

IN THE SUPREME COURT OF NEW ZEALAND

**SC 56/2010
[2010] NZSC 97**

BETWEEN

NATHAN STANLEY GEDYE
Applicant

AND

COLIN ROBERT SOUTH, DIANA LEE
SOUTH AND RICHARD JAMES
BURRELL (AS TRUSTEES OF THE
SOUTH FAMILY TRUST)
Respondents

Court: Elias CJ, Blanchard and Tipping JJ

Counsel: J A MacGillivray for Applicant
M H Benvie for Respondents

Judgment: 5 August 2010

JUDGMENT OF THE COURT

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

REASONS

[1] The applicant, Mr Gedye, and his wife had building work done on their residence in 1997 for which a permit or building consent was required. In 2003 they sold the property to the respondent trustees, warranting in the sale and purchase agreement that in connection with such works done or caused to be done by them on the property all obligations imposed under the Building Act 1991 were fully complied with. In August 2008 the respondents commenced proceedings against Mr and Mrs Gedye alleging breach of that warranty in relation to the works done in 1997.

[2] Mr and Mrs Gedye applied for summary judgment relying on s 91(2) of the Building Act:

Civil proceedings relating to any building work may not be brought against any person 10 years or more after the date of the act or omission on which the proceedings are based.

[3] The High Court¹ and the Court of Appeal² have refused summary judgment, holding that the act or omission on which the proceedings are based is not the carrying out of the building works but the breach of warranty in 2003 (and thus within the six year limitation period in the Limitation Act 1950 which applies by virtue of s 91(1)).

[4] We consider that this view is undoubtedly correct. The act or omission is the breach of contract. The claim against the Gedyes, as framed, could not succeed simply and only if the building works were non-compliant and the contractual warranty had not been given. It was in respect of the latter event that the claim arose. Furthermore, on the argument proposed for the applicant, if the warranty had been given on a sale more than 10 years after the building works were done, it would never be enforceable by proceedings. That cannot be the position.

[5] Leave is declined because there is no prospect of the proposed appeal succeeding.

Solicitors:
Tompkins Wake, Hamilton for Applicant
Lovegroves, Auckland for Respondents

¹ *South v Auckland City Council* HC Auckland CIV-2008-404-5116, 20 August 2009 per Associate Judge Sargisson.

² *Gedye v South* [2010] NZCA 207 per Arnold, Panckhurst and Harrison JJ.