IN THE SUPREME COURT OF NEW ZEALAND

SC 25/2006
[2007] NZSC 1

	BETWEEN	PAPER RECLAIM LTD Appellant
	AND	AOTEAROA INTERNATIONAL LTD Respondent

Hearing: 9 February 2007

Court: Blanchard, Tipping and McGrath JJ

Counsel: G J Judd QC and A G Rowe for Appellant
A F Grant and A A Sinclair for Respondent

Judgment: 15 February 2007

JUDGMENT OF THE COURT

A The applications by Paper Reclaim Ltd to amend its ground of appeal and for leave to adduce further evidence are dismissed.

B Paper Reclaim Ltd is to pay costs to Aotearoa International Ltd in the sum of $5,000 together with reasonable disbursements.

REASONS

(Given by McGrath J)

[1] Paper Reclaim Ltd has been given leave to appeal to the Supreme Court against the judgment of the Court of Appeal in a contract claim brought against it by Aotearoa International Ltd.[1] Aotearoa has also been given leave to appeal against

[1] *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188.

other aspects of the same judgment. The two appeals will be heard together on 5 to 7 March this year.

[2] Paper Reclaim has applied to add a new ground of appeal to that for which it has obtained leave to appeal. It has also applied for leave to call fresh evidence at the hearing. Both applications are opposed by Aotearoa.

[3] The background, so far as relevant to the present applications, is that following a trial occupying 22 days in the High Court, Nicholson J held that in the mid-1980s Paper Reclaim and Aotearoa entered into an oral contract for Aotearoa exclusively to export waste paper sourced by Paper Reclaim. The contract was terminable on reasonable notice, which the Judge found in the circumstances to be a period of eight years. Paper Reclaim had repudiated the contract in 2001 and had done so in breach by failing to give reasonable notice of termination. The High Court awarded Aotearoa damages based on loss of profits over the period of eight years following the repudiation.

[4] On appeal by Paper Reclaim, the Court of Appeal upheld the High Court's finding that there was a contract between the parties which governed their arrangements for export of paper and that it was terminable on reasonable notice. It also, however, held that the period of notice of termination should have been twelve months rather than eight years. The Court remitted the proceeding to the High Court to determine the amount of damages that was payable by Paper Reclaim in light of that finding.

[5] While the existence of a continuing contract between the parties had been a hotly contested issue in both the High Court and the Court of Appeal, by the time the parties each sought leave to appeal to this Court, that question was no longer in dispute and the grounds of appeal for which this Court granted leave are not concerned with the question.

[6] The present applications have been made by Paper Reclaim because, during September 2006, one of its employees discovered a document dated 1 October 1997 in the attic of the company's main office building. The document purports to be a

contract between Paper Reclaim and Aotearoa. It comprises two pages. On the first page there is a stipulation that the agreement is designed to cover all arrangements between the two parties. Paragraphs 5 and 6 of the document, which also appear on the first page, read as follows:

> 5. This agreement will replace any prior agreement whether written or unwritten.
>
> 6. This agreement is on a monthly basis and can be terminated by either party with one month's notice.

[7] The second page of the agreement includes only two terms. The first provides that Aotearoa is to be an exclusive agent on the export market. The second provides that the commencement date of the agreement is 1 October 1997. There is also provision on the second page for the agreement to be signed on behalf of Aotearoa and Paper Reclaim. Two signatures appear on the document and Paper Reclaim says they are those of Mr Cash, a director of Aotearoa and Mr O'Rourke, a director of Paper Reclaim.

[8] In making its present applications in this Court, Paper Reclaim's position is that, had the 1997 document been before the Court of Appeal, it would have held that in February 2001 Paper Reclaim's relationship with Aotearoa was governed by the 1997 agreement rather than the earlier contract, which the Court of Appeal upheld. In consequence the Court would also have held that Paper Reclaim had the right in February 2001 to terminate contractual arrangements on one month's notice. Its liability to Aotearoa would have been determined on that basis rather than on the basis that 12 months' notice or some longer period was required. Paper Reclaim's application to call evidence seeks to put the 1997 agreement before this Court in support of what it refers to as its proposed amended ground of appeal.

