IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA509/2024
[2024] NZCA 654

BETWEEN	VAN DEN ANKER CONSTRUCTION LIMITED Applicant
AND	WILSON MCKAY TRUSTEE COMPANY LIMITED, ANNE VALERIE NOBES-JESS AND RODNEY NORMAN JESS Respondents

Court: Katz and Cooke JJ

Counsel: I J Stephenson for Applicant
J A Ruddell for Respondents

Judgment: (On the papers) 11 December 2024 at 2.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B The respondents are entitled to costs for a standard application on a band A basis.

REASONS OF THE COURT

(Given by Cooke J)

[1] The applicant seeks leave to appeal a decision of the High Court which allowed, in part, an appeal by the respondents from a decision of the District Court.[1]

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[1] *Wilson McKay Trustee Co Ltd v Van Den Anker Construction Ltd* [2023] NZHC 3475 [High Court judgment].

The District Court had allowed the applicant's claim, and dismissed the respondents' counterclaim.[2] The High Court partly allowed the respondents' appeal by upholding an aspect of their counterclaim.[3] The High Court then declined the applicant's application for leave to appeal to this Court in accordance with s 60 of the Senior Courts Act 2016.[4] The applicant now seeks leave to appeal from this Court.[5]

Factual background

[2] The applicant is a construction company. The respondents are trustees of a trust owning a residential property. In April 2018, the respondents entered into a contract with the applicant to undertake building work at the property to alter the garage so that it included a living space.[6]

[3] Works commenced on 30 April 2018. The respondent trustees then went overseas between 25 June and 17 September 2018. The applicant issued eight payment claims in respect of its work. The respondents did not pay three of these claims. The applicant suspended work on 7 September 2018 because of this failure. When the respondent trustees returned from overseas they took issue with the standard of the roofing work that had been done on the garage while they were away. The applicant then cancelled the contract on 6 November 2018 and commenced proceedings in the District Court to obtain payment of the outstanding claims totalling $49,920.65. The applicant also advanced a claim for loss of profits. The respondents counterclaimed for overcharging, and for remedial work. The most substantial remedial work claimed was in respect of the garage roof, which was said to be defective, and alleged to cost $25,817.75 plus GST to repair.

[4] In the District Court, Judge M-E Sharp upheld the applicant's claims for the amounts of the unclaimed invoices but she rejected the claim for loss of profit.[7] The

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2 *Van Den Anker Construction Ltd v Wilson McKay Trustee Co Ltd* [2022] NZDC 20497 [District Court judgment].
3 High Court judgment, above n 1, at [53].
4 *Van Den Anker Construction Ltd v Wilson McKay Trustee Co Ltd* [2024] NZHC 1875 [Leave judgment].
5 Senior Courts Act 2016, s 60(2).
6 It was agreed that the regime of the Construction Contracts Act 2002 did not apply.
7 District Court judgment, above n 2, at [36].

Judge also dismissed the counterclaim in its entirety.[8] In respect to the defective roof work she accepted that the roof required remedial work, but held that given the overall construction works had not been completed, and the respondents had breached their contractual obligation by failing to pay the payment claims, there had been no breach of contract by the applicant, and the applicant was entitled to cancel the contract because of the respondents' failure to pay. The applicant could not be sued for required remedial work that had not yet been undertaken. She accordingly awarded the applicant $49,920.65 and dismissed the counterclaim.[9]

[5] On appeal, Peters J found that the District Court had erred in dismissing the counterclaim. She held that s 42 of the Contract and Commercial Law Act 2017 entitled the respondents to their rights under the contract at the time of cancellation, and the manner in which the roofing work was carried out constituted a breach by the applicant of its contractual obligation to exercise reasonable care and skill in carrying out the building work.[10] She did not accept the evidence of the applicant's principal at trial that he intended to return to the site and carry out remedial work on the roof as he was denying that remedial work was required at that stage.[11] She held that the respondents had a right to have the defect remedied that survived cancellation, and in the absence of the applicant undertaking that work the respondents were entitled to recover the costs of a third party doing that work.[12] She awarded the respondents $25,817.75 plus GST on their counterclaim.[13]

Applicant's submissions

[6] The applicant contends that the proposed appeal involves an important point of principle warranting the grant of leave. It contends that the decision is important to the construction sector, particularly in relation to the continuing application of the "temporary disconformity doctrine" as explained in this Court's previous decisions in

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8 At [137]–[141].

9 At [137]–[141]. The District Court judgment originally awarded the applicant $48,417.32: see District Court judgment, above n 2, at [140]. This sum was subsequently varied by minute dated 26 January 2023 to $49,920.65.

