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IN THE HIGH COURT OF NEW ZEALAND 23/4
AUCKLAND REGISTRY M.377/92

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MEDIUM PRIORITY

BETWEEN AJ WILLIS AND MM WILLIS

Appellants

A N D PJM CASTELEIN and MEC CASTELEIN

Respondents

Hearing: 5 April 1993

Counsel: Mr R Jagush for Appellants
Ms Kate Davenport for Respondents

Judgment: 5 April 1993

(ORAL) JUDGMENT OF WILLIAMS J.

This is an application for leave to appeal to the Court of Appeal pursuant to s 67 of the Judicature Amendment Act 1908.

The appellants, as purchasers of a 10 acre lifestyle house near Auckland, sued the respondents.as vendors, to recover $44,100 being the estimated cost of repairing allegedly defective alterations which the appellants themselves carried out to the property prior to sale.

In the District Court a number of causes of action were advanced. The appellants succeeded on part of a contractual cause of action which, based on the parties agreement as to quantum means, I am told, that the appellant

was held entitled to recover approximately $13,000 of the $44,100 claimed. The hearing in the District Court lasted 6 days. On the negligent cause of action the District Court held that, notwithstanding the contract between the parties, the respondents owed a duty of care to the appellants in respect of the alteration work they carried out. However this did not assist the appellants because the Judge further held that that duty did not extend to purely aesthetic defects and only such defects had been shown to exist.

In the appeal to this Court all causes of action were run again over a 2 day hearing in September 1992. The appellants failed to improve their position. Moreover, I held that the Judge had been wrong to find that any duty of care existed in the circumstances.

The most persuasive ground in support of the application for leave was that there were questions of law at stake of wide public importance namely, the question of whether a so-called owner/renovator owes a duty of care to subsequent purchasers in respect of defective alterations and, if so, the precise content of that duty. My judgment certainly adverts to the broad significance of that question in New Zealand where it is so common for home owners to undertake alterations to residential properties.

Ms Davenport accepted that it was difficult to argue against the existence of a question of law of some general public importance. However, she emphasised that in the end the matter must be decided on the basis of the overall justice of the situation. She submitted that with such a small amount in issue the respondents should not be subjected to the worry and expense of a further appeal. She relied upon Cuff v. Broadlands Finance Ltd [1987] 2 NZLR 343 and to the passage from the judgment of Somers J at p.347. After confirming the continuing relevance of the criteria listed by Salmond J in Rutherford v. Waite [1923] GLR, 34, Somers J. said in that passage:

> "The intention of the legislature remains the same, that one appeal is normally to be sufficient. From this it follows that the case must show some features which justify a second appeal. The indicia mentioned by Salmond J are therefore still important. But, as he observed, the section places no fetters on the exercise of the discretion to grant leave. That being so, the guiding principle in the end must be the requirements of justice ...".

Ms Davenport contended that it would be unjust to her clients who are people of modest means, to put them to the added cost of a further appeal. The submission has obvious merit. Moreover, these days it is appropriate to consider not only the direct costs to the parties but also the likely indirect costs of granting leave including the costs to the State of providing the judicial and administrative resources involved in an appeal of this kind. In my view economic factors are a relevant consideration which, although not explicitly mentioned in Rutherford v. Waite (supra) can be properly taken into account. This is especially so in the current times of economic stringency when the costs of litigation are the subject of general public concern. It is therefore appropriate to attempt a rough cost/benefit analysis in deciding whether to grant leave. As Hoffman LJ put it in a different context in Morgan Crucible Co. v. Hill Samuel & Co. [1991] Ch. 295, 303, economic realities are relevant to a consideration of what is fair, just and reasonable.

In the course of my discussion with counsel it became apparent that the maximum further amount that the appellants could recover would be a further $23,000. Even if the appeal succeeded there would need to be deducted the costs of arguing the appeal which the appellants estimate at around $5,000 inclusive of disbursements, this commendably modest figure being advanced on the footing that only the negligence issue would be argued in the Court of Appeal. Ms Davenport estimates that the direct cost to her clients might be more like $7,000 or $8,000 inclusive of disbursements bearing in mind the novelty of the issues. Neither party is legally aided. Sufficient to say that the small amount involved, especially after the likely additional costs are considered, tells against granting leave, even though the appellants are apparently prepared to risk more of their money to try to improve upon their modest recoupment to date. If the appellants succeed the amount recovered will be far less than the cost of operating the appellate procedural system for this appeal.

However, on the other side it can be said that it is important to have the legal issue settled authoritatively by the Court of Appeal so that in future contracting parties will know whether any tortious duties intrude upon their relationships. In short, there is raised an important issue of conveyancing practice which has a bearing upon the efficient operation of the market in residential housing. The savings in the avoidance of the costs of re-

litigation of the point in future cases and in likely reduced future transaction costs which will flow from increased certainty on the issue, are I think, sufficient to justify the appeal on a cost-benefit basis, especially when the duration of the hearing in the Court of Appeal is likely to be no more than a day or so.

Thus while it is completely understandable that the respondents do not wish to see the appeal proceed I have come to the view that leave should be granted. Although I am sympathetic to the position of the respondents this is not a case like, for example, Fisher & Paykel Ltd v. Commerce Commission [1991] 1 NZLR 569 where the mere existence of an outstanding appeal has a direct adverse effect on the business interests of the opposing party. While I fully appreciate the respondents' desire to have the litigation terminated and to avoid further costs, in the end those factors are outweighed by the broader public interest considerations. As Richardson J said in Ratepayers Association v. Auckland City Council [1986] 1 NZLR 746, 750, "any Court exercising a discretion in the interests of justice in the particular case must have regard to any public interest considerations which the litigation serves."

However, in recognition of the concerns of the respondents I impose the following conditions designed to ensure that the appeal is pursued with expedition.

1. Leave to appeal is granted on the negligence issue only;

2. Security to be fixed and paid within 21 days from the date of this judgment;

3. Appellant to file in the Court of Appeal a Notice of Appeal containing the points on appeal no later than 30 April 1993;

4. Appellant to file in the Court of Appeal and serve written synopsis of argument in support of the appeal no later than 30 May 1993;

5. Respondent to file in the Court of Appeal and serve written synopsis of argument in opposition to the appeal by 30 June 1993;

6. Praecipe to be filed in Court of Appeal by appellant no later than 15 July 1993. I understand from the Registrar of the Court of Appeal that it may be possible to allocate a hearing for the appeal in August or September.

My objective is to enable the respondents to know at the earliest practicable moment what is their ultimate liability so that they will not have to worry about this case any longer than is strictly necessary.

I do not propose to award any costs to either party on this application for leave.

Solicitors:
Simpson Grierson Butler White, Auckland, for Appellants;
Ms KG Davenport, Auckland, for Respondents.

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