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

**CIV-2009-404-000093**

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| BETWEEN | ERROL CARR AND PATTI CARR<br>Appellants |
| AND | AMBLER HOMES LIMITED<br>Respondent |

Hearing: 19 May 2009

Appearances: R J Hooker and C G Taylor for the Appellants
D M Law and J E Fredrickson for the Respondents

Judgment: 19 May 2009

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## (ORAL) JUDGMENT OF DUFFY J

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Solicitors: Vallant Hooker and Partners P O Box 47088 Ponsonby Auckland 1144 for the Appellants
Wood Ruck Manukau P O Box 76014 Manukau City Manukau 2241 for the Respondent

[1] This is an application by the appellants to introduce fresh evidence on appeal, pursuant to r 20.16 of the High Court Rules. The application is opposed. The application has been filed late and it is being heard at the same time as the fixture for the appeal.

[2] The appellants were the unsuccessful defendants in a Judge alone civil trial heard at the District Court at Manukau. The case was for breach of a building contract. The statement of claim alleged the existence of a written contract and a subsequent oral contract.

[3] The District Court Judge appears to have treated the oral contract as a variation of the written contract. The appellants contend that, on the pleadings as they then stood, it was not open to the Judge to take that approach. Their grounds of appeal also encompass a contention that is to the effect that any amendment to the pleading that may have occurred was done in a procedurally irregular way. This, in turn, would preclude the District Court Judge from forming any view of the case, based on there being an oral variation to the pre-existing written contract.

[4] The appellants seek to introduce fresh evidence that records a discussion between counsel for the parties, which occurred on or about 16 January 2008, during a recess break of the trial in the District Court. On that occasion, counsel for the appellants (then the defendants) allegedly asked counsel for the respondent (then the plaintiff) if she was going to apply to amend the statement of claim to include a pleading that the oral contract constituted a variation of the written contract. The respondent is alleged to have indicated that no amendment would be sought. The fresh evidence is relied on to support the grounds of appeal to the effect that during the trial the respondent "disavowed" any notion of amending the statement of claim to include an oral variation of the written contract.

[5] The respondent opposes the introduction of the fresh evidence on the ground that it is hearsay, that it is not cogent and material evidence, and, therefore, it does not meet the legal tests for the admission of fresh evidence on appeal. It is submitted that the District Court record can speak for itself. Finally, the lateness in making the application is relied on as a ground for dismissing it.

[6] The record of the proceedings before the District Court reveals that in this case, the parties filed written closing submissions after the hearing of the trial was completed. Furthermore, the order of filing and serving the written submissions was unusual. The District Court Judge directed that the parties were to file their submissions contemporaneously, with each being given an opportunity to file a further submission responding to issues raised in the opposing party's submissions. In its first written submission, the respondent included a submission to the effect that if an amendment to the statement of claim, to include an oral variation to the written contract, was thought to be required by the District Court Judge, such an amendment was sought. This appears to be the first formal record of a pleading amendment being sought. Even then, it was contingent on the District Court Judge deciding an amendment was necessary.

[7] The appellants' first submissions do not record any opposition to the amendment. That is not surprising, as they would have been filed without knowledge of the respondent's request for an amendment. The appellants were not sure that all the written submissions they had filed were currently before the Court. Consequently, I cannot at this time determine if they ever formally recorded any opposition to the request for an amendment to the statement of claim.

[8] In the judgment now under appeal, the District Court Judge appears to proceed on the basis he was dealing with an oral agreement that had the effect of varying the written contract. This is dealt with in [32]-[37] of the judgment. However, why he approached the case in this way is not recorded in the judgment. There is no separate written ruling on the request to amend the pleading. Nor is anything said in the judgment about whether or not an amendment to the statement of claim had been allowed. Hence, it is not clear whether the District Court Judge considered that the pleadings without amendment permitted him to take the approach which he took, or whether he did so following a decision to allow an amendment to the statement of claim. Moreover, the request for leave to amend is unusual in that it was not made in the form of an application (either written or oral), and it was contingent on the Judge forming the view an amendment was necessary.

