice might result because of what was described as the "limitation issue" and the "defendant's defence". As far as the record in this Court goes, neither suggested ground of miscarriage was particularized.

[11] The application to set aside the default judgment was opposed and supported by an affidavit of a Ms Garters which put a copy of the instrument by way of security in evidence, gave brief details of the history of the claim, said the "plaintiff will suffer prejudice if the judgment is set aside or suspended" – though again without particulars – and baldly said:

> Pursuant to Rule 134 of the District Court Rules 1992 the plaintiff was granted an extension of time for service by the Deputy-Registrar on 19 December 2007.

[12] A further affidavit was filed by Ms Wiltshire exhibiting a copy of her firm's letter of 27 July 2007 saying:

> "My client categorically denies having purchased this vehicle"

and setting out the reasons for taking that view. She also exhibited a reply dated 2 August 2007 from Receivables Management (N Z) Limited, which described itself as a "duly authorized agent of the plaintiff" detailing reasons why the plaintiff or its agent took the view that Ms Wiltshire's client and the person who signed the instrument by way of security were the same. Statements concerning the way in which the original loan was obtained and documents provided in support were detailed but only one, a letter from the employer of an Eneliko (Henry) Levao, Century Drilling and Energy Services (NZ) Limited, testifying that person was employed by them at the date of the letter, 22 February 2008, was exhibited. The letter concluded:

> Our client – Southern Finance Limited – suggest [*sic*] there is sufficient information in their records to conclude that SFL debtor and your client is one and the same

- but again without supporting documents.

[13] Ms Garters filed a further affidavit sworn on 15 May 2009 replying to a further affidavit of Ms Wiltshire, sworn on 5 September 2008. That affidavit was not before this Court but apparently challenged proof of the defendant's identity. Ms Garters' second affidavit exhibited a photocopy of a signed New Zealand driver's licence in the names of "John Levao" and "Henry Eneliko". It exhibited a receipt dated 26 January 2000 which it was said was given the plaintiff at the time of the finance application as proof of the defendant's address, but, as the receipt is unsigned, it is of limited utility. The affidavit also exhibited a credit search of one "Levao, Henry Eneliko" of 7 Ryan Place, Taupö, and a copy of a letter dated 20 May 2005 from Custom Credit Advances in the name of "Henry Eneliko Levao of 7 Ryan Place, Richmond Heights, Taupö" asking for an amount to settle account 2094. That contained a box essentially agreeing to Custom Credit making the inquiry, the box

being signed by two persons who, from superficial consideration of the photocopy, had identical surnames which might have been Levao.

[14] For the sake of documentary completeness, Ms Wiltshire's affidavit filed in this Court and sworn on 14 August 2009 (apparently before a partner in her employer firm of solicitors) exhibited a different letter from the employer of "Eneliko (Henry) Levao" saying he had been continuously employed by them since 22 September 1977 and commented that the copy of the drivers' licence Ms Garters had put before the District Court had apparently been faxed from Century Resources on 21 March 2000.

[15] That (apart, of course, from the further affidavit filed in this Court) was the evidence concerning the defendant's application to set aside the default judgment against him when that matter came on for hearing in the District Court.

Issues for Decision n District Court

[16] As that recital shows, in seeking to meet the well-known tests for setting aside default judgments (was the failure to act excusable, is there a substantial ground of defence, will the judgment creditor suffer prejudice, and the overall interests of justice: *Russell v Cox* [1983] NZLR 654; *Patterson v Wellington Free Kindergarten Association Inc.* [1966] NZLR 975) the defendant had to overcome at least the following hurdles:

a) Was he the person who signed the instrument by way of security and was Ms Wiltshire's client the correct person to be named as defendant in the proceedings?

In that regard, it is noteworthy that Ms Wiltshire's client has sworn no affidavit and, other than instructing solicitors and counsel, not participated in the proceeding at all. A sidelight on that issue is that Ms Wiltshire's assertion that her client had not signed the instrument by way of security was plainly hearsay and was, at best, of doubtful admissibility under Part 2 Sub-

Part I of the Evidence Act 2006. Further on that, there was no evidence from an expert document examiner.

b) There was no evidence as to what became of the proceeding between its commencement on 27 March 2001 and its renewal on 19 December 2007.

