

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA218/2023
[2024] NZCA 212**

BETWEEN ECTCH LIMITED
 Applicant

AND DENNIS & LEO BRADY
 CONSTRUCTION LIMITED
 Respondent

Court: Katz and Wylie JJ

Counsel: T J P Bowler for Applicant
 J M Glover for Respondent

Judgment: 4 June 2024 at 11.00 am
(On the papers)

JUDGMENT OF THE COURT

- A The application for an extension of time to file a case on appeal and apply for the allocation of a hearing date is granted. The case on appeal is to be filed within 20 working days of this judgment.**
- B The application for an extension of time to pay the scheduling fee is granted. The scheduling fee is to be paid within 10 working days of this judgment.**
- C We make no order as to costs.**
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REASONS OF THE COURT

(Given by Katz J)

Introduction

[1] The applicant, ECTCH Ltd, seeks an extension of time under r 43(2) of the Court of Appeal (Civil) Rules 2005 (the Rules) to file a case on appeal. It also seeks an extension of time for payment of the required scheduling fee.

Background

[2] ECTCH is a property developer. The respondent, Dennis & Leo Brady Construction Ltd (Brady Construction), is a construction contractor. ECTCH and Brady Construction are engaged in litigation over funds that Brady Construction is owed by ECTCH under a construction contract.

[3] Brady Construction issued a statutory demand against ECTCH. ECTCH applied unsuccessfully to set aside that statutory demand on the basis that payment claims had not been validly served (the statutory demand judgment).¹ Having declined that application, Andrew J issued a separate judgment in which he awarded indemnity costs under s 23(2)(a)(ii) of the Construction Contracts Act 2002 to Brady Construction and ordered that ECTCH pay its debt by 28 April 2023. Andrew J further ordered that, if ECTCH failed to pay by that date, Brady Construction would be entitled to apply to put ECTCH into liquidation (the costs judgment).²

The application

[4] ECTCH filed an appeal against the costs judgment in this Court on 27 April 2023, within the statutory timeframe. The deadline for filing a case on appeal and applying for a fixture was 27 July 2023. That day, counsel for ECTCH advised the Registry that a four-week extension to file the case on appeal was required. Counsel also sought an extension of time to pay the scheduling fee under r 5A of the Rules.

¹ *ECTCH Ltd v Dennis & Leo Brady Construction Ltd* [2022] NZHC 2980.

² *ECTCH Ltd v Dennis & Leo Brady Construction Ltd* [2023] NZHC 770 at [6].

[5] The Registry extended the time for filing the case on appeal and the application for a fixture by five working days under r 5A(1)(c)(ii) of the Rules (until 3 August 2023). In response to the request for a four-week extension, the Registry advised counsel that an application under r 43 of the Rules was required.

[6] On 2 August 2023, an employee of counsel for ECTCH wrote to the Registry enquiring whether the case on appeal was required to be hyperlinked and stating that if hyperlinking was required “we will likely need to make an application for extension as we will need to outsource electronic hyperlinking”.

[7] On 3 August 2023, ECTCH filed an application for an extension of time to file its case on appeal and to pay the scheduling fee. In its application, ECTCH sought a four-week extension to file its case on appeal, and a two-week extension to pay the scheduling fee.

Submissions

[8] The grounds on which the application was made were that:

- (a) counsel for ECTCH had been at hearings, including a hearing in Tauranga, during the week of 3 August 2023;
- (b) counsel had only become aware on 2 August 2023 that the case on appeal needed to be hyperlinked;
- (c) counsel needed to outsource hyperlinking to another organisation;
- (d) the organisation to which the hyperlinking was outsourced had confirmed that they required at least two to three weeks to complete the process; and
- (e) the delay was short and Brady Construction would not be prejudiced.

