IN THE SUPREME COURT OF NEW ZEALAND

SC 28/2006
[2006] NZSC 59

BETWEEN	AOTEAROA INTERNATIONAL LIMITED Appellant
AND	PAPER RECLAIM LIMITED Respondent

Hearing: 7 August 2006

Court: Blanchard, Tipping and McGrath JJ

Counsel: A F Grant and A A Sinclair for Aotearoa International Limited
G J Judd QC and A G Rowe for Paper Reclaim Limited

Judgment: 10 August 2006

JUDGMENT OF THE COURT

A. Paper Reclaim's application for leave to admit further evidence under Rule 40 of the Supreme Court Rules 2004 is dismissed.

B. Costs are reserved.

C. Timetable orders and directions are made as set out below.

REASONS

(given by Tipping J)

Introduction

[1] Both Paper Reclaim Ltd and Aotearoa International Ltd have been granted leave to appeal on specified grounds from the decision of the Court of Appeal. The issues concern the damages awarded to Aotearoa; the length of the required notice; the finding that the fiduciary cause of action added nothing in terms of the relief to which Aotearoa was entitled; and, relevantly for present purposes, the amendment made by the Court of Appeal to the order for costs in Aotearoa's favour in the High Court. In short, the High Court awarded costs on an indemnity basis but the Court of Appeal decided that this approach was inappropriate and reduced the sum which Paper Reclaim was obliged to pay.

[2] Aotearoa has been given leave to challenge the Court of Appeal's decision in that respect. Paper Reclaim resists that challenge on the basis that the Court of Appeal was correct on the material before it. Paper Reclaim also wishes, pursuant to Rule 20(4) of the Supreme Court Rules 2004, to support the Court of Appeal's decision, if necessary, on a further ground. This ground is that the additional evidence which the Court of Appeal refused to admit would support the Court's costs determination, even if it were not justified on the more limited material which the Court of Appeal did have before it.

Primary issues

[3] To achieve its purpose, Paper Reclaim has filed in this Court an application under Rule 40 of the Supreme Court Rules for leave to admit the very same evidence as the Court of Appeal declined to admit. Two legal questions arise on this application. The first concerns whether a recent change in the terms of the Court of Appeal rule concerning further evidence makes any substantive difference to the application of the Rule. The second concerns whether it is appropriate for

Paper Reclaim to make an application under Rule 40 without directly challenging the Court of Appeal's order declining to admit the same evidence in that Court.

The change of the wording of the further evidence rule

[4] Rule 45 of the Court of Appeal (Civil) Rules 2005 provides:

> **45. Application for leave to adduce further evidence—**
>
> (1) The Court may, on the application of a party, grant leave for the admission of further evidence on questions of fact by—
>
> (a) oral examination in Court; or
>
> (b) affidavit; or
>
> (c) depositions taken before an examiner or examiners in accordance with rules 369 to 376 of the High Court Rules.
>
> (2) The parties and their counsel are entitled to be present at, and take part in, the examination of a witness.

[5] This Rule is in materially the same terms as Rule 40 of the Supreme Court Rules and was no doubt amended in 2005 so as to achieve that coincidence. The earlier version of Rule 45 was Rule 24 of the Court of Appeal (Civil) Rules 1997 which read:

> **24. Application for leave to adduce fresh evidence—**
>
> (1) The Court may, on the application of any party, receive further evidence on questions of fact by—
>
> (a) Oral examination in Court; or
>
> (b) Affidavit; or
>
> (c) Depositions taken before an examiner or examiners in accordance with rules 369 to 376 of the High Court Rules.
>
> (2) Special leave to adduce further evidence on questions of fact is not required if the evidence is to be adduced for the purposes of an interlocutory application or if the evidence concerns matters that have occurred after the date of the decision appealed from.
>
> (3) On an appeal from a judgment or order after trial or after the hearing of any cause or matter on the merits, further evidence on questions of fact may be admitted only with the special leave of the Court and on special

> grounds, unless the evidence concerns matters that have occurred after the date of the decision appealed from.

[6] Mr Judd QC for Paper Reclaim contended that the change in wording from Rule 24 to Rule 45, whereby the references to "special leave" and "special grounds" were removed, should be construed as liberalising the conventional approach to the admission of further evidence on appeal. Counsel could not point to anything other than the change in wording to support that proposition which we note is not advanced by the editors of McGechan on Procedure. We agree with Mr Grant's submission for Aotearoa that there cannot have been any intention on the part of the framers of the new version of the Rule that the well understood and firmly established principles which had developed under the previous rules[1] were to be altered in some unspecified manner. The references in Rule 24(2) and Rule 24(3) to "special leave" and "special grounds" were in a sense declaratory of the general tenor of the discretion given by Rule 24(1). Rule 45 simply reflects a more modern drafting approach and does not signal any change to the underlying principles, or to the true nature of the discretion given by the Rule.

[7] The Court of Appeal in England took the same view in *Hertfordshire Investments Ltd v Bubb*.[2] The comparable rule in England had been amended so as no longer to require "special grounds" to be shown for admitting further evidence on appeal. The Court indicated that despite that change the conventional principles should still be applied. The Court's approach to the case in hand demonstrates clearly that the change in the rule, effectively the same change as in our rule, did not make any material difference to how to determine the question whether further evidence should be admitted.