[17] Issue (b), subdivides into a number of sub-issues.

[18] In the District Court and in this Court counsel for both sides agreed Southern Finance's cause of action against Mr Levao accrued on 30 August 2000, the date of the last payment, and accordingly as a contract claim an action was, by s 4 of the Limitation Act 1950, not able to be brought after the expiration of six years from the date on which the cause of action accrued, namely 30 August 2006.

[19] This claim had, of course, been issued well before 30 August 2006, namely on 27 March 2001, but the lapse of time between issue and renewal necessarily brought into play rr 133 and 134 of the District Courts Rules 1992 (then in force). They read:

> **133. Prompt service required –**
>
> (1) The statement of claim and notice of proceeding shall be served -
>
> (a) As soon as practicable after they are filed; or
>
> (b) Where directions as to service are sought, as soon as practicable after such directions have been given.
>
> (2) Unless service is effected within 12 months after the day on which the statement of claim and notice of proceedings are filed or within such further time as the Court may allow, the proceeding shall be deemed to have been discontinued by the plaintiff against any defendant or other person directed to be served who has not been served.
>
> **134. Extension of time for service -**
>
> (1) The plaintiff may, before or after the expiration of the period referred to in rule 133 apply to the Court or the Registrar for an order extending that period in respect of any person (being a

> defendant or other person directed to be served) who has not been served.
>
> (2) On an application under subclause (1), the Court or the Registrar, if satisfied that reasonable efforts have been made to effect service on that defendant or person, or for other good reason, may extend the period of service for 6 months from the date of the order and so on from time to time while the proceeding is pending.

[20] Not apparently put in evidence in the District Court on the setting aside application and similarly absent from the case on appeal in this Court was what motivated the Registrar to endorse the notice of proceeding as he or she did on 19 December 2007. Presumably that action was taken following the filing by Southern Finance Ltd of an application under r 134(2), but whether that application was advanced on the "reasonable efforts ... to effect service" or the "other good reason" ground, or both, and how either was satisfied, was not in evidence.

[21] As a sidelight on that issue, authority makes clear that, in the usual run of such applications "exceptional circumstances" must be demonstrated by a plaintiff to obtain renewal in proceedings where a limitation period has expired before service (*Brookers District Courts Procedure* Vol.2 para DR134.06, p2-175).

[22] Thus, this Court – and, presumably, the District Court – had no way of knowing whether or not the renewal had been properly granted and on appropriate grounds.

[23] A further sub-issue on this topic was that the terms of r 133(2) were that if, as here, the proceedings had not been served on the named defendant within 12 months or issue, namely here, 27 March 2002, they were "deemed to have been discontinued". That immediately raises issues as to the effect of that deemed discontinuance and, in the case of a renewal application filed after the deemed discontinuance was operative, whether the phrase in r 134(1) "before or after the expiration of the period referred to in rule 133" means a discontinued proceeding could be revived.

[24] That question necessarily involves consideration of r 480A(1) which provided:

480A. Effect of discontinuance

(1) A proceeding ends against a defendant or defendants, as the case may be, on –

(a) The filing and service of a notice of discontinuance under rule 479(1)(a); or

(b) The giving of oral advice of the discontinuance at the hearing under rule 479(1)(b); or

(c) The making of an order under rule 480.

and rr 480B as to when a discontinuance could be set aside and 480D which provided that where costs arose on a discontinuance another proceeding between the same parties covering the same subject matter could not be commenced before payment of those costs.

[25] It may be the case that the framers of the District Courts Rules 1992 did not turn their attention to the issue of the deemed discontinuance in r 133(2) when rr 480A ff were promulgated from 1 February 2003 (which, since these proceedings were deemed to have been discontinued on 27 March 2002, might have raised another issue).

[26] It is interesting to note in that regard that the framers of the new High Court Rules appear to have recognised the problem in that the new High Court r 5.72(2) requires prompt service of a statement of claim and says that if service is not effected within 12 months "the proceeding must be treated as having been discontinued". The problem also appears to have been addressed by the framers of the District Courts Rules 2009 as r 3.40.2 provides that if service is not effected in 12 months "the proceeding is treated as having been discontinued".

