

**N THE DISTRICT COURT  
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE  
KI TE WHANGANUI-A-TARA**

**[2022] NZACC 250      ACR 96/21**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	STEVEN CUTHBERT Appellant
AND	ACCIDENT COMPENSATION CORPORATION First Respondent
AND	GOODMAN FIELDER LTD Second Respondent

Judgment on the papers.

Submissions:    T Harvey for the Appellant  
                      L Hawes-Gandar for the First Respondent  
                      A Sharp for the Second Respondent

Date of Judgment: 19 December 2022

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**JUDGMENT OF JUDGE P R SPILLER  
[Late filing of an appeal to the District Court –  
s 151, Accident Compensation Act 2001]**

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**Introduction**

[1] The appeal in the above matter was lodged by Mr Cuthbert on 10 May 2021. The appeal was filed late in respect of a decision of a Reviewer dated 22 January 2021. The Reviewer dismissed reviews against the decisions of WellNZ dated 11 February and 14 April 2020, declining cover for a right rotator cuff tendon injury and surgery funding. In the Notice of Appeal filed on 10 May 2021, Mr Darke for

Mr Cuthbert noted that the appeal was filed late because there had been a backlog of cases and matters had been complicated by the Level 3 lockdown in February 2021.

[2] On 11 May 2021, Judge McGuire issued a Minute which noted, *inter alia*, that the appeal was filed outside the 28-day timeframe specified for filing new appeals. As a result, Judge McGuire noted that Mr Cuthbert needed to apply formally for leave to appeal out of time and set out the reasons why the appeal was late.

[3] On 14 April 2022, Judge McGuire issued a Minute which noted, *inter alia*, that the appeal was filed outside the 28-day timeframe specified for filing new appeals. As a result, Judge McGuire noted that Mr Cuthbert needed to apply formally for leave to appeal out of time and set out the reasons why the appeal was late.

[4] On 14 April 2022, Judge Spiller issued a Minute which pointed out that Judge McGuire's Minute of 11 May 2021, noting that Mr Cuthbert needed to apply formally for leave to appeal out of time and set out the reasons why the appeal was late, appeared to have been overlooked. The Court hereby directed that:

- (a) Mr Cuthbert file a formal application for leave to appeal out of time, with supporting reasons, by 3 May 2022;
- (b) The Corporation and Goodman Fielder each file submissions in response to the leave application, by 17 May 2022;
- (c) Mr Cuthbert file a submission in reply by 24 May 2022

[5] On 5 May 2022, Mr Darke, for Mr Cuthbert submitted that the appeal was filed late because of the build-up of ACC reviews (and appeals) towards the end of the year when there was a "general rush". Mr Darke also referred to the arrival of Covid-19 on 14 February 2021. He submitted that this made it difficult to contact people, the supply of client information slowed down, and there were increased stress levels for many people including sole practitioners. Mr Darke submits that Mr Cuthbert has an arguable case and there is no prejudice to the Corporation because all the files are still electronically available.

[6] On 9 May 2022, Mr Light for the Corporation submitted that its position was neutral.

[7] On 16 May 2022, Mr Sharp, for Goodman Fielder, opposed leave to appeal being granted. Mr Sharp pointed to: the considerable delay in filing the appeal, the longer delay in applying for leave to appeal, the absence of specific and detailed reasons for the delays, the preceding bringing of a review application concerning the Corporation's decision out of time, the delays since the appeal was lodged with resultant prejudice to the second respondent, and the absence of submissions as to the wider significance of the issues in the appeal.

[8] On 30 May 2022, Mr Darke replied to the submissions of Mr Sharp. Mr Darke noted that the appeal was governed by social legislation which was intended to be applied flexibly. Mr Darke submitted that Mr Cuthbert should not be denied his case due to the failings of his representative, and that the delay in filing was relatively short and should not bar him from his day in Court.

### **Relevant law**

[9] Section 151 of the Accident Compensation Act 2001 (the Act) provides:

- (1) An appellant brings an appeal by sending a notice of appeal to, or filing a notice of appeal in, a specified registry.
- ...
- (3) The notice must be received by the specified registry—
  - (a) within 28 days after the date on which the reviewer gives a copy of the review decision to the appellant; or
  - (b) ...
  - (c) within any longer time allowed by the District Court.

