IN THE SUPREME COURT OF NEW ZEALAND

SC 46/2011
[2011] NZSC 102

	BETWEEN	NEIL TONY HICKMAN AND ORS Appellants
	AND	TURN AND WAVE LIMITED Respondent
	BETWEEN	DAVID JOHN LESTER AND ORS Appellants
	AND	GREENSTONE BARCLAY TRUSTEES LIMITED Respondent
	BETWEEN	ANTHONY COLLINGWOOD AND ORS Appellants
	AND	ICON CENTRAL LIMITED Respondent

Court: Elias CJ, Tipping and William Young JJ

Counsel: S H Barter and R S Phillips for H and M Herrick
P J Dale and N R Campbell for all other Appellants
D J Chisholm and G P Blanchard for Respondent Turn & Wave Limited
R B Stewart QC and D J Neutze for Respondent Greenstone Barclay Trustees Limited
B O'Callahan and J Puah for Respondent Icon Central Limited

Judgment: 6 September 2011

JUDGMENT OF THE COURT

Leave to appeal is granted on the following questions:

(1) Did the marketing by Blue Chip companies and sales agents of the Blue Chip investment products amount to offers to the public of equity and/or debt securities for the purposes of s 37 of the Securities Act 1978?

(2) If so, is the exemption in s 5(1)(b) applicable?

(3) If the answers to questions (1) and (2) are favourable to the investors, does this impeach the ability of the developers to enforce the agreements for sale and purchase on the basis that they (a) constituted part of the relevant allotments and were thus void and of no effect under s 37(4) or, (b) were tainted by their association with those allotments and thus illegal?

REASONS

[1] Leave is not presently granted on the proposed ground that the developers are precluded from taking the benefit of the agreements for sale and purchase on the basis that (a) the Blue Chip investment products were offered to the public in breach of the Securities Act 1978 and (b) those who did this were acting as agents of the developers. The agency arguments associated with this proposed ground of appeal may be material to the issues identified in question 3 above and can be developed in that context. But we do not, at least for the moment, see these arguments as giving rise to an independent basis upon which relief might arguably be available. If in the course of formulating submissions, counsel for the investors wishes to pursue the agency argument as an independent ground of appeal, the application for leave to appeal on this ground can be renewed.

[2] It is also necessary to address the application by Mr and Mrs Herrick to amend the application for leave to appeal on the basis of their wish to pursue separate appeal points based on arguments of non est factum, mistake and fraud in equity.

[3] Mr and Mrs Herrick had initially agreed to buy three apartments in a development known as the Verve which had not proceeded as quickly as planned. They executed documents which released them from the Verve transactions but committed them to the acquisition of three apartments in the Icon development.[1]

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[1] See the outline of the factual background in the appendix to *Hickman v Turn and Wave Ltd* [2011] NZCA 100 at [209]–[211].

[4] At trial, and departing significantly from the pleaded case, Mr Herrick claimed that he had understood that the documents he was signing were in relation to the cancellation of the Verve transactions only and he had not appreciated that he was also signing up for replacement apartments in another development. He claimed that he had only been given the signature pages of the documents. While this evidence might have supported defences along the lines of non est factum and mistake, such defences had not been pleaded and counsel for Mr and Mrs Herrick at trial did not seek to amend the pleadings. The case was resolved against Mr and Mrs Herrick by Venning J, in the High Court,[2] and by the Court of Appeal[3] on their case as pleaded.

[5] Mr and Mrs Herrick also seek to rely on what they describe as "fraud in equity". It is not entirely clear just what the argument encompasses. It seems to be focussed on whether Mr Mark Bryers was a majority shareholder in BFB Underwriters Ltd (which was the actual entity marketing the Icon apartments[4]) at the time of the transactions with Mr and Mrs Herrick and was thus a directing or controlling mind of BFB. There was some evidence as to Mr Bryers' shareholding in BFB at trial but the contention that he was still a shareholder does not appear to have been advanced by counsel for Mr and Mrs Herrick in his closing argument and Venning J's conclusion to the contrary[5] was not challenged in the Court of Appeal.[6] In any event, whether Mr Bryers was a shareholder in BFB is not obviously relevant. It was found by both Venning J and the Court of Appeal that he was well aware of the detail of the PIP and PAC products and that they were being used for the marketing of the Icon apartments. Both courts concluded that Icon, through him, was on notice of this.[7]

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2 See *Icon Central Ltd v Collingwood* HC Auckland CIV-2008-404-7424, 25 November 2009 at [179] and [315]–[319].
3 See *Hickman v Turn and Wave Ltd* [2011] NZCA 100 at [223].
4 See *Hickman v Turn and Wave Ltd* [2011] NZCA 100 at [126].
5 At [43], that "BFB was controlled by Messrs Bell and Flowerday".
6 See [117].
7 At, respectively, [139] and [279]; and [156]–[160].

[6] Given that the proposed arguments were not advanced in the High Court and Court of Appeal, it would be prejudicial to the respondents and wrong to grant leave to appeal in relation to them.

Solicitors:
Barter & Co, Auckland for Appellants Norman Herrick and Marie Herrick
Ellis Law, Auckland for all other Appellants
CMS Legal, Auckland for Respondent Turn & Wave Limited
Brookfields, Auckland for Respondent Greenstone Barclay Trustees Limited
Carter & Partners, Auckland for Respondent Icon Central Limited