

IN THE SUPREME COURT OF NEW ZEALAND

**SC 93/2010
[2010] NZSC 139**

BETWEEN ALDWYN JOHN COCKBURN AND
ORS
Applicants

AND C S DEVELOPMENT NO 2 LIMITED
Respondent

Court: Blanchard, Tipping and McGrath JJ

Counsel: C R Carruthers QC and R P Harley for Applicants
H B Rennie QC for Respondent

Judgment: 16 November 2010

JUDGMENT OF THE COURT

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

REASONS

[1] The proposed appeal concerns whether the High Court¹ and the majority in the Court of Appeal² erred in concluding that the supply of the property in question was not zero rated for GST purposes and that the applicant vendors, the Cockburn trustees, ought to have supplied the respondent, C S Development No 2 Ltd, with a tax invoice reflecting a supply on which GST was payable.

[2] The date of supply under the agreement for sale and purchase was the date of payment of the deposit, at which time there was an existing tenancy, namely a holding over by a tenant under an expired lease. However, the agreement, as varied,

¹ *C S Development No 2 Ltd v Cockburn* HC Wellington CIV-2009-485-587, 24 July 2009 per Associate Judge Gendall.

² *Cockburn v C S Development No 2 Ltd* [2010] NZCA 373 per O'Regan and Baragwanath JJ; William Young P dissenting.

provided for vacant possession at settlement. In that circumstance we do not consider that it is fairly open to argument that this was a sale of the vendors' leasing business as a going concern. The requirement for vacant possession precluded that. Although the deemed date of supply preceded the settlement date it was still necessary to look forward to the latter date in order to determine what was actually being supplied. Under the varied agreement the purchaser was never at any stage going to receive rentals from the holding over, which was to cease at settlement and to be replaced by a new lease from the purchaser to the tenant. No going concern was, or was to be, supplied.

[3] The proposed argument that s 109 of the Tax Administration Act 1994 prevented the High Court from determining the proceeding was rightly rejected in both Courts below. It did not involve the Court in ruling on a tax assessment but, rather, on the rights and obligations of the parties to an agreement for sale and purchase. No challenge was being made to any assessment by the Commissioner of Inland Revenue.

Solicitors:
Jefferies Raizis, Wellington for Applicants
Treadwells, Wellington for Respondent