[10] In *Almond v Read*,<sup>1</sup> Arnold J (for the Supreme Court) outlined the following principles to guide the exercise of the discretion to grant or deny an extension of time to lodge an appeal:

[37] Accordingly, where a litigant takes steps to exercise the right of appeal within the required timeframe (including advising the other party), but misses

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<sup>1</sup> *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801, (2017) 23 PRNZ 533.

the specified time limit by a day or so as a result of an error or miscalculation (especially by a legal adviser) and applies for an extension of time promptly on learning of the error, we do not think it is appropriate to characterise the giving of an extension of time as the granting of an indulgence which necessarily entitles the court to look closely at the merits of the proposed appeal. In reality, there has simply been a minor slip-up in the exercise of a right. An application for an extension of time in such a case should generally be dealt with on that basis, with the result that an extension of time should generally be granted, desirably without opposition from the respondent.

[38] The ultimate question when considering the exercise of the discretion to extend time under r 29A is what the interests of justice require. That necessitates an assessment of the particular circumstances of the case. Factors which are likely to require consideration include:

- (a) *The length of the delay.* Clearly, the time period between the expiry of the appeal date and the filing of the application to extend time is relevant. But in a case where there has been a slip-up and the appeal date has been inadvertently missed, how quickly the applicant sought to rectify the mistake after learning of it will also be relevant. Obviously, the longer the delay, the more the applicant will be seeking an “indulgence” from the court and the stronger the case for an extension will need to be.
- (b) *The reasons for the delay.* It will be particularly relevant to know whether the delay resulted from a deliberate decision not to proceed followed by a change of mind, from indecision, or from error or inadvertence. If from a change of mind or from indecision, there is less justification for an extension than where the delay results from error or inadvertence, particularly if understandable.
- (c) *The conduct of the parties, particularly of the applicant.* For example, a history of non-cooperation and/or delay by an applicant may be relevant.
- (d) *Any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome.* Again, the greater the prejudice, the stronger the case will have to be to justify the grant of an extension of time. Where there is significant delay coupled with significant prejudice, then it may well be appropriate to refuse leave even though the appeal appears to be strongly arguable.
- (e) *The significance of the issues raised by the proposed appeal, both to the parties and more generally.* If there is a public interest in the issues, the case for an extension is likely to be stronger than if there is no such interest.

## **Discussion**

[11] In terms of section 151(3)(a) of the Act, Mr Cuthbert was required to file a Notice of Appeal against the Reviewer’s decision within 28 days after the date on which the Reviewer provided a copy of the review decision to him. The Reviewer’s

decision was dated 22 January 2021, which left a date of 19 February 2021 for the filing of the Notice of Appeal. In the event, the Notice of Appeal was filed on 10 May 2021. This Court is now being asked to exercise its discretion to allow a longer time for filing the Notice of Appeal (in terms of section 151(3)(c)). In deciding whether to exercise its discretion, this Court will follow the guidelines provided by the Supreme Court in *Almond v Read*.<sup>2</sup>

**(a) The length of the delay**

[12] The Supreme Court noted that the longer the delay, the more the applicant will be seeking an indulgence from the Court and the stronger the case for an extension would need to be; and that, in a case where there had been a slip-up and the appeal date had been inadvertently missed, how quickly the applicant sought to rectify the mistake after learning of it would also be relevant.

[13] This Court notes that the delay in the formal filing of this appeal was over 11 weeks, which is a significant period of time. The Court notes that there was an unsuccessful attempt by Mr Darke to file an appeal on 11 April 2021, which was over seven weeks from the deadline, and which acknowledged that the appeal was being filed late. The Registry advised that the appeal lacked part of the Authority to Act form. However, there was no response received. On 6 May 2021, the Registry advised Mr Darke that the appeal had still not been registered, and the appeal was filed four days later.

**(b) The reasons for the delay**

[14] The Supreme Court noted that, if the delay arose from a change of mind or from indecision, there was less justification for an extension than where the delay resulted from error or inadvertence, particularly if understandable.

