IN THE SUPREME COURT OF NEW ZEALAND

SC 34/2017
[2017] NZSC 95

BETWEEN	STEVENSON BROWN LIMITED Applicant
AND	MONTECILLO TRUST Respondent

Court:	William Young, Glazebrook and Ellen France JJ
Counsel:	R W Raymond QC for Applicant D R Tobin for Respondent
Judgment:	22 June 2017

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B Costs of $2,500 are awarded to the respondent.

REASONS

Background[1]

[1] Montecillo Trust (Montecillo) constructed a rest home and hospital in Dunedin. This has suffered damage from physical settlement with an estimated cost of remedial work of over $5 million.

[2] Mr Rutter, an architectural designer, was engaged by Montecillo to design the building. As agent of Montecillo, Mr Rutter engaged Stevenson Brown Limited (Stevensons), an engineering firm, to design and supervise construction of the foundations. Montecillo alleges negligence on the part of Stevensons.

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[1] The factual background is taken from *Stevenson Brown Limited v Montecillo Trust* [2017] NZCA 57 (Harrison, Cooper and Brown JJ) at [1]–[2] and [7]–[18].

[3] The contract between Montecillo and Stevensons was formed at a brief meeting between Mr Rutter and Mr Brown, the principal of Stevensons, in February 2005. Mr Rutter gave Mr Brown a set of preliminary drawings and asked Stevensons to undertake the structural design and fire engineering work. Mr Brown hand wrote on the file that the fee for the fire work would be $1,350 plus GST. No other contractual terms were discussed.

[4] On 22 April Mr Brown sent a 12 page facsimile to Mr Rutter which included a model IPENZ/ACENZ short form agreement and a Structural Design Features Report. This agreement in turn provided that, once it was signed, it would "replace all or any oral agreement previously reached between the parties".

[5] The facsimile, but not including the short form agreement, was sent to Montecillo. Mr Rutter did not send the short form agreement because he expected that it would be forwarded with the invoices in the usual way (see below). This is what occurred. There were three invoices between 31 May and 30 November 2005. These (and the accompanying short form agreement) were forwarded to Montecillo and paid by it.

[6] Mr Brown and Mr Rutter had worked together since the mid 1990's, first on residential developments and on at least three occasions on commercial developments. Mr Brown, either before or after entering into contracts of engagement on these projects, would send Mr Rutter, together with his first invoice, the short form agreement between himself (or Stevensons after it was incorporated in March 2004) and the engaging owner.[2] This occurred on at least 11 occasions before February 2005.

Procedural history

[7] In the High Court a split trial was ordered. One of the preliminary questions was:[3]

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2 Mr Brown always requested that the short form agreement be signed by the owner and returned to him but that never occurred.

3 *Montecillo Trust v Stevenson Brown Limited* [2016] NZHC 684 at [14].

(a) Was the model IPENZ/ACENZ SHORT FORM AGREEMENT (the short form agreement) incorporated into the contract between [Montecillo] and [Stevensons] by reason of a previous course of dealings between [Montecillo's] agent, Mr Rutter, and [Stevensons]?

[8] The question was significant because the short form agreement included a limitation on Stevensons' liability for a breach of contract to $100,000. On 14 April 2016 Davidson J held that the short form agreement was not so incorporated.[4]

[9] In the Court of Appeal counsel reframed the question as follows:[5]

(a) whether Messrs Rutter and Brown of Stevensons mutually intended when the contract for engagement was formed that it incorporated the short form agreement; and

(b) if not, whether the limitation of liability provisions in the short form agreement were incorporated into the contract by a previous course of dealing.

[10] The Court of Appeal said that it agreed with Davidson J's answer to the question identified for determination before trial. It held that the contract for engagement between the parties did not incorporate the short form agreement by reason of a previous course of dealing between Mr Rutter and Stevensons.[6]

[11] The Court of Appeal did make the following observation:[7]

> We add that [Stevensons] has not addressed what was the apparently arguable question for determination. Without expressing a view on the issue, it seems arguable that on 18 February 2005 the parties left open for agreement at a later date a number of terms including risk allocation;[8] and that [Stevensons] subsequent provision of the short form agreement to Mr Rutter together with its invoices and the Trust's payment of them might establish agreement on these relevant terms. We, stress, however, that

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4 At [114].
5 *Stevenson Brown Limited v Montecillo Trust*, above n 1, at [12].
6 At [33].
7 At [24].
8 *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA) at [51].

> counsel did not address that question before us or in the High Court. We cannot indulge this line of argument in the absence of evidence.

Our assessment

[12] The parties chose to have a preliminary question on the short form agreement adjudicated. That question was in very narrow terms. It did not cover all the issues with regard to the short form agreement, as identified by the Court of Appeal at [24] of its judgment. There may be other questions that arise. We do not know whether, or if so when, the other issues relating to that agreement will be pursued in the High Court.[9] If they are, either in the substantive proceedings or in a further preliminary question, then this may well resolve the dispute between the parties.

[13] In these circumstances, even assuming there could be issues of principle involved,[10] we do not consider it in the interests of justice to grant the application for leave.

Result

[14] The application for leave to appeal is dismissed.

[15] Costs of $2,500 are awarded to the respondent.

Solicitors:
Duncan Cotterill, Christchurch for Applicant
Solomons, Dunedin for Respondent

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[9] We are not to be taken as expressing a view on whether there is any impediment to other issues now being raised in the High Court or on the outcome if they are addressed.

[10] A point on which we express no view.