[8] For these reasons we are of the view that by directing itself in terms of the conventional principles the Court of Appeal did not err in its interpretation or application of Rule 45.

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1 As confirmed in *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190, 192 (CA) where the Court said:

> The conventional requirements are that the further evidence must be fresh, it must be credible and it must be cogent. Evidence is not regarded as fresh if it could with reasonable diligence have been produced at the trial.

2 [2000] 1 WLR 2318.

The appropriateness of the application under Rule 40

[9] By seeking leave under Rule 40 without directly impugning the Court of Appeal's order, Paper Reclaim is effectively asking this Court to exercise the discretion afresh. It thereby avoids the constraints that would apply to any appeal from the Court of Appeal's discretionary order. We do not consider this is appropriate.

[10] Mr Judd argued that the Court of Appeal could not fetter this Court's discretion and that nothing in the nature of issue estoppel or abuse of process was involved in what his client was seeking to do. In agreement with Mr Grant's response we cannot accept these propositions. Rule 40 is, in our view, focused primarily, if not entirely, on evidence which is genuinely new in this Court. The most obvious kind of evidence to which Rule 40 applies is relevant updating evidence which it might be necessary or desirable for this Court to have before it. Rule 40 is not designed to be a surrogate means of attacking a decision already made below. We consider it would be an abuse of the process made available to this Court by Rule 40 to use it in that way.

[11] To do so would also raise problems of or akin to issue estoppel. The Court of Appeal has held that it is not in the interests of justice to admit the further evidence. Paper Reclaim is endeavouring, without appealing from that determination, to satisfy this Court that it is in the interests of justice to do so. Mr Judd suggested this difficulty was overcome because the purpose of the evidence was different in this Court from its intended purpose in the Court of Appeal. We do not consider this circumstance, even if correct, makes any material difference. Between these very parties, in this very litigation, there is a ruling of a Court of competent jurisdiction to the effect that it is not in the interests of justice to admit the evidence. In principle this Court should not be invited to take a different view, save by the normal process of challenge, that is by appeal. A collateral challenge by the invocation of Rule 40 should not be permitted.

The need for leave to appeal

[12] It is therefore necessary for Paper Reclaim to seek and obtain leave to appeal against the Court of Appeal's evidence order, and then to succeed on that appeal. Its application for leave should be supported and opposed by written submissions in the normal way. The unusual feature that Paper Reclaim wishes to have the further evidence admitted in order to support rather than to attack the Court of Appeal's costs determination does not affect these requirements. Nor does the fact that Paper Reclaim only needs the evidence on the contingency that it fails to hold the Court of Appeal's costs decision on the material already before the Court. If Paper Reclaim succeeds in its appeal against the evidence order, the very fact of that success will effectively bring the evidence before the Court so as to be available for consideration, either in this Court or on any reference of the matter back to the Court of Appeal. In that situation we doubt whether an order under Rule 40 would be necessary in addition. But if that were so an application under Rule 40 would be no more than pro forma.

[13] The parties were agreed that following the filing of written submissions, the application for leave could then stand adjourned to the substantive hearing of the appeal on the various other issues. It will not become necessary for the Court to consider the application unless Aotearoa might otherwise be successful on its costs appeal.

Issues of time

[14] Mr Grant pointed out that Paper Reclaim was now out of time for the necessary application for leave. We note, however, that Mr Judd foreshadowed the possible need for such an application in his earlier written submissions. We also point out that it is not generally necessary to appeal against an interlocutory order made during the course of proceedings until after the substantive decision in the

proceedings has been delivered.[3] Up to that time it is not necessarily apparent whether and on what basis the interlocutory ruling may be relevant to the substantive outcome. Any application for leave to appeal brought against that substantive determination can signal that it includes a wish to appeal against an order made in the course of the proceedings which logically influenced the substantive determination. Here, because Paper Reclaim wishes to use the further evidence not to attack but to support the Court of Appeal's costs determination, the Court's discretion in relation to the time of making what must be a stand alone application for leave to appeal from the Court of Appeal's evidence order must take account of the fact that no question of any need for the application arose, from Paper Reclaim's point of view, at least until Aotearoa applied for leave to appeal against the costs determination. The need only crystallised when leave was granted to Aotearoa to do so.

Disposition

[15] For the reasons given Paper Reclaim's application for leave to admit the further evidence must be dismissed.

[16] Costs are reserved.

Timetable

[17] Any application for leave to appeal against the Court of Appeal's evidence order must now be made within five working days of the date of this judgment, accompanied by the evidence sought to be admitted. Written submissions for the applicant are to be filed within ten working days thereafter and the written submissions of the respondent must be filed within ten working days of the applicant's submissions.

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[3] See *Crowley v Glissan* (1905) 2 CLR 402, confirmed recently in *Gerlach v Clifton Bricks Pty Ltd* (2002) CLR 478, 483, in which the High Court of Australia followed the established practice of the Privy Council to that effect. The same approach is taken in Spencer Bower, Turner and Handley *The Doctrine of Res Judicata* (3 ed 1996) 79-80 at para 170.

[18] The Registrar is directed to allocate an early hearing date for the appeal, after consultation with the parties. The time allowed should be sufficient for the hearing of all questions arising which do not require reference to the proposed additional evidence.

Solicitors:
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Morrison Kent, Auckland for Paper Reclaim Limited