IN THE SUPREME COURT OF NEW ZEALAND
SC 3/2006

IN THE MATTER	of an Application for Leave to Appeal
BETWEEN	**ELLERSLIE PARK HOLDINGS LIMITED**
	Appellant
AND	**THE ATTORNEY GENERAL**
	Respondent

Hearing 12 June 2006

Coram Blanchard J
Tipping J
McGrath J

Counsel B O'Callahan and G S Erskine for the Appellants
M T Scholtens QC and C J Mathieson for Respondent

APPLICATION FOR LEAVE TO APPEAL

10.07am

O'Callahan May it please Your Honours O'Callahan with Erskine for the appellants.

Blanchard J Yes Mr O'Callahan.

Scholtens May it please Your Honours Mrs Scholtens with Mr Mathieson for the respondent.

Blanchard J Yes Mrs Scholtens, thank you. Yes Mr O'Callahan.

O'Callahan May it please Your Honours we have summarised in short-form the duty alleged, a written summary of it is in the memorandum that we filed on the 30 March 2006, that's in response to His Honour Justice Blanchard's minute and is to be found page 5 at

Blanchard J Yes

O'Callahan It's a summary of the claim, the duty alleged is that, perhaps if Your Honours have that together with the statement of claim by EPHL which is at tab 1 of the green bundle of documents.

Blanchard J Is this is the amended statement that came on the 12 August 2004?

O'Callahan Yes it is.

Tipping J Is your essential point that you were over duty of care and that it was in the circumstances breached and that the implicit finding in the Court of Appeal, more than implicit, was wrong in that respect?

O'Callahan Yes, well that's really the fallback position because the first point is that on the express terms of the Court of Appeal judgment it appears that the particular claim advanced by the EPHL isn't actually dealt with in the judgment, in fact it's put aside. At para.65 the Court of Appeal said the Body Corporate is not seeking to show that acceptable solution B2/AS1 was intrinsically false or wrong, now there's a difference in terminology but if the Court meant to mean that by those words that they thought there was no claim before them that included an allegation that as in 4.1 of EPHL's statement of claim that the BIA should not have approved untreated kiln-dried timber for use as framing timber at all together with some alternative and letter allegations in that respect that which follow in (b) and (c), then we say that in fact the Court of Appeal has just entirely misunderstood that part of the claim and hasn't dealt with it and that's the first point that's made in the application for leave and that's the miscarriage of justice point.

Tipping J Are you saying that your claim in para.4, 6th defendant BIA is materially different from the plaintiffs' claim?

O'Callahan Yes we are.

Tipping J Could you explain that?

O'Callahan Yes. What the plaintiff's say is that kiln-dried timber that any standard in relation to the approval of kiln-dried timber ought to have included, well ought not to have related in particular to face-fixed monolithic cladding or alternatively and perhaps it seems to have ultimately been treated like this by counsel and by the Court of Appeal that there was a duty to warn in respect of face-fixed monolithic cladding, whereas what EPHL says in its statement of claim is that this untreated kiln-dried timber ought not have been approved for use as framing timber at all, and the reasons for that are set out in particulars.

Tipping J That's the difference between a duty to warn, okay to approve but with a duty to warn and not okay to approve at all?

O'Callahan Yes. And the other difference which may effect the Court's ultimate finding on the existence of a duty is that the plaintiffs' allege that only

in relation to face-fixed monolithic cladding whereas the claim by EPHL says that this 18 % moisture requirement that is associated with the use of untreated kiln-dried timber in standard is an impossible standard on known best building practices and of course the Court of Appeal in its reasoning in paras.65/66 indicated that a claim about B2/AS1 cannot be sensibly looked at on a stand-alone basis and one of the reasons they mention is that in this particular case the moisture standard of 18 % wasn't met so it said that the use of kiln-dried timber was not in accordance with the standard and we say well the BIA by approving that standard effectively set that up as the result and the reasons for that are set out in the particulars, pages 332.

Tipping J I'm not appearing and sort of making these distinctions that you're now making before us, you were making the life of the Court of Appeal very difficult weren't you?

O'Callahan Well I think that has to be accepted that

Tipping J This is all pretty subtle. I mean you've explained it very well. I've followed the distinction but

Blanchard J It seemed to me that it's even more difficult than that because if I understand it correctly you have conveyed both to counsel for BIA and to the Court of Appeal that you would rest on the submission's put up by Mr Fardell, having not put in any written submissions yourselves and indicating that you would not be appearing. Now as I understand it and correct me if I'm wrong, Mr Fardell and his clients were never contending for the point that you now wish to advance.

O'Callahan Well I'd have to accept that point because that's the truth of it that they weren't contending for that point but where it seems to have gone wrong is in our submission with the appellants in the Court of Appeal's approach to the matter. Certainly it's regrettable and far from ideal that EPHL chose not to appear in the Court of Appeal but that aside for the moment Justice Williams's judgment dealt with it reasonably shortly but his recitation of this comes towards the end of the judgment. Paragraphs 164 through to 171

Blanchard J Now where have we got that?

