Supreme Court of New Zealand

9 August 2012

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

NEIL TONY HICKMAN AND ORS v TURNER AND WAVERLEY LIMITED & OTHERS
(SC 46/2011)
[2012] NZSC 72

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

The appellants participated in investment schemes marketed by the Blue Chip group of companies and became committed to the purchase of apartments in one or more of three proposed apartment buildings which the respondent companies were developing. In each case, the vendor was one of the respondents.

The investment schemes involved three Blue Chip products, the joint venture agreement (JVA), the premium income product (PIP) and the put and call agreement (PAC). All were variants of a single theme which involved Blue Chip marketing apartments in the three proposed buildings. This was on behalf of the respondents. The purpose was to generate sufficient pre-sales to allow funding to be drawn down for the construction of the apartment buildings. Underwriting fees were payable to Blue Chip. The appellants were all short-term investors as it was proposed that Blue Chip would locate a second purchaser for each apartment

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whose purchase payment would enable the original investor to be taken out. The returns for the JVA and PIP investors came in the form of fees which were functionally similar to interest. The return for the PAC investor was a share of the underwriting fee which was referable to the apartment. The security of the investments made by the appellants depended on what were in substance indemnities from Blue Chip. Blue Chip failed and its financial commitments to the appellants will not be honoured.

The appellants wish to be excused from completing the sales. They argued that when Blue Chip marketed its investment schemes, it was offering securities to the public within the meaning of the Securities Act 1978 and that it did so without meeting the associated requirements. On this basis, they sought to impeach the closely associated agreements for sale and purchase they entered into with the respondent developers. The appellants were unsuccessful in the High Court and in the Court of Appeal. They appealed to the Supreme Court.

The Supreme Court has unanimously allowed the appeals.

The marketing by Blue Chip of its investment products involved offers of securities to the public for the purposes of the Securities Act. This is on the basis that (a) Blue Chip was an "issuer" under the Act; (b) the investment products Blue Chip was marketing were "debt securities" because they conferred on the investors the right to be paid money that was to be owing to them by Blue Chip; and (c) the s 5(1)(b) exemption was not applicable. There being no prospectus and no trustee having been appointed, the marketing of the investment products was in breach of s 33(1) and (2) of the Act. Accordingly, s 37(4) of the Act renders unenforceable the allotments of the improperly marketed securities and the associated subscriptions for such securities.

Given that the appellants subscribed for the securities issued by Blue Chip by, inter alia, entering into the sale and purchase agreements with the developers, the unenforceability provided for by s 37(4) extends to those sale and purchase agreements.

Further, the developers were also issuers, meaning that the investors are entitled to relief under s 37(5).

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