District Court Hearing

[27] At the hearing in the Manukau District Court of what was initially a straightforward claim for a modest sum but facing all the above problems, and perhaps more, what did the Judge Epati do when Mr Levao's application to set aside the default judgment came on for hearing on 16 June 2009?

[28] The answer – at least to an impartial observer who did not have the power or the inclination to peruse the whole of the Manukau District Court file – is that it is impossible to tell.

[29] All that was included in the Case on Appeal was a 10-page transcript of a hearing which took less than 15 minutes, signed by Judge Epati, and an email sent to counsel by the Registrar on 17 June 2009 saying:

> "The above matter was heard before His Honour Judge Epati yesterday, 16th June 2009, and has made the following decision:
>
> > **'Application to set aside/suspend judgment declined. Costs to plaintiff to be included in the proceedings to enforce judgment.'**
>
> Please find attached copy of the transcript of the hearing yesterday."

[30] Considering the transcript first:

a) the issue of identity of the defendant was raised by Ms Opai (on p 2).

b) The Court raised the issue of jurisdiction (on pp 2-3) and personal issues, including whether the matter should be stood down or dealt with by another Judge;

c) When the Court resumed after a five minute break at 2:58pm, Ms Opai referred to submissions from both counsel and the limitation/renewal question (p 5) which led to the Judge's observation "I am inclined towards his [Mr Mitchell's] view" (p 6).

d) That led Ms Opai to observe: "That leaves the issue of identity" and the Judge saying: "I am also inclined towards the view of the – of his view and submissions with regard to identity on that point" (p 6) and that "I agree with the interpretation not only of the particular rule but also on the cases and judgments that you have both addressed" (p 7).

e) Ms Opai replied: "Well with that indication it leaves it open to me to argue it fully, because obviously my position is that I don't agree with

that indication, or to leave it and just simply allow you to write your reasons." (p 7)

f) The Judge then said: "Now I have given you where I stand which is tantamount to a ruling on that matter" (p 8) and in response to the question whether "I give it another try?" he said: "Well I'm not sure whether you can. All I can do, I think, is to just make it as my ruling and you can appeal." (p 9).

g) The hearing concluded with Judge Epati saying: "I will formalise my ruling today" and then, after dealing with preparation of the transcript, said: "I rule in favour of the plaintiff in terms as indicated in the submissions filed in the court today. And I – as I have already ordered, ask that the full record of not only the discussions but as well as my ruling be typed up and I will sign it ..."

[31] As mentioned, the Registrar's email followed next day but seems to have confused the issue by referring to possible suspension of the judgment – but maybe Mr Levao had applied for that as well.

Submissions

[32] Ms Opai submitted Judge Epati erred in law by failing to give reasons for his decision, both on factual matters and on issues of procedure. She submitted there may have been a miscarriage of justice as a result of the way in which the hearing proceeded.

[33] She – and Mr Mitchell for the respondent – each took the Court through the evidence outlined, both relating to the identity issue and the linked questions of limitation and renewal. She submitted that the lack of reasons meant little weight could be accorded the signed transcript and presented detailed arguments on both the major issues before the District Court.

[34] Mr Mitchell firmly submitted on several occasions that the transcript amounted to a reasoned judgment when counsel's submissions were taken into account, but was unable to answer the obvious query as to how a disinterested reader, with no connection with the case and access to the District Court file, could discern what led Judge Epati to his decision on what were obviously complex and difficult issues.

[35] Mr Mitchell also submitted the requirements for Judges to give fully reasoned decisions was not absolute.

