#42

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-4152

IN THE MATTER OF	of an Appeal from the Decision of the District Court being a decision of Judge DM Wilson QC dated 5 July 2006
BETWEEN	IAN LAYWOOD AND GARY REES Appellants
AND	HOLMES CONSTRUCTION WELLINGTON LIMITED Respondent

Hearing: 15 February 2008

Appearances: RB Hucker for Appellants
D Hughes and AJ Nolan for Respondent

Judgment: 15 February 2008

ORAL JUDGMENT OF ASHER J

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Introduction

[1] This is an application for leave to appeal to the Court of Appeal from a decision given by me on 13 December 2007 in the High Court at Auckland. In that decision I dismissed an appeal challenging the entry of an adjudicator's determination under the Construction Contracts Act 2002 in the District Court as a judgment of that Court.

[2] Section 67(1) of the Judicature Act 1908 provides:

> **67 Appeals against decisions of High Court on appeal**
>
> (1) The decision of the High Court on appeal from an inferior court is final, unless a party, on application, obtains leave to appeal against that decision—
>
> (a) to the Court of Appeal; or
>
> (b) directly to the Supreme Court (in exceptional circumstances as provided for in section 14 of the Supreme Court Act 2003).
>
> ...

Leave is therefore required for such an appeal.

[3] The test to be applied has not been in contention between the parties. In *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343 (CA) at 346-347, it was stated that leave may be given:

> ... where the appeal would raise some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal.

This approach has been reiterated in a number of cases including *Waller v Hider* [1998] 1 NZLR 412 (CA). In that case Blanchard J stated at 413:

> Upon a second appeal this Court is not engaged in the general correction of error. Its primary function is then to clarify the law and to determine whether it has been properly construed and applied by the Court below. It is not every alleged error of law that is of such importance, either generally or to the parties, as to justify further pursuit of litigation which has already been twice considered and ruled upon by a Court.

I have also been referred to the High Court decisions of *New Zealand Sports Drug Agency v Bray* (2000) 14 PRNZ 702 and *Riddell v Porteous* (1996) 10 PRNZ 64.

[4] Applying the cases, I observe that before leave is granted:

a) The case must involve some interest, public or private, of sufficient importance to outweigh the cost and delay of a further appeal;

b) Any question of law must be capable of bona fide and serious argument;

c) Not every alleged error of law is of sufficient importance to justify a further appeal; and

d) In very limited circumstances an appeal may be of sufficient importance if the decision under the appeal reflects seriously on the applicant's character and reputation or has special consequences for that applicant.

The guiding principle in the end must be the requirements of justice.

[5] It has been observed that if the High Court reverses the decision of the District Court, that may give cause for leave for a second appeal to be granted more readily than if the two decisions had effectively agreed with each other: *Riddell v Porteous* at 65. It can also be observed that when the circumstances have resulted in the appeal Court making decisions *de novo* without the benefit of a consideration of a Judge at first instance, that may also give cause for leave for a second appeal to be granted more readily than otherwise.

[6] In his submissions, Mr Hucker for the appellant raises the following four points arising from the High Court judgment as issues for determination:

a) Does s 29 of the District Courts Act 1947 apply to limit the jurisdiction of the District Court where an application is made under s 73 of the Construction Contracts Act 2002 to enforce an

adjudicator's award as a judgment to entering judgment in an amount of no more than $200,000.00?

b) Is a party, having made an application to prevent an adjudicator's award being entered as a judgment, entitled to the observance of the principles of natural justice, and does the observance of those principles require a hearing to be convened and/or a date of hearing to be allocated by the Court?

c) Does s 74(2)(a) of the Construction Contracts Act 2002 prevent enquiry into whether amounts found to be payable by an adjudicator have in fact been credited or paid to the party in whose favour the adjudicator's award was made where such payment or credit arose prior to the adjudicator's determination being made? and

d) In holding that the learned District Court Judge failed to consider the ground advanced under s 74(2)(a) of the Construction Contracts Act 2002 at all was there a breach of natural justice with the result that the District Court judgment was irregularly obtained and ought to have been set aside?

[7] None of these questions of law appear to have been considered by the Court of Appeal or indeed to have been subject to any particular consideration by any Court other than in the judgment in respect of which leave is sought. The procedure set out in ss 73-75 of the Construction Contracts Act 2002 is one of only two procedures whereby an adjudicator's determination can be enforced. The Constructions Contracts Act 2002 has only been in force for a comparatively short period of time and the correct interpretation of the procedures set out in that Act is of importance to the community.

[8] If the proposed appeal points related only to the $200,000 limit on jurisdiction and the ability of the Court to inquire into the amounts paid prior to adjudication, I would have required some persuasion as to whether there was a seriously arguable point of law of sufficient importance to justify a further appeal.

However, the important issue of whether a full hearing is required before a determination is entered as a judgment is not expressly dealt with in the statute or the relevant District Court rules. The issue did not arise before the District Court Judge, so there has therefore been only a single decision on the issue rather than the usual two decisions when leave to appeal further is sought.

[9] These factors persuade me that leave should be granted. It is not appropriate or necessary to give any more detailed reasons.

[10] Given the importance of the processes, and the lack of detailed appellate guidance since *George Developments Limited v Canam Construction Limited* [2006] 1 NZLR 177, which related to different issues, I do not propose limiting the points that should be raised on the appeal.

Result

[11] Leave to appeal is granted.

Costs

[12] Mr Hucker for the successful applicant seeks costs. Mr Hughes opposes that application and asks that costs be reserved. He observes that his client has been successful throughout, and that costs have not been paid on the recent judgment.

[13] Rule 48E of the High Court Rules governs the payment of costs on interlocutory matters, and provides that unless there are special reasons to the contrary, costs must be fixed when the application is determined and become payable when they are fixed.

[14] Holmes Construction has been successful on three occasions to date in the history of this matter; first, before the adjudicator, second, in the District Court and, third, in the High Court. Given that s 3 of the Construction Contracts Act 2002 provides that the purpose of the Act is to provide for the speedy resolution of disputes, Holmes Construction's frustration at the delays is understandable. It can hardly be blamed for its opposition to an application for a discretionary order of this

type. The decision to grant leave has nothing to do with the merits of Holmes Construction's case, as it is based on a test of whether it is in the public interest that points of law be settled on appeal.

[15] As in all such issues the overall interests of justice cannot be ignored. If Messrs Laywood and Rees are still unsuccessful after their fourth attempt, it will seem quite unjust to Holmes Construction Ltd that it that it had to pay costs. Ordinary principles of fair play would indicate that Messrs Laywood and Rees should have paid costs throughout.

[16] I conclude that while costs should be fixed, there are special reasons why they should not be payable at this point, in particular the public interest basis for the granting of leave and the history of unsuccessful applications by the applicants, which have greatly delayed payment well beyond the delays that would normally arise.

[17] Accordingly I fix costs to be payable on a 2B basis for a hearing that has lasted one-quarter of a day, but the issue of the payment of those costs is reserved to be determined following the conclusion of the appeal.

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Asher J