IN THE SUPREME COURT OF NEW ZEALAND

SC 11/2007
[2007] NZSC 25

BETWEEN	MANU CHHOTUBHAI BHANABHAI AND ANOTHER Applicants
AND	COMMISSIONER OF INLAND REVENUE Respondent

Court: Elias CJ, Blanchard and Tipping JJ

Counsel: D F Dugdale and L M Nicholson for Applicants
D B Collins QC and C J Curran for Respondent

Judgment: 26 April 2007

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

[1] The applicants seek leave to appeal against a decision of the Court of Appeal dated 20 December 2006 that they were liable to the Commissioner of Inland Revenue on their undertaking to him that, on settlement of units in a development undertaken by Golden Gate Holdings Limited, they would "forthwith" pay to the Commissioner the GST component of the sale consideration.

[2] The applicants were the solicitors for Nautilus Developments Limited and Golden Gate Holdings Limited, related companies which were developers of an apartment building in Hobson Street, Auckland. Mr Bhanabhai, a partner in the applicant firm, was also an investor in the development, a director of Golden Gate Holdings Limited and had personally guaranteed the loan which had financed the development.

[3] GST output tax became payable on the sale of units in the development when purchasers paid the deposit. The developer companies did not pay the GST output tax at the time the deposits were paid on 13 units. In April 1997 the Commissioner agreed that he would not seek payment of the GST output tax until sales of the units were finally settled. As part of this agreement, the Commissioner obtained an undertaking by the applicant firm by letter of 17 April 1997 which provided:

> We are the solicitors for Golden Gate Holdings Limited. We have been instructed to settle the sale of the units in the development and we undertake that on settlements of Units 3F, 5A, B, C, D, E, F, 6A, B, C, D, E & F we will forthwith pay to you the GST component of the sale consideration.

The undertaking was a non-standard provision made in the circumstances of the particular case, when the developer was already in breach of its GST obligations.

[4] The finance advanced by UDC Finance Ltd (the financiers for the developers) became repayable on 8 May 1998. UDC then became entitled to all proceeds of sale of the units. As a result the developer companies were unable to pay the GST and went into liquidation.

[5] In the High Court, the applicants were held liable by Justice Laurenson on the basis of an ancillary obligation implied from the terms of the undertaking to keep the Commissioner advised of developments which could affect payment of GST. On appeal to the Court of Appeal, the applicants' liability was confirmed on the different basis that the undertaking was not contingent on receipt by the firm of the sale proceeds, but constituted a direct obligation to pay the GST once the sale of the units was settled, irrespective of whether the proceeds were received by the firm.

[6] The judgment of the Court of Appeal is based upon the interpretation of a one-off undertaking entered into in a particular factual setting. The interpretation is of no general importance such as would engage s 13(2)(a) or (c) of the Supreme Court Act 2003. The applicants frame the issue for the court as:

> Is it the law that notwithstanding the actual intention of the parties a solicitor's undertaking in respect of matters outside the solicitor's control must be construed not as a conditional promise but as an absolute guarantee?

[7] That is not, however, a fair characterisation of the issue determined by the Court of Appeal. Rather, the Court came to its conclusion about the proper interpretation of the undertaking on the basis of the language used, the factual context in which it arose and its commercial purpose to arrive at its objective meaning. No error of principle in approach arises. The applicants simply seek a different conclusion in application of a correct approach to the facts of the case.

[8] The applicants seek also to invoke s 13(2)(b) of the Supreme Court Act 2003. They claim that a serious miscarriage of justice may have occurred. In order to come within the s 13(2)(b) ground for leave it is necessary to point to a sufficiently apparent error of such a substantial character that it would be repugnant to justice to allow it to go uncorrected.[1] The circumstance that the Court of Appeal has reached its conclusion on a different basis than the High Court does not of itself suggest such error. No error of principle in approach appears from the Court of Appeal decision. There is no apparent error such as would give rise to a miscarriage of justice.

Solicitors:

Dyer Whitechurch, Auckland for Applicants
Crown Law Office for Respondent

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1 *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] 3 NZLR 522 at para [5] (SC).