[9] Affidavits in support of the applications have been filed concerning why the 1997 document was neither put in evidence nor even referred to in evidence in the High Court. The tenor of the affidavits is that the 1997 document was inadvertently misfiled in records of Paper Reclaim which had no relation to its dealings with Aotearoa. As a result it had become lost and was forgotten by Paper Reclaim's witnesses during the period leading up to the trial. It was discovered amongst the

unrelated records only when they were being culled in the course of checking prior to destruction in 2006. When the document was then brought to the attention of Mr O'Rourke, he says that he recalled that the parties had entered into a written contract in October 1997. When another employee of Paper Reclaim, Mr Bland, saw the document, he remembered that he had drafted and typed the document and that it had been signed by Mr Cash and Mr O'Rourke.

[10] Likewise another employee, Mr Taylor, who was shown the document after it emerged, recalled the circumstances of its preparation and that Mr Cash had signed it on behalf of Aotearoa as well as Mr O'Rourke on behalf of Paper Reclaim. Mr Taylor, like Mr Bland, also identified their respective signatures.

[11] The position of Aotearoa in response, stated in an affidavit filed by Mr Cash, is that the 1997 document is not genuine and no transaction of the kind it evidences was entered into. He says that the wording on page 2, which he accepts he may have signed, is not controversial. The first page, however, contains terms which Mr Cash says he would never have agreed to. He points out that his initials are not on the first page (as it seems are those of Mr O'Rourke). He also states that the new terms of remuneration of Aotearoa that are set out in the document were never implemented. In essence, the position of Mr Cash is that if he did sign the second page of the 1997 document, the first page was not part of the document he signed.

[12] Mr Judd QC submits on behalf of Paper Reclaim that it should have leave to include an additional ground of appeal that would enable Paper Reclaim to rely on the 1997 document, as otherwise this Court would be allowing a judgment to stand when it is known that it has been obtained on a false basis. He says that unless this Court allows the amendment, and the evidence concerning the 1997 document, to be adduced at the appeal, a substantial miscarriage of justice will have occurred.[2] That is because if the 1997 document is authentic, its terms clearly override those of the earlier contract and preclude any claim based on it.

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[2] If this were the case it would be necessary in the interests of justice for the Court to give leave for the appeal under s 13(1) and (2)(b) of the Supreme Court Act 2003.

[13] It will, however, be apparent that Paper Reclaim wishes to raise a new ground of appeal of a highly unusual kind. It is seeking to reopen the case that it presented in the lower Courts in order to present a totally different case in its appeal to this Court. To do this Paper Reclaim wishes to present evidence that is directly contradictory of the extensive evidence that was given on its behalf at the trial, namely that there was no contract having general application to the arrangements between the parties.

[14] There must in these circumstances be real doubt over whether the 1997 document tendered by Paper Reclaim is what on the surface it appears to be. We consider that its authenticity could not be resolved without full cross-examination of the deponents and a proper evaluation of their evidence alongside that given concerning the parties' arrangements at the trial. There are major and well-recognised problems for an appellate court undertaking such an exercise, especially when it involves evaluation of the evidence of witnesses it has not heard.[3] We are, however, prepared to decide the applications on the basis that the document is genuine and that it applies to the arrangements between the parties which are in issue, because it is clear that there are objections of principle in permitting Paper Reclaim to change its course at this point in the litigation.

[15] There are strong policy reasons why the courts should take a restrictive approach to applications by parties to litigation who seek to alter the basis of the case that they presented at trial, after judgment has been given. They reflect a strong societal interest in the final determination of concluded litigation. This interest must be balanced against the individual interests of particular litigants who, having received an adverse judgment, consider that the approach they took at the trial of their dispute was based on an incorrect premise and that a new approach is necessary to achieve the right result. It has been said that part of the societal interest lies in the risk that a liberal approach would lead to temptation by dissatisfied litigants to commit perjury.[4] Another consideration is the unfairness to a successful litigant in allowing the protraction of proceedings by its opponent because its witnesses now

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3 *Sulco Ltd v E.S. Redit and Co Ltd* [1959] NZLR 45 at p 75 at lines 19-30 per Turner J.
4 *Sanders v Sanders* (1881) 19 Ch D 373, 381 per Lord Jessel MR.

say their evidence was mistaken.[5] To these ends courts are required to function within prescribed limits framed to ensure there is an end to litigation.

