

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

**CIV-2009-404-001506**

BETWEEN

T & T DRAINAGE LIMITED  
Appellant

AND

JOHN ALFRED RENNELL AND  
JUDITH PENELOPE RENNELL  
Respondents

Hearing: 12 May 2009

Appearances: B O'Callahan for Appellant and E R Michell  
K F Gould for Respondents

Judgment: 14 May 2009 at 2.00 p.m.

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**JUDGMENT OF VENNING J  
ON APPLICATION FOR LEAVE TO CROSS-APPEAL AND APPEAL OUT  
OF TIME**

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**This judgment was delivered by me on 14 May 2009 at 2.00 p.m., pursuant to Rule 11.5 of the High Court Rules.**

**Registrar/Deputy Registrar**

**Date.....**

Solicitors: Rice Craig, Auckland  
Wilson McKay, Auckland  
Copy to: B O'Callahan, Auckland  
K F Gould, Auckland

## **Introduction**

[1] The respondents J A and J P Rennell seek orders granting them leave to appeal and cross-appeal out of time against the decision of Judge Andrée Wiltens in the District Court.

## **Background**

[2] T & T Drainage Limited were engaged by the Rennells to carry out roading and associated drainage work at the Rennell's property. A dispute arose between the parties. T & T Drainage took proceedings against the Rennells in the District Court to recover a balance of \$85,230 owing for the work together with the cost of interest of \$20,671. The Rennells counterclaimed against T & T Drainage for \$340,485 being the cost of work they said was required to remedy T & T Drainage's defective workmanship. The Rennells also joined Mr Michell, a director of T & T Drainage Limited as a second counterclaim defendant alleging that he was personally liable for the defective work.

[3] The Judge dismissed the Rennell's claim against Mr Michell. He then entered net judgment for the Rennells. While the Judge awarded T & T Drainage \$90,349 on its claim, he awarded the Rennells the sum of \$247,064 on their counterclaim.

## **The appeals**

[4] The judgment was released to the parties on 20 February 2009. On 17 March T & T Drainage appealed from the judgment in favour of the Rennells against it. T & T Drainage's appeal was allocated an appeals case management conference on Tuesday 7 April 2009. On 6 April 2009 the Rennells filed a notice of cross-appeal seeking, inter alia, to appeal the judgment of \$90,349 in favour of T & T Drainage,

seeking judgment in the further, additional sum of \$49,846 against T & T Drainage and seeking entry of judgment against Mr Michell personally.

### **The cross-appeal against T & T Drainage**

[5] Rule 20.11(2) requires a notice of cross-appeal to be filed no later than two working days before the case management conference except with leave of the Court. The cross-appeal was not filed by 3 April as was required. Mr Rennell has filed an affidavit in which he explains the reason for that. The Rennells had a disagreement with the solicitors who had represented them in the District Court. For that practical reason, while Mr Rennell made arrangements for fees to be paid to cover the filing of the cross-appeal the matter was not attended to by Friday 3 April but was attended to the next working day, Monday 6 April 2009.

[6] Mr O'Callahan accepted that, in the circumstances, and given the delay was only one working day he could not suggest there was any prejudice to T & T Drainage. He did not oppose leave being granted for the cross-appeal against T & T Drainage to be brought out of time.

### **The appeal (or cross-appeal) against Mr Michell**

[7] The intended second cross-appeal respondent Mr Michell does however, oppose leave being granted in relation to the proposed cross-appeal as it affects him. Mr O'Callahan submitted that as T & T Drainage's appeal did not raise any issues concerning the quite separate dispute between the Rennells and Mr Michell, the Rennells were not able to challenge, by cross-appeal, the judgment insofar as it related to the dismissal of the Rennell's claim against Mr Michell personally.

[8] Mr O'Callahan submitted that if the Rennells intended to appeal the decision dismissing the counterclaim against Mr Rennell, they should have filed a separate notice of appeal. He referred to the following passage from *37 Halsbury's Laws of England (Practice and Procedure)* (4<sup>th</sup> ed) para 688, at note 4:

A respondent's notice may only be given in relation to the subject matter of the action, so when an action and counterclaim founded on separate causes of action are dismissed, the respondent to an appeal from dismissal of the counterclaim who wishes to appeal from the dismissal of the action should give a separate notice of appeal: *National Society for the distribution of Electricity by Secondary Generators v Gibbs* [1900] 2 Ch 280, CA. The same applies where the respondent seeks to vary the order on a point which does not concern the appellant: *Re Cavander's Trusts* (1881) 16 Ch D 270, CA.

[9] The relevant procedural rule considered by the Courts in the cases referred to in the note was r 6 of Order LVIII of the Rules of Court 1875:

It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the Court below should be varied, he shall, within the time specified in the next Rule, or such time as may be prescribed by special order, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not diminish the powers conferred by the Act upon the Court of Appeal, but may, in the discretion of the Court, be ground for an adjournment of the appeal, or for a special order as to costs.

[10] The rule is to similar effect as r 20.11 when the different terminology used in the rules is taken into account. The notice of intention to vary in r 6 is effectively the notice of cross-appeal provided for by 20.11. The reference to notice of motion by way of cross-appeal in r 6 is equivalent to a notice of appeal in r 20.6. The intent of r 6 was to provide that a respondent was not required to file a separate notice of motion of cross-appeal if the respondent sought to vary the judgment under appeal. Rule 20.11 is to the same effect. A respondent is not required to file a separate notice of appeal if they seek to vary "the decision appealed against". A cross notice suffices.