[9] The appellants' case is that at all relevant times they proceeded on the basis that the oral contract was not a variation of the written contract, but was instead a separate contract.

[10] The respondent contends that although the first record of an attempt to amend the statement of claim was in the written closing submissions, there had been references during the trial to an oral variation. The respondent contends, therefore, that it would have come as no surprise to the appellants that the respondent sought, as an alternative argument, to have its pleading amended to include the allegation based on the oral variation of the written contract. Hence, there can be no complaint about surprise or prejudice, irrespective of any procedural irregularity in how the District Court Judge may have dealt with the request to amend the statement of claim.

[11] If I were dealing with this matter purely by looking at the written record, I would work on the basis that the first formal record of a request to amend the pleading was made at the time the respondent (then plaintiff) filed its written closing submissions. However, the respondent seeks to rely on earlier interchanges between counsel and the Bench relating to a possible oral variation of the written agreement, so to overcome any complaint of surprise and prejudice that the appellants might make about any late amendment to the statement of claim. If this is to be relied on by the respondent, it seems to me that the factual matrix relating to the understanding each counsel had on whether or not there was to be an amendment to the pleading is a material matter in this appeal. The fresh evidence shows that counsel for the appellants was concerned about the state of the statement of claim in terms of what it conveyed to him about the allegations the appellants were facing. The fresh evidence shows that he made enquiries during the course of the trial about whether or not an amendment would be sought and was advised it would not be. If the next time he learned of the request to amend was in the form it appears in the respondent's written closing submissions, and if, without informing the parties he would deal with this request, the Judge has simply acted on it, this could all amount to a procedural irregularity that has prejudiced the appellants.

[12] The fresh evidence was not reasonably available during the trial. The first recorded notice of an amendment being sought was in the respondent's closing submissions, which were prepared after the oral hearings were completed. Until the request to amend in the respondent's written submissions was made, the defendants would not have been on notice and so would not have known of the need to call evidence on this topic.

[13] On one view of the case, the fresh evidence is material and cogent. It could have been relevant to any decision the District Court Judge made on permitting an amendment to the statement of claim, if that is how he approached the matter before him. Not only is how the Judge approached the request to amend the statement of claim not clear from his judgment, but also the failure to notify the appellants about how the request would be dealt with meant that they had no opportunity to put before the District Court Judge evidence that would show that they had earlier raised concerns about the state of the pleadings and their concerns were allayed by the respondent's conduct. The irregular way in which the potential amendment to the statement of claim occurred means that, from the appellants' perspective, there has been a denial of an opportunity to address something adverse to their interests.

[14] The discretionary power to admit fresh evidence on appeal is set out at r 20.16. A concise summary of the standard tests courts adopt for the exercise of the discretion to grant leave can be found in *Culverden Retirement Village Limited v McLuckie* HC AK CIV2007-404-750 18 September 2007, in which Andrews J said:

> The discretion is sparingly exercised and the presumption is that appeals will be heard on the record, as it exists. In order to satisfy the test the evidence must be cogent and likely to be material and could not reasonably have been produced at first instance.

[15] However, these tests do not mandate rigid requirements. As was recognised by Priestley J in *Coates and Bowden* HC AK CIV2006-404-7028 12 December 2006 at [18]:

> Although, ultimately a judicial discretion is deployed, such discretion must be exercised in a principled way.

[16] A principled approach includes ensuring that standard tests do not become a fetter on the exercise of judicial discretion. The exercise of the judicial discretion in r 20.16 is no different from the exercise of any other discretionary power.

[17] Whilst applications to adduce fresh evidence must be considered in accordance with recognised principles, this includes standing back and assessing the particular case for the purpose of seeing if there is anything about the case that justifies a departure from the standard tests. This need to consider every case in relation to its own circumstances was recognised by Gallen J in *Comalco New Zealand Ltd v Television New Zealand Ltd* (1996) 10 PRNZ 573.

