

IN THE SUPREME COURT OF NEW ZEALAND

SC 86/2011  
[2011] NZSC 115

BETWEEN	RODNEY JOHN HUMPHRIES Applicant
AND	EWAN ROBERT CARR Respondent

Court: Blanchard, Tipping and McGrath JJ

Counsel: A R Gilchrist for Applicant  
J E Bayley for Respondent

Judgment: 28 September 2011

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**JUDGMENT OF THE COURT**

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**The application for leave to appeal is dismissed with costs of \$2,500 to the respondent.**

**REASONS**

[1] This application for leave to appeal concerns the consequences of cancellation by the applicant of an agreement which was to settle a number of disputes between the parties. The applicant cancelled it because the respondent failed on the appointed day to complete a purchase of certain assets as required by the agreement. Time was of the essence and the applicant was within his rights in electing to cancel.

[2] The Court of Appeal has held that, following that cancellation, the respondent is entitled to resume certain litigation against the applicant or interests associated with him, which litigation was to have been discontinued in accordance with the settlement agreement.<sup>1</sup> The applicant wishes to argue in this Court that, although he himself is free to resume other claims against the respondent, the latter is precluded

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<sup>1</sup> *Humphries v Carr* [2011] NZCA 314.

from pursuing his litigation because to do so would involve him in taking advantage of his own wrong (his failure to complete).

[3] This argument cannot succeed. The respondent is not taking advantage of his own default. It was the applicant who chose to cancel the agreement. (He did so despite the respondent's expression of readiness and willingness to complete if given a short extension of time). What the respondent now wishes to do is to act upon the consequences of that choice by the applicant. The settlement agreement was, as the Court of Appeal found, an accord and conditional satisfaction. That finding is not sought to be challenged on further appeal. The condition was not met. The applicant's election to cancel restored the status quo ante for each party. It would be extraordinary if thereafter only one of them could pursue his pre-existing rights. The applicant may have an additional ability to make a claim against the respondent for breach of the settlement agreement (a matter which we have not investigated) but he cannot now say that the respondent is barred from enforcing such rights as he may have had before the settlement agreement was entered into.

Solicitors:

Dyer Whitechurch, Auckland for Applicant

Rhodes & Co, Christchurch for Respondent