[9] In its subsequent submissions in support of the extension application, dated 16 October 2023, counsel repeated the grounds above and further stated that the

process for hyperlinking was “now underway” and was “expected to be complete within the next three to four weeks”. ECTCH’s submissions sought “a further extension ... to accommodate this estimated timeframe”. ECTCH further advised that it was now in a position to pay the scheduling fee.

[10] ECTCH submitted that the extension should be granted because there is no prejudice to Brady Construction, whereas ECTCH will be highly prejudiced if the extension is not granted because it has a claim against Brady Construction in excess of \$1 million that it will not be able to pursue if ECTCH is put into liquidation.³

[11] Brady Construction opposed any extension being granted. It noted that ECTCH was not in a position to file a case on appeal within the period of the original extension sought and states further that ECTCH has made no effort to consult with it regarding the preparation of the case on appeal. Further, to Brady Construction’s knowledge, the scheduling fee has not yet been paid. Brady Construction further submitted that:

- (a) The length of delay is significant, especially having regard to the reasons ECTCH has given for the delay. Counsel should have been aware of the need for hyperlinking from the outset and should not have needed a lengthy extension of time to enable this task to be completed.
- (b) The ongoing delays have caused, and are continuing to cause, prejudice to Brady Construction, as it “has been significantly out of pocket for three to four years due to [ECTCH’s] ongoing delays”.
- (c) The merits of the proposed appeal are weak. ECTCH attempted to rely on a counterclaim in the original High Court proceedings, without success. A counterclaim, set-off or cross-demand cannot be raised in proceedings for recovery of a debt under s 23 of the Construction Contracts Act.
- (d) The issues raised by the appeal are not of general or public importance.

³ We understand that proceedings have now been issued in the High Court in relation to this claim.

Relevant principles

[12] As this Court explained in *Yarrow v Westpac New Zealand Ltd*, the decision of the Supreme Court in *Almond v Read*, although concerned with r 29A of the Rules, not r 43, applies to any interlocutory application for an extension of time where there is a right of appeal.⁴

[13] The ultimate question when considering the exercise of the discretion to grant or decline an extension of time is what the interests of justice require. Factors identified as likely to require consideration include:⁵

- (a) the length of the delay;
- (b) the reasons for the delay;
- (c) the conduct of the parties, particularly of the applicant;
- (d) any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome; and
- (e) the significance of the issues raised by the proposed appeal, both to the parties and more generally.

[14] While the Court recognised that the merits of an appeal may, in principle, be relevant to the exercise of the discretion to extend time, a decision to refuse an extension of time based substantially on that ground should be made only where the appeal is clearly hopeless. The lack of merit must be readily apparent.⁶

Discussion

[15] The extension application was filed promptly, within five working days of the original r 43 compliance date and within the period of extension granted by the

⁴ *Yarrow v Westpac New Zealand Ltd* [2018] NZCA 601 at [4]; and *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [39].

⁵ *Almond v Read*, above n 4, at [38].

⁶ At [39(c)].

Registry. As Brady Construction notes, however, the case on appeal had not been filed by the time ECTCH filed its submissions on 16 October 2023, and a further extension of three to four weeks was sought at that time.

[16] Overall, we consider the delay to be modest. It is not unusual for an appellant to await the outcome of an extension application before incurring the costs of finalising its case on appeal. This simply reflects that such an exercise (including engaging an external professional to undertake the required hyperlinking) can be expensive. If an extension is not granted, any costs incurred in preparing and finalising the case on appeal will have been wasted.

[17] As to the reasons for the delay, the sole reason the case on appeal was not filed within time was counsel oversight or error. Counsel for ECTCH failed to appreciate the need to hyperlink the case on appeal until a very late stage. This reflects somewhat poorly on counsel, given that the letter of filing sent by the Registry on 28 April 2023 referred the parties to the Senior Courts Civil Electronic Document Protocol 2019, which stipulates that electronic bundles should be hyperlinked.⁷ Further, the Court of Appeal’s Electronic Document Practice Note 2019 states that the case on appeal must be prepared in accordance with the Protocol and explicitly references hyperlinking.⁸ Counsel should have been aware of this. Nevertheless, it is significant in our view that the delay was due to error or inadvertence on the part of counsel, rather than any default on the part of ECTCH itself. It would arguably be unfair for ECTCH to lose its right of appeal due to an oversight on the part of its counsel.