10 High Court judgment, above n 1, at [37]–[45].

11 At [44].

12 At [45].

13 At [53].

Oxborough v North Harbour Builders Ltd and *Yu v T & P Developments Ltd*.[14] A breach of a construction contract only arises when the required standard of construction has not been met at the time of completion. Until then the builder is able to remedy any temporarily non-conforming work. The High Court did not apply the doctrine, and there is now uncertainty about the applicability of this well-established principle.

[7] The applicant also argues that the High Court wrongly interfered with the District Court's factual findings on appeal notwithstanding the well-established principles emphasising the importance of deference to the findings of fact at first instance.[15] The applicant has been subject to five years of litigation over unpaid bills, and litigation would not have started if the respondents had simply paid these bills in accordance with the contract.

Assessment

[8] An application for leave to bring a second appeal will only be granted if the proposed appeal raises 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 a further appeal. The guiding principle is ultimately the requirements of justice.[16]

[9] We accept that questions concerning the applicability of the so-called "temporary disconformity doctrine" as explained by this Court in *Oxborough v North Harbour Buildings Ltd* and *Yu v T & P Developments Ltd* could be of wider significance justifying the grant of leave. The applicability of the doctrine has been called into question, and it has not been applied at first instance in England and Wales.[17]

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14 *Oxborough v North Harbour Builders Ltd* [2002] 1 NZLR 145 (CA); and *Yu v T & P Developments Ltd* [2003] 1 NZLR 363 (CA).

15 *Fonterra Co-Operative Group Ltd v McIntyre and Williamson Partnership* [2016] NZCA 538 at [153]–[160].

16 *Waller v Hider* [1998] 1 NZLR 412 (CA) at 413.

17 See Tómas Kennedy-Grant *Kennedy-Grant on Construction Law* (2nd ed, LexisNexis, Wellington, 2012) at [12.17], citing *Lintest Builders Ltd v Roberts* (1980) 13 BLR 38; *Guiness plc v CMD Property Developments Ltd* (1995) 76 BLR 40; and *William Tompkinson & Sons Ltd v The Parochial Council of St Michael* (1990) 6 Const LJ 319.

[10] But any doubts about the doctrine may not ultimately matter for the outcome of any appeal in this case. Peters J held that the applicant did not intend to carry out remedial work on the roof when the contract was cancelled, and given that stance the respondents were entitled to recover the cost of a third party undertaking that work.[18] That potentially falls within the recognised aspect of the doctrine that it does not apply when the builder has made it clear that it does not intend to rectify.[19] Given that the applicant had cancelled the contract and commenced proceedings there is clearly a foundation for this view.

[11] We do not accept the applicant's submission that there is a strong argument that Peters J inappropriately overturned the District Court's factual findings. The District Court Judge proceeded on the basis that the applicant was entitled to cancel the contract because of the respondents' failure to pay. She found that the applicant was willing to remediate before cancellation, but did not address the question whether the applicant was prepared to do so after cancellation.[20] She then held that by failing to pay the respondents had "waived their contractual right to have any incomplete or defective works completed or remediated".[21] So we consider that the key issues on any appeal would more likely turn on questions of principle rather than findings of fact.

[12] In any event, notwithstanding the points of principle raised, and the arguable points for either side, we agree with the view of Peters J when declining leave that the decisive consideration is the relatively modest sum in dispute and the need for proportionality.[22] This was a residential building contract for alterations to a garage undertaken some six years ago. The building company has obtained judgment for its outstanding invoices for the amount of $49,920.65 with the only issue being the homeowner's claim for $25,817.75 plus GST for repairs to what was admitted to be defects in the roofing work.[23] The amount in issue does not warrant the cost of a third

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18 High Court judgment, above n 1, at [44].
19 *Yu v T & P Developments Ltd*, above n 14, at [56].
20 District Court judgment, above n 2, at [99]–[108].
21 At [138].
22 Leave judgment, above n 4, at [29]–[30].
23 The work was undertaken by a sub-contractor who Peters J noted had not been paid by the applicant. She also held that the District Court had not recognised that the respondents had paid the invoices for the roof, see High Court judgment, above n 1, at [44].

level of court decision with the further delays that this would involve. The applicant has emphasised that it is not just the principal amount, but interest and costs that are in issue. But this illustrates that a disproportionate amount of time and money has already been spent on this dispute. It does not provide a good reason for incurring more cost, and creating more delay. We do not consider the interests of justice warrant the grant of leave.

Result

[13] The application for leave to appeal is declined.

[14] The respondents are entitled to costs for a standard application on a band A basis.

Solicitors:
Lane Neave, Auckland for Applicant
Wilson McKay, Auckland for Respondents