IN THE SUPREME COURT OF NEW ZEALAND

SC 3/2006
[2006] NZSC 44

	BETWEEN	ELLERSLIE PARK HOLDINGS LIMITED Applicant
	AND	THE ATTORNEY-GENERAL Respondent

Hearing: 12 June 2006

Court: Blanchard, Tipping and McGrath JJ

Counsel: B O'Callahan and G S Erskine for Applicant
M T Scholtens QC and C J Mathieson for Respondent

Judgment: 20 June 2006

JUDGMENT OF THE COURT

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1. The application for leave to appeal is dismissed.

2. The applicant must pay to the respondent $2,000 in costs plus any reasonable disbursements, to be fixed by the Registrar.

REASONS

[1] Ellerslie Park Holdings Limited has applied for leave to appeal against a judgment of the Court of Appeal, striking out claims by the applicant, and other parties, against the Attorney-General.

[2] The plaintiffs in the proceeding are the body corporate for, and individual apartment owners of, a complex known as the "Sacramento" development in Manukau City. The complex is affected by leaky building syndrome. The applicant

is a defendant builder, alleged by the plaintiffs to have constructed the complex negligently. The Attorney-General is another defendant, sued in respect of the liabilities of the former Building Industry Authority, which were assumed by the Crown under the Building Act 2004.

[3] The Authority was a statutory regulator of building practices, and is alleged to be liable for the leaky building syndrome damage as a result of negligence in the performance of those functions. The plaintiffs allege that the Authority owed them various duties of care, in particular as clients of the building certifier who certified compliance with the building code, and in the approval of the use of face-fixed monolithic cladding over untreated timber.

[4] The applicant cross-claimed against the Authority for contribution, repeating the plaintiffs' allegations of its breaches of duty and adding that it was also a breach of duty to the applicant for the Authority to approve, as part of its "Acceptable Solution B2/AS1", the use of untreated kiln dried timber at all.

[5] The Attorney-General applied to the High Court to strike out the various claims brought against the Crown. Williams J dismissed the application in so far as it had sought to strike out claims concerning the Authority's approval of Acceptable Solution B2/AS1, its refusal to amend or revoke that approval, its review of the approval of the building certifier for the project, and its alleged failure to arrange adequate insurance cover for the certifier.

[6] The Attorney-General appealed to the Court of Appeal. The Attorney-General's submissions in that Court were structured to address the findings of the High Court and followed the same course. The applicant's cross-claim was not dealt with separately from those of the plaintiffs in the Attorney-General's submissions but treated as if part of the plaintiffs' claims.

[7] The Attorney-General and the plaintiffs were represented by counsel at the hearing of the appeal but the applicant was not. In a memorandum filed on 21 October 2005, shortly before the hearing, the applicant notified the Court of Appeal that it would not appear or make submissions for economic reasons, adding

that it would rely on the submissions of the plaintiffs. At the time that the applicant filed the memorandum, it had received the Attorney-General's points of appeal and written submissions in the appeal, and the written submissions of the plaintiffs in response.

[8] The Court of Appeal delivered judgment on 1 December 2005 in which it upheld the submissions of the Attorney-General and allowed the appeal, striking out all claims against the Authority.

[9] In dealing with the submission that the Authority had breached a duty of care by approving Acceptable Solution B2/AS1, the Court of Appeal described the issue as a red herring. The Court said:

> [64] It is important to recognise that the building system used for the Sacramento complex did not conform to the BIA's "Acceptable Solution B2/AS1" as it did not ensure that the moisture content of the timber framing was less than 18%. Further the body corporate accepts that untreated pinus radiata is suitable for framing timber, providing it is used within the constraints provided for in NZS 3602:1995.
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> [65] The body corporate is not seeking to show that Acceptable Solution B2/AS1 was intrinsically false or wrong. Indeed, the body corporate's reliance on Acceptable Solution B2/AS1 is very indirect. The claim is that when the BIA issued Acceptable Solution B2/AS1 in February 1998, it knew (or ought to have known) that untreated timber was being used with faced fixed monolithic cladding systems in circumstances where the requirements stipulated in NZS 3602.1995 were not being achieved.
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> [66] These considerations highlight the reality that an "Acceptable Solution B2/AS1" claim cannot sensibly be looked at on a stand-alone basis. Rather the arguments as to this document simply form a subset of the arguments which relate to the contention that the BIA ought to have been warning the industry and public of the dangers of monolithic cladding systems over untreated pinus radiata framing or taking other steps to ameliorate the risks of building failure associated with this particular building practice.