[18] The parties disagree on the extent to which Brady Construction is prejudiced by the delay. ECTCH contended that there is “no prejudice” to Brady Construction, whereas Brady Construction argued it has been significantly prejudiced as it has been “significantly out of pocket for three to four years due to [ECTCH’s] ongoing delays” and “is entitled to have any appeal brought on for hearing promptly”. As far as we are aware, no stay has been granted in respect of the costs judgment. Although there is an informal reference in ECTCH’s memorandum to wanting a stay, no interlocutory application for a stay has been filed in this Court. We are not aware if a stay application

⁷ Senior Courts Civil Electronic Document Protocol 2019, at [2.2(b)].

⁸ Electronic Document Practice Note 2019, at [6(3)(b)].

has been made to the High Court. If a stay has been granted, the degree of prejudice will obviously be greater. If not, further delay should not materially prejudice Brady Construction.

[19] There is no suggestion that the appeal raises issues of general or public importance. The issues are, however, significant to the parties. Brady Construction submits that it is “critical” that “it can recover at least some of the funds owing to it”, and ECTCH submits that it will be “highly prejudiced” if it is not able to pursue its proposed appeal, as if it is liquidated it “will lose its right to bring its claim against [Brady Construction] which is in excess of \$1 million”.

[20] As for the merits of the appeal, there is insufficient information before the Court to assess these in any detail. We are certainly not in a position to say that the appeal is clearly hopeless. We therefore see the merits as a neutral factor.

[21] The final issue is the conduct of the parties, particularly the applicant. Brady Construction argues that ECTCH has “acted vexatiously and frivolously in bringing a meritless appeal and then delaying in bringing it on for hearing”. As noted above, we are not in a position to form a firm view of the merits of the appeal at this preliminary stage. As for delay, apart from the failure of counsel for ECTCH to hyperlink the case on appeal within the required timeframe (for which ECTCH is not at fault) we are not aware of any other conduct by ECTCH that has delayed the progress of this appeal. The notice of appeal was filed within time and security for costs has been paid (albeit with a delay of approximately one month). ECTCH’s conduct does not therefore weigh against a grant of leave.

[22] In conclusion, taking all of these factors into account, it is our view that the overall interests of justice strongly favour granting an extension. The key factor, in our view, is that the delay in filing the appeal is attributable to counsel inadvertence or error rather than any failings (or deliberate delaying tactics) on the part of ECTCH. It would be contrary to the interests of justice for ECTCH to lose its right of appeal because of a failure by its counsel to prepare the case on appeal on time, in accordance with the requirements of the relevant Protocol and Practice Note.

Costs

[23] The Rules set out the principles that apply to the determination of costs in this Court (subject to the Court's over-riding discretion). Those principles include that the party who fails with respect to an appeal should pay costs to the party who succeeds.⁹

[24] In relation to interlocutory applications, r 53GA provides that costs on interlocutory applications are dealt with according to the same principles that apply to costs for an application for leave to appeal under r 53G.¹⁰ This rule provides:

53G Principles applying to costs on application for leave to appeal

- (1) If the Court refuses to give leave to appeal, the applicant will normally be liable for costs in accordance with the principle stated in rule 53A(1)(a).
- (2) If the need for an application for leave to appeal arises from a default on the applicant's part, the respondent will normally be entitled to costs with respect to the application at the time it is determined, unless the respondent's opposition to it was in the circumstances unreasonable, in which case there will normally be no order as to costs.

...