[16] These limits include limits to the scope of the parties' rights of appeal. The Supreme Court Act 2003 requires that appeals to this Court proceed by way of rehearing.[6] Such an appeal does not contemplate a right to a new hearing of the evidence. The appellate court is required to determine issues which had to be determined in the proceeding of the court appealed from on the basis of the evidence appearing in the lower court's record.[7] This may be supplemented by adducing fresh evidence but only within established guidelines.[8] It would ordinarily be outside the scope of the statutory direction to proceed by way of rehearing for this Court to allow a new case to be put up by a party to the appeal on which fresh evidence had to be called. The short answer accordingly, to the applications to add the proposed new ground of appeal and to call fresh evidence to support it, is that they would take the appellate process outside of appropriate bounds.

[17] There are, of course, circumstances in which the judicial system does allow a new trial to be held but for the same reasons of policy they are also closely restricted. Under r 494 of the High Court Rules that Court may make an order for a new trial. Rule 494 relevantly provides:

> **494 Power to order new trial**
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> (1) A new trial may be ordered only where, in the opinion of the Court, there has been a miscarriage of justice that justifies a new trial.
>
> (2) An order under subclause (1) may be made on such terms as the Court thinks fit.
>
> (3) Without limiting the circumstances in which the Court may hold that there has been a miscarriage of justice that justifies a new trial, it is hereby declared that the Court may hold that there has been such a miscarriage of justice if –
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> …

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5 *Joftaa Holdings Ltd v Cavalier Bremworth Ltd* (Court of Appeal, CA 232/95, 29 April 1996).

6 Under s 24. The position is the same for appeals to the Court of Appeal under r 47 of the Court of Appeal (Civil) Rules 2005.

7 *Pratt v Wanganui Education Board* [1977] 1 NZLR 476 at p 490 per Somers J.

8 Rule 40, Supreme Court Rules 2004; *Airwork (NZ) Ltd v Vertical Flight Management Ltd* [1999] 1 NZLR 641 at p 649 (CA).

> (e) Material evidence has been discovered since the trial which could not reasonably have been foreseen or known before the trial; …

[18] Even if this Court were to treat the present applications as equivalent to an application for a new trial under r 494(3)(e), Paper Reclaim would have to show that its evidence concerning the 1997 document could not reasonably have been foreseen or known prior to the trial. That test is not met by the deponents' evidence which accepts that the existence of the document was known when it was executed but says that it was subsequently mislaid and the transaction forgotten by the time the litigation was under way.

[19] Furthermore**,** the ultimate requirement under r 494 before the Court can order a new trial is that there has been a miscarriage of justice that justifies that course. In *Dragicevich v Martinovich*[9] the Court of Appeal applied well known principles in relation to calling fresh evidence on appeal to an application for a new trial. The Court cited English authority which said:

> In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.[10]

[20] These applications would fail the due diligence test. It was incumbent on Paper Reclaim prior to trial to ensure that those of its executives who had dealings with Aotearoa put their minds to work over what transactions or other relevant arrangements had been entered into by the parties. They needed to apply their minds diligently to what documents were available and cause appropriate searches of their records to be undertaken. There is nothing to suggest any form of diligent inquiry was made. The failure of the deponents to refer at trial even to an agreement having possibly been reached around 1997 which could not be located, in the circumstances also demanded an explanation. The impression is left that Paper Reclaim had a casual attitude to these matters.

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9 [1969] NZLR 306, 308 per Turner J. See also *Green v Broadcasting Corporation of New Zealand* [1988] 2 NZLR 490, 504 per Casey J (CA).

10 The passage appears in *Ladd v Marshall* [1954] 3 All ER 748 , 748 per Denning LJ.

[21] The bare assertion that this critical document was mislaid and the transaction it evidences forgotten by those involved in entering into it is an insufficient basis to require Aotearoa at this very advanced stage in the litigation to address a wholly different case. It would be unjust to put it in that position. For these reasons we would dismiss the applications.

[22] The applications are dismissed. Paper Reclaim must pay costs to Aotearoa in the sum of $5,000.00 together with reasonable disbursements.

Solicitors:
Wells and Co, Auckland for Appellant
Morrison Kent, Auckland for Respondent