Discussion and Decision

[36] In relation to the lack of a reasoned judgment, it is only necessary to refer to the decision of the Court of Appeal in *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, 565-567 where, speaking for the Court. Elias CJ said:

> [75] There is no invariable rule established by New Zealand case law that Courts must give reasons for their decisions. That is a proposition which may seem surprising. Many may think that it is the function of professional Judges to give reasons for their decisions. And in recent years the general proposition has been steadily eroded in the United Kingdom and Australia, although in Canada the traditional view seems still to be adhered to. ...
>
> [76] There are three main reasons why the provision of reasons by Judges is desirable. Others are identified in *Singh v Chief Executive Officer, Department of Labour* [1999] NZAR 258 at pp 262 – 263. Most importantly, the provision of reasons by a Judge is an important part of openness in the administration of justice. The principle of open justice in criminal proceedings is affirmed by s 138(1) of the Criminal Justice Act 1985 and s 25(a) of the New Zealand Bill of Rights Act 1990, but it is far older in observance and extends beyond criminal proceedings (although it is of particular importance there). It yields only where the application of the general rule in the particular circumstances of the case would frustrate the interests of justice, and then only to the extent necessary (*Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 at p 123 per Woodhouse P; *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at p 450 per Lord Diplock; *Police v O'Connor* [1992] 1 NZLR 87 at pp 95 – 96 per Thomas J). There were no special circumstances in the present case which required modification of the principle of open justice.
>
> [77] Moreover, the lack of reasons in the present case failed to correct irregularities in the conduct of the hearing. It was understandable that the Judge should have acceded to the request from the police prosecutor to see counsel for the appellant and the prosecutor in Chambers. But it was a course which carried special risks for the principle of open justice. It made it incumbent on the Judge to take care in communicating his eventual decision.

In the event, the interests of open justice were not served. As the transcript of the proceedings indicates, the public exchanges between counsel, the police prosecutor and the Judge proceeded by allusion to the written material and what had transpired in Chambers. The case would have been largely unintelligible to anyone present in Court. It effectively proceeded on a basis understood only by those who had participated in the Chambers hearing.

...

[79] The principle of open justice serves a wider purpose than the interests represented in the particular case. It is critical to the maintenance of public confidence in the system of justice. Without reasons, it may not be possible to understand why judicial authority has been used in a particular way. The public is excluded from decision making in the Courts. Judicial accountability, which is maintained primarily through the requirement that justice be administered in public, is undermined.

[80] The second main reason why it said Judges must give reasons is that failure to do so means that the lawfulness of what is done cannot be assessed by a Court exercising supervisory jurisdiction. Those who exercise power must keep within the limits imposed by law. They must address the right questions and they must correctly apply the law. The assurance that they will do so is provided by the supervisory and appellate Courts. It is fundamental to the rule of law. The supervisory jurisdiction is the means by which those affected by judicial orders, but who are not parties to the determination and who have no rights of appeal or rehearing, obtain redress. Their right to seek such review is affirmed by s 27 of the New Zealand Bill of Rights 1990. It is important that sufficient reasons are given to enable someone affected to know why the decision was made and to be able to be satisfied that it was lawful. Without such obligation, the right to seek judicial review of a determination will in many cases be undermined.

[81] The reasons may be abbreviated. In some cases they will be evident without express reference. What is necessary, and why it is necessary was described in relation to the Civil Service Appeal Board (a body which carried out a judicial function) by Lord Donaldson MR in *R v Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All ER 310 at p 319:

> ". . . the board should have given outline reasons sufficient to show to what they were directing their mind and thereby indirectly showing not whether their decision was right or wrong, which is a matter solely for them, but whether their decision was lawful. Any other conclusion would reduce the board to the status of a free-wheeling palm tree."

[82] The third main basis for giving reasons is that they provide a discipline for the Judge which is the best protection against wrong or arbitrary decisions and inconsistent delivery of justice. In the present case it is hard to believe that the Judge would have granted the order if he had formally marshalled his reasons for doing so.