[11] However, the authorities referred to by Mr O'Callahan confirm that where the respondent seeks to have the decision appealed against varied on a point in which the appellant has no interest or where, as in this case, there is both a claim and a quite separate counterclaim founded on separate causes of action and the appeal before the Court is only on the claim the respondent cannot issue a cross notice (or cross-appeal in the present case) but must file a separate notice of motion of appeal, (or notice of appeal in the present case).

[12] The wording of r 20.11 supports Mr O'Callahan's argument. Rule 20.11 could have provided that a separate notice of appeal was not required, but it is not worded that way. For r 20.11 to apply to the present situation, "the decision appealed against" would have to be interpreted as the entire decision of the Judge, including both the T & T claim, the Rennell's counterclaim against T & T and the Rennell's separate counterclaim against Mr Michell. However, such an interpretation strains the meaning of the wording. The appeal by T & T Drainage is against the decision of the District Court Judge in relation to the claims between T & T Drainage and the Rennells (including both claim and counterclaim). That is the extent of the decision appealed against. T & T Drainage has not appealed the decision dismissing the separate counterclaim by Rennell against Michell. T & T Drainage had no interest in that claim.

[13] There is support for the argument that a separate appeal is required in these circumstances in the wording of r 20.11 itself. 20.11(4) for example provides the Court may allow the respondent to contend the decision appealed against should be varied at the hearing, even in the absence of a cross-appeal notice. But it could not possibly be the case that could occur if there was no notice to Mr Michell of the appeal in this case.

[14] There are competing policy interests. The principle of finality of litigation supports the argument that a separate notice of appeal is required. On the other hand, the objective of r 1.2, namely, the just, speedy and inexpensive determination of proceedings could arguably support a broad interpretation of r 20.11. Neither principle is conclusive. The issue falls to be determined on the basis of the authorities and the wording of r 20.11.

[15] Having regard to that, and for the reasons given above, I accept the argument for Mr Michell that in this case the cross notice procedure under r 20.11 does not apply to the quite separate appeal by the Rennells against Mr Michell. The Rennells should have filed a separate appeal against Mr Michell by 20 March 2009.

[16] The application before the Court, however, is broad enough to encompass an application for leave to appeal out of time. The issue is whether leave ought to be granted.

[17] An extension of time is an indulgence. Mr O'Callahan relied upon the authority of *CIR v Dick* (2000) 14 PRNZ 378 to support the submission that a proper explanation should be provided as to the circumstances surrounding the failure to appeal in time where there was confusion surrounding the appropriate procedure. In the present case while there is no affidavit directed specifically at the confusion there has been an affidavit filed to explain the delay. As noted, Mr Rennell has explained the delay. It is implicit from that affidavit that the Rennells and their solicitors misunderstood the procedure and the requirement to file a separate appeal. As noted there appears to be no authority in New Zealand on the point. In the circumstances the mistaken belief that the cross notice procedure would apply is understandable.

[18] While the appeal is out of time it is not markedly so. The notice of cross-appeal was some 11 working days out of time.

[19] The delay is not material. There is no suggestion of prejudice to Mr Michell beyond the fact that he may have considered, for just over a fortnight, that he would not face an appeal.

[20] The point that the Rennells wish to raise is the liability of Mr Michell, even though he is a director of the company. It is an arguable point.

[21] In the circumstances I grant leave to the Rennells to bring an appeal against Mr Michell.

[22] The correct procedure is for a separate appeal to be filed and served. A separate filing fee will be required. That appeal file will then be consolidated with this appeal for hearing purposes.

### **Result/orders**

[23] I make the following formal orders and directions:

- a) Leave is granted to the Rennells to cross-appeal against T & T Drainage out of time.
- b) Leave is granted to the Rennells to file and serve an appeal against Mr Michell. That appeal is to be filed and served by **5.00 p.m. Wednesday 20 May 2009**.
- c) Once filed that appeal will be consolidated with this appeal for hearing on the same day, **21 July 2009**.
- d) The time for T & T Drainage to file and serve the common bundle of numbered and indexed copies of all relevant documents is extended to **27 May 2009**. (Counsel to note the change from the date discussed in Court).
- e) Mr and Mrs Rennell are to pay security for costs in the sum of \$800. That security is to be paid by **3 June 2009**. **Unless the Rennells pay security by that date the appeal against Mr Michell will be treated as abandoned and dismissed without any further call before the Court.**
- f) T & T Drainage Limited is to file and serve submissions in support of its appeal by **5 June 2009**.
- g) The Rennells are to file and serve submissions in response to the appeal by T & T Drainage, in support of their cross-appeal against T & T Drainage and in support of their appeal against Mr Michell by **19 June 2009**.
- h) T & T Drainage and Mr Michell are to file and serve submissions in response to the cross-appeal and appeal by the Rennells by **3 July 2009**.

- i) The fixture for one day for **21 July 2009** is confirmed.

**Costs**

[24] The points taken in opposition had force. The Rennells have been granted an indulgence. The Rennells are to pay Mr Michell's costs associated with the application for leave on a 2B basis with a quarter day allowed for the hearing.

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Venning J