[15] Mr Darke submitted that the reasons for the delay were that there had been a build-up of ACC reviews (and appeals) towards the end of the year when there was a “general rush”. Mr Darke also submitted that the arrival of Covid-19 on 14 February 2021 made it difficult to contact people, the supply of client information slowed

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<sup>2</sup> Above, note 1.

down, and there were increased stress levels for many people including sole practitioners.

[16] This Court notes that Mr Cuthbert's appeal needed to be filed in the period 22 January 2021 to 19 February 2021, which is well clear of the end of the previous year and beyond the Christmas break. The Court also notes that, up to 14 February 2021, all of New Zealand was on Covid alert level 1 and had been so since the previous October. Between 14 February and 12 March 2021, Auckland fluctuated between alert levels 1 and 3, before then returning to level 1, which remained in place until 17 August 2021. Thus, the substantial part of the 28-day filing period, and then the period leading up to the actual lodging of the appeal on 10 May 2021, was without material Covid restriction or disruption.

[17] This Court is unable to deduce from the above information precisely why the appeal was filed late, but it appears that the responsibility for this lay primarily with Mr Cuthbert's advocate.

**(c) The conduct of the parties**

[18] The Supreme Court observed that a history of non-cooperation and/or delay by an applicant might be relevant.

[19] This Court notes that:

- (a) the review application concerning WellNZ's decision dated 11 February 2020 was lodged out of time;
- (b) the direction issued by Judge McGuire on 11 May 2021, that Mr Cuthbert needed to apply formally for leave to appeal out of time and set out the reasons why the appeal was late, appears to have been overlooked;
- (c) the direction of Judge Henare on 22 September 2021, that evidence for Mr Cuthbert would be filed and served by 5 November 2021, was not

met, and, despite six reminders from the Registry in the ensuing seven-month period, evidence was not filed;

- (d) the deadline directed by Judge Spiller on 14 April 2022, for Mr Cuthbert to file a formal application for leave to appeal out of time by 3 May 2022, was not met.

[20] The Court views with concern the above history of non-cooperation and delay by Mr Cuthbert and his advocate.

**(d) Prejudice or hardship to the respondent or to others with a legitimate interest in the outcome**

[21] The Supreme Court noted that, where there is significant delay coupled with significant prejudice, then it might well be appropriate to refuse leave even though the appeal appeared to be strongly arguable.

[22] This Court notes that the delay in this case is significant. Mr Sharp, for Goodman Fielder, has submitted that the compounding delays caused by Mr Cuthbert since his alleged injuries (in October 2019) are likely to result in prejudice to Goodman Fielder in obtaining countervailing medical evidence. The Court also notes that, while this appeal is governed by social legislation, it is in the interests of the administration of justice that claimants/appellants pursue their suits with cooperation and reasonable speed.

**(e) The significance of the issues raised by the proposed appeal, both to the parties and more generally**

[23] The Supreme Court observed that, if there is a public interest in the issues, the case for an extension is likely to be stronger than if there is no such interest.

[24] This Court accepts that the proposed appeal is significant to Mr Cuthbert. The Court is not in a position to assess the significance of the issues raised by the proposed appeal more generally.

## The Decision

[25] The Supreme Court in *Almond*,<sup>3</sup> provides, as an example of where leave to appeal should be granted, the case of a litigant who takes steps to exercise the right of appeal within the required timeframe, but misses the specified time limit by a day or so as a result of an error or miscalculation (especially by a legal adviser) and applies for an extension of time promptly on learning of the error. The history of Mr Cuthbert's claim and appeal is far from the example envisaged by the Supreme Court.

[26] However, this Court is conscious that the responsibility for the ongoing unacceptable delays appears to lie, not with Mr Cuthbert himself, but with his advocate Mr Darke. On this basis, and by a narrow margin, this Court finds that the interests of justice require the exercise of the Court's discretion to sustain his application for leave to file his appeal out of time, and so his application is granted.

[27] This Court will ensure that a copy of this decision is provided, not only to Mr Darke, but also to Mr Cuthbert. Both Mr Darke and Mr Cuthbert need to be on notice that, if future deadlines directed by the Court are not met, Mr Cuthbert's claim will be at risk of being dismissed.

[28] There are no issues as to costs.



P R Spiller  
District Court Judge

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<sup>3</sup> Above, note 1.