IN THE SUPREME COURT OF NEW ZEALAND

SC 82/2009
[2010] NZSC 44

BETWEEN	BLAIR & CO LIMITED Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent

Hearing: 12 and 13 April 2010

Court: Elias CJ, Blanchard, McGrath, Wilson and Anderson JJ

Counsel: M E Parker and D J Taylor for Appellant
D J Goddard QC, D J Heaney SC and R F Karalus for Respondent

Judgment: 22 April 2010

JUDGMENT OF THE COURT

A Leave to appeal is revoked.

B The appellant is ordered to pay the respondent costs of $7,500, together with reasonable disbursements incurred prior to the abandonment by Charterhall Trustees Ltd of its appeal (SC 81/2009).

REASONS

(Given by Wilson J)

Introduction

[1] The background to this appeal may be summarised chronologically as follows:

- 1 December 2003 – a fire damaged a lodge owned by Charterhall Trustees Ltd ("Charterhall") at Glenorchy, on the shores of Lake Wakatipu.

- 19 October 2007 – Charterhall filed proceedings in the High Court seeking to recover the cost of repairing the damage and loss of profits, while the lodge was closed for that purpose, from the present appellant ("Blair") and respondent ("the Council"); Blair were said to have been negligent, as architects contracted to architects engaged by Charterhall, in designing the building and the Council to have been negligent in issuing a building consent and subsequently a certificate of code compliance.

- 27 June 2008 – Fogarty J refused an application by the Council to strike out the claim against it on the ground that it did not owe a duty of care to Charterhall.[1]

- 25 August 2009 – the Court of Appeal allowed an appeal by the Council, with the consequence that Charterhall's claim against it was struck out.[2]

- 24 November 2009 – Charterhall and Blair were each granted leave to appeal by this Court.

- 2 February 2010 – Charterhall abandoned its appeal.

[2] In their written submissions on the appeal, neither Blair nor the Council addressed the question of whether the abandonment of Charterhall's appeal created a difficulty for Blair's appeal. Indeed this point did not emerge until identified by the Court during the hearing.

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1 *Charterhall Trustees Ltd v Queenstown Lakes District Council* HC Invercargill CIV-2007-425-588, 27 June 2008.

2 *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] NZCA 374, [2009] 3 NZLR 786 per Chambers, Arnold and Ellen France JJ.

Availability of contribution

[3] Blair does not allege that the Council owed a duty of care to it. It is right not to do so. The Council could not possibly be under a duty to Blair to ensure that Blair, as designer, was not at fault in its design. Rather Blair contends that, to the extent that the damage to the lodge was due to the breach by the Council of the duty of care which it owed to Charterhall, any liability of Blair arising out of a breach of its duty of care to Charterhall should be reduced by a contribution from the Council. In other words, if both Blair and the Council were liable to Charterhall they would be joint tortfeasors.

[4] Blair therefore seeks to rely on s 17(1)(c) of the Law Reform Act 1936, which in material part provides that:

> Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise ...

[5] A defendant claiming contribution from a non-party as a joint tortfeasor may issue a third party notice pursuant to r 4.4(1)(a) of the High Court Rules. Rule 4.18 confers the same right on a defendant claiming contribution from another defendant. As between defendants, the claim is made by filing and serving a notice that contribution is sought, commonly known as a cross-claim. Accordingly, Blair could have served such a notice on the Council at any time prior to the abandonment by Charterhall of its appeal. It did not do so.

[6] The difficulty which now arises is that it is well-established in this country,[3] and also in England[4] and Australia,[5] that a defendant who has been sued by the plaintiff and has been held not to be liable on the merits cannot be a tortfeasor. As Professor Stephen Todd writes in *The Law of Torts in New Zealand*,[6] after reviewing complexities such as making a cross-claim against defendants who have been beneficiaries of a consent judgment or a limitation defence, "on any view, where [the

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3 *Waitapu v R H Tregoweth Ltd* [1975] 2 NZLR 218 (SC).
4 *Nottingham Heath Authority v Nottingham City Council* [1988] 1 WLR 903 (CA).
5 *James Hardie & Coy Ltd v Seltsam Pty Ltd* [1998] HCA 78, (1998) 196 CLR 53.
6 Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [24.3.03].

defendant] has previously been sued by [the plaintiff] and found not liable on the merits, clearly a claim for contribution cannot succeed."

[7] The reason for this rule was explained by the Law Commission in its discussion paper on Apportionment of Civil Liability:[7]

> ... if all the parties to the litigation are before the court in the one action, either with [the plaintiff] suing [two defendants] as co-defendants or [the plaintiff] suing [a defendant] who joins [another party] as the third party, claiming contribution or indemnity, a judgment given in that action ought to be (and is) binding on all parties even when the judgment directly affects fewer than them all. If [the plaintiff] obtains in that action a judgment against [the defendant] it will be after a hearing in which [the other defendant or the third party] has a right to participate in the fullest sense.

The last sentence applies with equal force to the position of a party against whom contribution or indemnity is sought obtaining a judgment against the plaintiff.

[8] By holding that the Council did not owe a duty of care to Charterhall, the Court of Appeal found that the Council was not liable to Charterhall on the merits. "The merits" in this context may be the legal merits (as here), the factual merits or both. Once Charterhall discontinued its appeal to this Court there was no possibility of the Council being held to be liable to it. The Council could not therefore be a tortfeasor, with the consequence that Blair has no basis in law for claiming a contribution from it.

[9] It must follow that, even if Blair were able to persuade this Court that Charterhall's claim against the Council should not have been struck out, it would have no basis for bringing a cross-claim against the Council, as if it remained a defendant, or for joining the Council as a third party. It is therefore unnecessary to consider other possible difficulties in the way of either course, such as the failure of Blair to file a cross-notice prior to the abandonment by Charterhall of its appeal or the possible application, in third party proceedings, of the limitation defences conferred by s 91 of the Building Act 1991.[8]

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7 Law Commission *Apportionment of Civil Liability* (NZLC PP19, 1992) at [221].

8 We were told by counsel that the code compliance certificate was issued in January 2000.

Result

[10] Section 13(1) of the Supreme Court Act 2003 requires the Court not to give leave to appeal "unless it is satisfied that it is necessary in the interests of justice" that the appeal be heard and determined. The legislative intention is therefore that the Court should hear and determine appeals only if to do is necessary in the interests of justice. That objective is defeated if, as a consequence of what has occurred subsequently to the grant of leave, it becomes apparent that the appeal cannot possibly succeed. In that situation, leave should be revoked. In practical terms, the test for possible revocation will be whether leave would obviously have been refused if the changed situation had pertained at the time leave was granted.

[11] Applying this test to the present facts, the result is clear. If Charterhall had not sought leave to appeal, there would have been no proper basis for the grant of leave to Blair because, even if Blair were able to persuade the Court that the claim against the Council should not have been struck out, the Court would have no ability to reverse that decision or to treat the Council as a joint tortfeasor. The leave to appeal which was granted to Blair must therefore be revoked.

[12] The Council is entitled to costs from the time Blair sought leave to appeal until Charterhall abandoned its appeal. As from that date (2 February 2010) the parties should bear equal responsibility for not advising the Court of the fatal difficulty which the abandonment created for Blair's appeal, and no party and party costs should be awarded. Blair is therefore ordered to pay to the Council costs of $7,500 and any disbursements reasonably incurred by the Council prior to 2 February 2010, to be fixed if necessary by the Registrar.

Solicitors:
M E Parker, Queenstown for Appellant
Heaney & Co, Auckland for Respondent