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

**CIV 2008-404-007791**

BETWEEN

MASEIGA AUMUA  
Applicant

AND

LAMBETH CONSTRUCTION LIMITED  
(TRADING AS FIX IT BUILDING  
SERVICES)  
Respondent

Hearing: 16 December 2008

Appearances: J C Chamley for Applicant  
M Davies for Respondent

Judgment: 16 December 2008

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**ORAL JUDGMENT OF VENNING J  
DISMISSING APPLICATION FOR LEAVE TO APPEAL**

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Solicitors: Thorne, Thorne, White & Clark-Walker, PO Box 140 Shortland Street, Auckland  
1140  
Meredith Connell, PO Box 2213, Auckland 1140

## **Introduction**

[1] This is an application for leave to appeal the summary judgment entered against the applicant in the District Court at Waitakere on 20 October 2008. The application is necessary because the appeal document was not filed until 21 November 2008, the appeal period having expired on 18 November 2008. The application is supported by an affidavit by the applicant. It is opposed by the respondent.

## **Background**

[2] The respondent's claim upon which summary judgment was entered related to building work carried out by the respondent company for the applicant. The respondent issued a demand for payment under the Construction Contracts Act 2002. When payment was not received the respondent issued summary judgment proceedings.

[3] The applicant did not file any papers in opposition and failed to take any formal steps to oppose the application for summary judgment. When the matter was called before the Court on 20 October 2008 he instructed counsel to appear and seek an adjournment. Counsel sought such adjournment. (I record that that counsel was not Mr Chamley). Counsel sought the adjournment to enable a notice of opposition to be filed. The Judge presiding inquired as to reasons for the delay. Counsel advised he had only recently been instructed and was not in a position to explain the delay. The application for adjournment was declined. There was no consideration by the District Court Judge of the merits of any possible defence because there was no opposition before him. No basis of opposition was put to him. Judgment was entered accordingly on the papers. It is from that entry of judgment that the applicant seeks leave to appeal.

[4] In his affidavit in support of the application for leave the applicant says that he considers he has a substantial claim against the respondent arising out of the

respondent's defective workmanship and materials. He said he wanted to file a counterclaim. After discussion with counsel Mr Chamley accepts that a counterclaim does not of itself amount to a defence to an application for summary judgment. However he has, in the notice of appeal, taken a further point. That is that the claim for payment under the Construction Contracts Act was not in a form that entitled the respondent to rely on it in its claim for summary judgment. But none of that documentation is before this Court at this time.

### **Application for leave**

[5] The applicant is now in the position where he must seek special leave of this Court to extend the time for him to appeal. As has been confirmed by the Court of Appeal the governing consideration on such an application is the overriding interests of justice: *Stedman v Stedman* [1987] 2 NZLR 336. But the Court will also consider the reasons for failing to bring the appeal within time, prejudice, subsequent events and the merits of the intended appeal. As Panckhurst J observed in the *Christchurch City Council v McVicar* HC CHCH CIV 2004-485-000925 20 May 2004 case a person in the shoes of the applicant seeking leave is asking an indulgence of the Court. There is an onus on such applicant.

### **Delay**

[6] The applicant explains the delay in this case on the basis that he tried to resolve the issues by making an offer to resolve all issues to the solicitors for the respondent while the appeal period was running. Counsel representing the respondent before the District Court has deposed that because of pressure of other work he did not obtain his client's instructions to that proposal until late in the piece. But on 13 November he obtained instructions. He confirmed that the matter could not be resolved. Counsel also advised the appellant's adviser that there were 20 working days to bring the appeal. Despite that advice the appeal was not lodged by 18 November as required.

## **Prejudice**

[7] As to the prejudice, as discussed with Mr Davies there is no stay. The respondent is entitled to seek to execute its judgment. But I accept the fact that there may be an appeal on foot would be a factor that may, in the exercise of the Court's discretion, lead to some form of stay in the future. There is the possibility of prejudice to the respondent. It can be put no higher.

## **Merits**

[8] The merits of the defence that the applicant seeks to raise were not considered by the District Court Judge. I make no criticism of him for that because of course he was not informed of those matters. It does seem that the focus of the applicant at the time was on the counterclaim based on defective workmanship and materials. But such counterclaim can not assist the applicant in relation to any response to the respondent's claim for payment.

[9] The matter that Mr Chamley has identified and seeks to rely on is not before the Court. Nor is the relevant documentation. It is impossible to form a view on the merits or otherwise of it.

[10] There is in this case a further, and in my view particularly relevant, factor. It is that there is a process provided in the District Court Rules to deal with the situation that the applicant faces. Rule 165 provides that where a summary judgment has been given against a party who does not appear at the hearing then that summary judgment may be set aside or varied by the Court if it appears to the Court there may have been a miscarriage of justice.

[11] There are authorities from this Court and the Court of Appeal to confirm that even although a defendant may have been physically present or have appeared through counsel to request an adjournment (which has been declined) such are not appearances on the summary judgment application. There is jurisdiction, notwithstanding the defendant's attendance or appearance of counsel on that limited brief to support the application to set aside the judgment. I refer to the cases of

*Mangarata Construction Ltd v Cavendish Executive Homes Ltd* (1995) 8 PRNZ 648; *Sinclair Investments Ltd v SJJ Investments Ltd* HC DUN CP12/96 14 February 1997 Chisholm J; *Stainton v King House Removals (Southland) Ltd* (1993) 13 PRNZ 202; and *Erwood v Glasgow Harley* (2001) 15 PRNZ 451 (CA);

[12] The applicant's complaint is that his defence has not been heard in the District Court. In short there is a remedy available to the applicant in that Court. If there is sufficient merit in the proposed defence then it would be open to a District Court Judge to grant the application to set aside the summary judgment entered without an appearance on the applicant's behalf if the Judge was satisfied there has been a miscarriage of justice.

[13] In my judgment it is more appropriate that the issue of the merits of the defence and whether there has been a miscarriage of justice would be more appropriately considered in the District Court rather than this Court. If leave were granted to pursue the appeal in this court, this Court would be faced with dealing with an appeal from the District Court without the benefit of a reasoned decision from the District Court on the merits. What is effectively before this Court at present is an appeal from the District Court on a decision to decline an application for adjournment and entering summary judgment on the papers. If there is merit in the points that Mr Chamley has identified then it is appropriate that they be considered by the District Court first rather than this Court.

## **Result**

[14] For those reasons the application for leave to appeal is dismissed.

## **Costs**

[15] Costs to the respondent on a 2B basis together with disbursements as fixed.

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Venning J