IN THE SUPREME COURT OF NEW ZEALAND

SC 94/2011
[2011] NZSC 137

BETWEEN	RODNEY MARK GIBSON First Applicant
AND	HABODE IP LIMITED Second Applicant
AND	RICHARD JOHN CURTIS First Respondent
AND	CURTIS HOLDINGS LIMITED Second Respondent

Court: Elias CJ, Blanchard and William Young JJ

Counsel: D D Vincent and A J Watt for Applicants
D J Goddard QC and C Matsis for Respondents

Judgment: 17 November 2011

JUDGMENT OF THE COURT

The application for leave to appeal is declined with costs of $2,500 to the respondents.

REASONS

[1] The case concerns commercial arrangements associated with the development and marketing of the Habode, a portable home based on the use of shipping containers. The Habode was the idea of Mr Rodney Gibson who at all times maintained control of the intellectual property. Other people have been involved in the project, including, and most particularly, Mr Richard Curtis. The arrangements between Messrs Gibson, Curtis and a third man broke down in March 2006.

[2] The present litigation involved claims by Mr Curtis that there had been a joint venture between him and Mr Gibson in relation to the development of the Habode

and that Mr Gibson had acted in breach of his fiduciary obligations as a joint venturer in a number of respects including the exploitation by Mr Gibson and related entities of commercial opportunities in Australia which had their origin in approaches which had been made prior to March 2006.

[3] Messrs Gibson and Curtis were undoubtedly joint venturers in at least a loose sense. But it was strenuously argued on the part of Mr Gibson that the arrangements between them (and the third man) were entirely recorded and subsumed in the formal arrangements which had been entered into. He denied that there was any over-arching joint venture which went beyond the formalised arrangements. On this argument (and associated considerations) Mr Gibson was successful in the High Court.[1] On appeal,[2] Mr Curtis advanced arguments which were undoubtedly narrower and more focussed, and in that sense different from, those which had been run at trial. His counsel acknowledged in the Court of Appeal that the joint venture between the parties had, as regards New Zealand, become subsumed in the formal legal structure but maintained that this was not so with respect to the ambitions of the joint venture in relation to international sales, in particular in Australia.[3] This argument was accepted by the Court of Appeal and Mr Curtis' appeal was allowed.

[4] In his submissions in support of the application for leave to appeal, counsel for Mr Gibson has tended to categorise the "new" contention advanced on behalf of Mr Curtis as amounting to an argument that there was a separate and new joint venture in relation to Australia. As is apparent from what we have just said, we see this categorisation as wrong. As a corollary of this conclusion, we consider that much of what is asserted in support of the application for leave to appeal[4] can be put to one side.

[5] The Court of Appeal held, and we agree, that the "new" argument was available to Mr Curtis on the pleadings.[5] As well, the Court of Appeal concluded

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1 *Gibson v Curtis* HC Wellington CIV-2007-485-907, 18 May 2010.
2 *Curtis v Gibson* [2011] NZCA 373.
3 See [9]–[10].
4 Along the lines that the Court of Appeal purported to exercise an original rather than an appellate jurisdiction.
5 At [87]. We have in mind [27]–[28] and [31(d)]–[31(e)] of the statement of claim.

that the narrowing of the argument had not prejudiced Mr Gibson.[6] Although it seems that the Court overlooked complaints made by counsel for the applicants in his written submissions about the shift in focus,[7] there was oral argument on the point and the Court called for and inspected the written opening and closing submissions which had been made on each side in the High Court. Given this context, the applicants' challenge to the decision of the Court to entertain the argument does not meet leave criteria.

[6] The applicants also allege that there were a number of factual errors in the findings made by the Court of Appeal. We regard the response given by counsel for the respondents in his submissions as convincing and likewise conclude that these complaints do not warrant a grant of leave to appeal.

[7] Accordingly, leave to appeal should be declined.

Solicitors:
Thomas Dewar Sziranyi Letts, Lower Hutt for Applicants
Gault Mitchell Law, Wellington for Respondents

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6 At [88].

7 In the Court of Appeal judgment there is a comment at [87] to the effect that there was no suggestion of prejudice in the written submissions of counsel for the applicant.