[83] In New Zealand, the leading case on provision of reasons is *R v Awatere* [1982] 1 NZLR 644 at pp 648 – 649. The Court declined to lay down "an inflexible rule of universal application", while recognising that "It must always be good judicial practice to provide a reasoned decision." The same

> view was taken by the majority in a differently constituted Court in *R v MacPherson* [1982] 1 NZLR 650. Somers J was prepared to go further. He would have held in that case that it was implicit in the right of appeal conferred by the Summary Proceedings Act 1957 that the Judge was under a duty to make "such findings or express such reasons or conclusions as in the particular circumstances are necessary to render the right of appeal effective" (*R v MacPherson* at p 652). Such reasons, he thought, would not need to be elaborate and would add little to what is usually done in New Zealand Courts.
>
> [84] *R v Awatere* was considered and applied in *R v Jefferies* [1999] 3 NZLR 211. That case confirmed that while the giving of sufficient reasons for decision is always highly desirable, it is not an inflexible requirement.
>
> [85] Whether it is time to say that as a general rule Judges must give reasons, is a matter this Court would wish to consider at an early opportunity. . . .

[37] In *Lewis*, as the citation shows, matters were discussed in chambers and documents - but not their contents - referred to in open court in a criminal case. Substituting counsel's submissions and acknowledging that this was a civil matter, the Court of Appeal's observations in *Lewis* are directly applicable. The signed transcript would have been "largely unintelligible" to anyone other than counsel. Persons affected – especially the parties – cannot know why the decision was as it was. Without reasons, anyone reading the signed transcript cannot understand why "judicial authority has been used in a particular way" and would be unable to find out without the right of access to the file and the diligence to follow it up. Finally, it is impossible for this Court, on appeal, to decide whether what was done was in accordance with law and authority and how the Judge grappled with and decided the conflicts on the identity evidence and the complicated issues of law the case threw up.

[38] It may also be doubtful whether a signed transcript and the Registrar's email qualify as a "judgment" or as "reasons for judgment" as those phrases were defined in r 529 of the District Court Rules 1992 and whether the manner of notifying counsel by email qualified under r 530-531.

[39] Therefore, thoroughly regrettable as it is to prolong a 2001 claim for a modest sum which may already be outweighed by the costs to the parties of getting to this point, there is no alternative to allowing the appeal and remitting the matter to the Manukau District Court for a fully reasoned determination on the setting aside

application, including full consideration of the identity and limitation/renewal questions raised in the notice of appeal. It may be that the other questions described earlier also need proper determination.

[40] In all the circumstances of this matter, it would seem appropriate to leave costs to lie where they fall.

[41] If either party wishes to persuade the Court to a different view, memoranda may be filed (maximum 5 pages each), with that from the appellant within 28 days of delivery of this judgment and that from the respondent within 35 days, with counsel certifying, if they consider it appropriate so to do, that all matters of costs (including no award either way) can be determined by this Court without a further hearing.

[42] When all that is said and done, it is extremely difficult to understand why Mr Levao would want the default judgment set aside and why Southern Finance would resist his application. There is, of course, the identity issue – on which the appellant may think he will succeed - and there may be the issues discussed and other reasons which do not appear on the file and were not argued which would justify the parties pursuing the setting aside application as they have. As noted, for some reason the default judgment of 13 May 2008 omitted any allowance for interest. Interest was initially claimed at the contractual rate of 35.5% pa from the date the proceedings were issued, 27 March 2001, to date of judgment. Even if, in the terms of that prayer for relief, the plaintiff is only entitled to interest at the rate under the Judicature Act 1908 from the date of judgment, it would nonetheless appear to be the case in terms of the pleadings that the plaintiff is entitled to interest on $11,368.59 at 35.5% pa from 27 March 2001 to 13 May 2008. Unless there is something about this case which counsel did not raise in argument, if after full consideration of its factual and legal merits Mr Levao is successful in having the default judgment set aside, the inevitable result would appear to be to expose him to a further award of around $30,000 for interest.

.....

HUGH WILLIAMS J.

Solicitors

Jensen Waymouth (Kathy Wiltshire), P O Box 1569 Taupö 3351, for appellant
Email: admin@jenwaylaw.co.nz

R A Fraser & Associates (Amy Hutton), P O Box 163 Christchurch 6140
Email: AmyH@raflaw.co.nz

Copy for:

Sharon Opai, P O Box 2193 Taupö 3351
Email: sopai@paradise.net.nz

Douglas Mitchell, Turner Hopkins, P O Box 33 237, North Shore City 0740
Email: douglas@turnerhopkins.co.nz

Case Officer: Indra.Gamage@justice.govt.nz