IN THE SUPREME COURT OF NEW ZEALAND

SC 13/2008
[2008] NZSC 54

BETWEEN	NEW ZEALAND EXCHANGE LIMITED Applicant
AND	BANK OF NEW ZEALAND First Respondent
AND	ACCESS BROKERAGE LIMITED (IN LIQUIDATION) Second Respondent
AND	DELOITTE TOUCHE TOHMATSU Third Respondent

Hearing: 7 July 2008

Court: Blanchard, Tipping and Wilson JJ

Counsel: M G Ring QC for Applicant
A R Galbraith QC and S J P Ladd for First and Second Respondents
No appearance for Third Respondent

Judgment: 23 July 2008

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed, with costs of $5,000 and reasonable disbursements to the first and second respondents jointly.

REASONS

[1] Following the collapse of the second respondent, Access Brokerage Ltd, the first respondent, the Bank of New Zealand, compensated the clients of Access for losses they had suffered and took an assignment of their rights. The Bank and the

liquidators of Access are now claiming substantial damages against the applicant, New Zealand Exchange Ltd, as regulator and the third respondent, Deloitte Touche Tohmatsu, as auditor. Access sues the Exchange in contract and in tort. The Bank sues in tort only. The Exchange applied to strike out those claims. It succeeded before Harrison J in the High Court[1] but the Bank and Access appealed successfully to the Court of Appeal.[2] The Exchange now seeks leave to appeal to this Court on the grounds that the claims against it should be struck out because:

- it did not owe a duty of care to Access and its clients;

- the claims could only succeed if a "but for" test were applied, wrongly, to establish causation; and

- the claim by Access depends on its own unlawful conduct.

[2] If the relevant rules of the Exchange had remained as they were when Access collapsed in September 2004, we would have granted leave on the first ground as raising the important question of principle of when a duty of care is owed by an entity exercising both regulatory and commercial functions. But the rules were changed in a significant and material way in February 2007. Apart from the losses which are the basis of these proceedings, no claims have been made or notified under the previous rules. In oral argument, Mr Ring QC could not point to any realistic scenario under which the previous rules would continue to apply, other than in the present litigation. He also responsibly accepted that the question of whether the Exchange owed a duty of care turns largely on the relevant rules. It must follow that the proposed question is not of general or public importance or of general commercial significance. In the recent words of this Court in *Shell (Petroleum Mining) Company Ltd v Todd Petroleum Mining Company Ltd*,[3] these are no longer issues in respect of which a judgment of this Court might give guidance to other

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1 Bank of New Zealand v Deloitte Touche Tohmatsu [2007] 1 NZLR 663.
2 [2008] NZCA 25.
3 [2008] NZSC 26 at para [3].

litigants in future cases.

[3] In developing his submissions in support of the second proposed ground, Mr Ring relied heavily on the judgment of the Court of Appeal in *Price Waterhouse v Kwan*,[4] and in particular the distinction there drawn between causing a loss and providing the opportunity for its occurrence. While this distinction may prove to be crucial in the present litigation, it cannot be said with confidence, in the absence of a full factual inquiry at trial, that even if a breach of duty is established it was not causative of the loss.

[4] The third ground is in the same category. At trial, the Exchange may well be able to rely on the unlawful actions of Mr Marshall, the Chief Executive of and a Director of Access (but not a shareholder) to defeat the claim of Access. But it may not. As the Court of Appeal correctly stated, "the extent to which the actions of Mr Marshall are to be attributed to Access is a question that is highly dependent on the factual matrix".[5] In any event, a defence founded on the conduct of Access could apply only to the claim by Access itself, and not to the claim by the Bank.

[5] More generally, as Mr Galbraith QC submitted, this Court will entertain appeals against judgments of the Court of Appeal refusing strike-outs, and thus allowing the proceedings to continue, only in compelling circumstances. This is not such a case. This litigation, delayed for so long by the strike-out application, should go to a hearing as soon as possible. The point or points at issue can always come to this Court after trial when all necessary factual determinations have been made and the Courts below have expressed their views on the issues in that light.

[6] The application for leave to appeal is therefore refused. The applicant is ordered to pay to the first and second respondents jointly costs of $5,000 and reasonable disbursements, to be fixed if necessary by the Registrar.

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4 [2000] 3 NZLR 39.
5 At para [115].

Solicitors:
McElroys, Auckland for Applicant
Bell Gully, Auckland for First and Second Respondents