[10] Despite its failure to appear before the Court of Appeal, the applicant now seeks to challenge the Court of Appeal's judgment, saying that it failed to address the additional ground of its cross-claim against the Authority, namely that the use of untreated kiln dried timber for framing should not have been approved by the Authority at all. The applicant wishes to advance this argument in an appeal to this Court. The additional argument had not been part of any of the plaintiffs' causes of

action at any stage. Indeed, in the Court of Appeal, counsel for the plaintiffs had disclaimed any argument that Acceptable Solution B2/AS1 was inherently false or wrong, as is recorded at [65] of the Court of Appeal's judgment.

[11] The applicant also wishes to argue that insofar as the Court of Appeal's judgment determined that Acceptable Solution B2/AS1 is not intrinsically false or wrong, it is based on a finding of fact that the Court of Appeal was not entitled to make on a strike-out application. Alternatively the applicant seeks to argue, in relation to the Court of Appeal's finding that the Authority did not owe a duty of care, that the duty owed to builders should be distinguished from those owed to other persons, such as the plaintiff homeowners.

[12] The plaintiffs have not sought leave to appeal against the Court of Appeal decision and have taken no part in the present application.

[13] It is clear that the applicant did not abandon its appeal to the Court of Appeal and that it was incumbent on that Court to satisfy itself that the High Court Judge was wrong in relation to his finding concerning the applicant before deciding, as it did, to strike out its cross-claim.

[14] The High Court judgment, however, did not deal separately with the applicant's additional argument. It addressed the various claims by the different parties concerning use of untreated timber on a "rolled together" basis and, as indicated, the Attorney-General's submissions in the Court of Appeal followed the same course.

[15] Importantly, the applicant did not give notice in the Court of Appeal of its intention to support the decision appealed against on any other ground than those on which it was based. If the applicant wished to rely on its additional basis of claim in its appeal, or an argument that different proximity or other considerations applied to a duty of care owed to builders rather than owners, this step was required under Rule 33 of the Court of Appeal (Civil) Rules 2005. While the procedural omission may have been overlooked had the point been raised by the applicant in the course of

written or oral submissions in the Court of Appeal, as indicated, it made no submissions of its own.

[16] In those circumstances additional grounds of appeal concerning the applicant's distinctive situation were not put in issue in the appeal and the Court of Appeal could not have been expected to address them in determining the appeal.

[17] The applicant is asking to be permitted to raise new points on a second appeal to this Court when it has not only failed to take the steps required to put the points in issue in the Court of Appeal, but has also failed to appear on its own behalf as a respondent in that Court. In effect it wants to bring a first appeal in this Court, focusing on its distinctive position, following a change of mind over its decision not to participate in the Court of Appeal hearing. The application is akin to cases where leave is sought from this Court to raise a new point deliberately not raised in the lower courts. This Court has indicated it would only rarely and with extreme caution give leave in such a case.[1] There are no special reasons for doing so in this case. Nor, given the position that the applicant took in the Court of Appeal, do we see any basis for concluding that it is in the interests of justice for this Court to permit the applicant to repeat on its behalf arguments on a second appeal in this Court which the plaintiffs ran on their own behalf in the Court below.

[18] For these reasons the application is dismissed with costs to the respondent of $2,000 plus any reasonable disbursements, to be fixed by the Registrar.

Solicitors:
Carter & Partners, Auckland for Applicant
Crown Law Office, Wellington for Respondent

[1] *Otago Station Estates Ltd v Parker & Ors* [2005] 2 NZLR 734 at [11].