[25] Brady Construction submits that this appeal should be classified as a standard appeal for the purposes of rule 53A(1)(b). It seeks indemnity costs in respect of the extension application, however, on the basis that the application is simply a further attempt by ECTCH to delay payment, and that ECTCH has acted frivolously and vexatiously in bringing the appeal.

[26] For the reasons we have outlined previously, at this preliminary stage there is not a sufficient basis for us to find that ECTCH has acted frivolously and vexatiously in bringing the appeal. Nor is there any evidence that the application is simply a further attempt by ECTCH to delay payment. As noted above, the reasons for the delay are attributable to counsel inadvertence or error, rather than any delaying tactics on the part of ECTCH. There is accordingly no basis for an award of indemnity costs.

⁹ Court of Appeal (Civil) Rules 2005, r 53A(1)(a).

¹⁰ Rule 53GA(1).

[27] Brady Construction is therefore entitled to an award of scale costs, unless its opposition to the extension application was unreasonable in the circumstances, in which case there will normally be no order as to costs.

[28] The present circumstances are similar to those that arose in *Minister of Education v Ahead Buildings*.¹¹ In that case the appellant, “entirely through counsel oversight and through no fault of her own” had failed to file the case on appeal within the stipulated time.¹² This led to the deemed abandonment of the appeal under r 43 and a subsequent application to extend time for a new appeal. This Court explained that the thinking behind r 53G(2) is that:¹³

A party seeking an indulgence should normally expect to contribute towards the costs of others who have been inconvenienced thereby. A respondent who acts unreasonably should not, however, receive costs. To allow an unreasonable respondent costs would be to encourage perverse behaviour and a waste of court time. If respondents in these circumstances thought they would receive costs whether the application for leave succeeded or failed, respondents would be encouraged to oppose regardless. Unnecessary legal costs would be incurred and valuable court time would be spent dealing with contested applications which should obviously succeed.

[29] Turning to the case before it, the Court observed that:

[6] A reasonable respondent would immediately have consented to the Minister’s application to extend time for a new appeal. If such consent had been forthcoming, the whole matter could have been dealt with on the papers under r 29A(2). It was obvious this application would be granted, given that [the respondent] suffered no prejudice at all as a result of the Minister’s counsel’s error. ...

[30] Similarly, in this case, counsel for Brady Construction should have realised that it was likely that an extension would be granted given that the failure to file the case on appeal on time was entirely attributable to counsel error, and not any fault on the part of ECTCH. If the application had not been contested, it could have been dealt with promptly, by way of a brief minute issued by a single Judge. A contested application, however, must be referred to a panel of two or more Judges (pursuant to s 49(2)(b) of the Senior Courts Act 2016) and requires the filing of

¹¹ *Minister of Education v Ahead Buildings (an operating division of Econicorp Holdings Ltd)* [2011] NZCA 81.

¹² At [5].

¹³ At [4].

submissions and the delivery of a formal judgment. This inevitably results in further expense and delay.

[31] Given the obvious unfairness that would arise if ECTCH were to lose its right of appeal due to counsel error, the more reasonable course in the circumstances would have been for Brady Construction to consent to the extension and press for the appeal to be set down for hearing (which need not await the filing of the case on appeal). Brady Construction was, of course, entitled to instead oppose the extension application and file comprehensive submissions in support of its opposition (which it did). In such circumstances, however, we are not persuaded that an award of costs in Brady Construction's favour is appropriate. It is our view that costs should where they fall.

Result

[32] The application for an extension of time to file a case on appeal and apply for the allocation of a hearing date is granted. The case on appeal is to be filed within 20 working days of this judgment.

[33] The application for an extension of time to pay the scheduling fee is granted. The scheduling fee is to be paid within 10 working days of this judgment.

[34] We make no order as to costs.

Solicitors:
Neilsons Lawyers, Auckland for Applicant
Blackwood Montagna, Pukekohe for Respondent