[18] In *Comalco*, Gallen J summarised the principles for the admission of fresh evidence on appeal. He acknowledged the standard principles to be applied. He noted that the jurisdiction was to be exercised sparingly; that cogency, relevance and the possible effect of the evidence on the result must be taken into account. He also recognised a requirement that the evidence should not have been available at the earlier hearing by the exercise of reasonable diligence. And he was conscious of the need to ensure that the appeal was not turned into a new case as a result of the introduction of fresh evidence. However, he was also careful to recognise that the test for the admission of fresh evidence:

> … should not be put so high as to require the circumstances to be wholly exceptional. Every case must be considered in relation to its own circumstances.

[19] When I look at the present evidence for which leave is sought, I consider that, on one view of the case, the evidence adds nothing at all because the matter can be looked at simply by considering the written record. However, on another view of the case, which is the one for which the respondent contends, I am going to be taken through the transcript and referred to various steps along the way in the hearing for the purpose of showing that there were some ongoing informal discussions about altering the pleadings (which never eventuated into a formal application). If this is the way in which the respondent is going to approach the appeal, I consider that it is important that I have as full a picture as possible of how matters developed during the course of the trial over the possible amendment of the statement of claim.

[20] The manner in which the amendment was ultimately dealt with may not be so procedurally irregular if everyone was expecting an amendment to the statement of claim. But if the appellants had not been expecting an amendment, any irregularity of procedure that I might find to have occurred may have had a significant impact on their ability to oppose the amendment. The absence of a proper application to amend, coupled with earlier statements that no amendment was sought, may have caused them to treat the references to amendment in the respondent's written submissions as less deserving of serious recognition than the District Court Judge may have given them.

[21] The new evidence reveals to me that as at 16 January 2008 or thereabouts, the defendants were asking the plaintiff whether or not there was going to be an amendment, and at the time they were told "no", there would not be. That is as far as the evidence goes. But I consider that, given the unorthodox approach already adopted with regard to the status of the statement of claim, to do justice to all parties, the fresh evidence should be before me.

[22] In terms of the objection on the grounds that the fresh evidence is hearsay, s 18 of the Evidence Act 2006 permits the admission of a hearsay statement if:

> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
>
> (b) either—
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> > (i) the maker of the statement is unavailable as a witness; or
> >
> > (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

[23] All I take from the evidence is that as at 16 January 2008, counsel for the appellants (then defendants) was concerned about the state of the pleadings and was making enquiries as to whether they would be altered. There is nothing to suggest to me that the evidence to that extent could be unreliable. I consider it would cause undue expense and delay if I were to require Mr Hooker to give that evidence himself, as that would immediately disqualify him from appearing as counsel. The fresh evidence shows that junior counsel for the appellants was present when the

discussions took place, and I see no reason to doubt the reliability of her account of what transpired. Under the common law, the evidence would have been admissible under the *res gestae* exception to the hearsay rule. Whilst that exception no longer applies, its existence under the common law reveals that hearsay evidence given in conditions which met the *res gestae* rules was then seen as being sufficiently reliable for it to be treated as an exception to the hearsay rule. The same reasons for such evidence being reliable would still apply, even though the legal principle permitting admission has now been abolished. Accordingly, I am prepared to admit the fresh evidence pursuant to s 18(1)(b)(ii) of the Evidence Act.

**Result**

[24] The application to admit fresh evidence on appeal in the form of the affidavits of Helen Catherine Carr and Errol Carr is granted.

[25] The respondent has 15 working days from today's date to file any rebuttal evidence.

[26] The appeal is adjourned part heard.

[27] A telephone conference is to be arranged following the filing of any evidence from the respondent, or alternatively, at a date subsequent to the expiration of the time for the respondent to file any rebuttal evidence.

Duffy J