

IN THE SUPREME COURT OF NEW ZEALAND

SC 97/2011
[2011] NZSC 141

BETWEEN	R B ROAD 391 LTD Applicant
AND	MALCOLM ALEXANDER JOHNSTONE, HEATHER PATRICIA JOHNSTONE, HARTS GAULD TRUSTEES LIMITED AND JMAT HOLDINGS LIMITED (AS TRUSTEES OF THE JOHNSTONE INVESTMENT TRUST) Respondents

Court: Elias CJ, McGrath and William Young JJ

Counsel: A J Sherlock for Applicant
G J Kohler for Respondents

Judgment: 18 November 2011

JUDGMENT OF THE COURT

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

REASONS

[1] This application for leave to appeal arises out of an application for summary judgment on a vendor's claim for wrongful cancellation of an agreement for sale and purchase of a section. At issue is whether the purchaser was able to cancel the contract under a condition that required that both parties be reasonably satisfied with the City Council's conditions of consent to the subdivision. The Court of Appeal¹ decided in favour of the purchaser, reversing decisions of two Associate Judges.²

¹ *Johnstone v R B Road 391 Ltd* [2011] NZCA 393.

² *R B Road 391 Ltd v Johnstone* HC Auckland CIV-2009-404-7048, 6 July 2010, *R B Road 391 Ltd v Johnstone* HC Auckland CIV-2009-404-7048, 28 June 2011.

The dispute centres on whether the Council's condition, which required that if earthworks on the section disclosed contamination, work should cease and Council approval for remedial action sought, should have been anticipated by the purchaser and whether in any event it was burdensome.

[2] In agreement with the Court of Appeal, we are satisfied that this is essentially a factual dispute. It raises issues that have to be resolved at trial where the purchaser can be cross-examined and, if thought necessary, contrary evidence called by the vendor. It was not an appropriate case for summary judgment and there is no other ground that would satisfy the statutory criteria for giving leave to appeal.

[3] The application for leave to appeal is accordingly refused.

Solicitors:
Hesketh Henry, Auckland for Applicant
Dawsons, Auckland for Respondent