O'Callahan With the application for leave we provided in accordance with the rules.

Tipping J My copy's behind the Court of Appeal's judgment.

Blanchard J Yes, I'm sorry which paragraphs?

O'Callahan It's 164, it's where it begins. Now at this stage the Judge is making no distinction between the two pleadings and any material way between the two positions of EPHL and the plaintiffs but he describes it as this

the reason there's no distinction probably is clear because of the way the Judge deals with it. He says the nub of the pleading on this point though it forms part of the same cause of action is that relating to the code is much the same, namely given the information it had by February 1998,BIA should either have not issued acceptable solution B2/ASI or should have reviewed or revoked it. So the first limb of that is the point that I'm now emphasise and he deals with the standards in the statutory framework and the position of the Sacramento Complex and in 168 he says 'like the code acceptable solutions must fit within the statutory purposes and principles'. He says that indicates it would not be unjust, unfair, unreasonable to impose a duty of care on a BIA in relation to the approval and amendment of acceptable solutions and he deals with the matters generally in terms of the considerations under the law and the case law he distinguishes the lines of authority that ultimately the Court of Appeal relied upon and towards the end of 169 says 'given that degree of control of finding a BIA over duty of care to the plaintiffs and EPHL in promulgating acceptable solution B2/AS1 in February 1998 and failing to amend it in combination with the information that they had later received, seems unlikely to have the chilling effect of **Attorney General v Carter**. So although there isn't this, what Your Honours have referred to, a subtle distinction that I've explained today there is a very clear dealing with the plaintiffs' claim and EPHL claim although because he doesn't need to make any distinction because of the way he deals within terms of the law and the resulting principles, he treats, he just treats it generally as a pleading in relation to firstly the approval of B2/AS1 and he refused to strike it out saying that the duty is arguable. Then the next step is the appellant's, that is the BIA's appeal and the notice of appeal is in general form under the old rules and then it's crystallised by the points on appeal.

McGrath J Just before we leave Justice Williams' judgment Mr O'Callahan, the Judge at the High Court refers to para.132 to your separate point doesn't he? In the middle of that paragraph 'first your submissions as being'

O'Callahan Yes he does, yes.

McGrath J That EPHL went further than Body Corporate 200200 to the point it said that untreated timber should never have been approved for use in conjunction with the cladding systems

O'Callahan Yes.

McGrath J So he just distinguishes the point you're now highlighting there doesn't he?

O'Callahan Yes it seems that in those submissions that the submission is a little more limited than the one I've made today and which the pleadings make.

Tipping J Well at this point in his judgment he's simply narrating the submissions but when he comes to disposition he seems to roll it all up into this higher level should not have approved at all.

O'Callahan Yes, now

McGrath J But in the end isn't that quite important the point that Justice Tipping's just made to you because in the end the issue, the first issue I think isn't so much as to what was said by respondents who are speaking for you as well as themselves in the Court of Appeal but whether the High Court was wrong and the Court of Appeal properly addressed that in all the circumstances, and isn't it important to that that the High Court, although it referred to your separate argument, was really content in the end to deal with it as just part and parcel of the whole of an argument on acceptable solutions and dealt with it in a generalised way and that that then became the focus of the Court of Appeal.

O'Callahan Yes and it became like that because of the way the appellant dealt with it, because it seems in my submission, because the appellant filed points on appeal.

McGrath J Yes.

O'Callahan Which are

Blanchard J They're attached to that memorandum from you client.

O'Callahan Do Your Honours have the points on appeal?

Tipping J We've just got a slight miss-match of files but we're sorting it out Mr O'Callahan thank you.

O'Callahan Yes.

Tipping J Yes, I've got the appellants points on appeal now than you. Which number is it?

O'Callahan Well the points in so far as they go through the grounds of appeal beginning on page 6 they say 'the decision of the High Court is wrong in law and in principle and in particular it will be submitted the High Court:

(a) wrongly held that the first and second respondents and the second-named fourth respondent (Ellerslie Park Holdings Limited, "EPHL') have a tenable cause of action that the BIA owed duties of care when issues acceptable solutions' so it's rolled up into that again.

Tipping J But this is why I inclined to start Mr O'Callahan with this duty of care point because if there is not duty of care at all the particular ingredients of any duty of care that might otherwise have existed are irrelevant.

O'Callahan Well yes that would be right as a matter of logic. At the moment I'm dealing with the progression through to how it was that we have a Court of Appeal judgment that doesn't deal with the particular claim.

Tipping J But isn't the Court of Appeal saying we are satisfied there is no tenable cause of action in the plaintiffs and equally we are satisfied there is no tenable cause of action, never mind the facts, the precise facts of what breach might be, vested in EPHL?

O'Callahan Yes, well that's a matter of interpretation of the judgment and

Tipping J Well that's how I read it and you can only get a high level point of law to carry to us on that issue. We wouldn't intervene if a Court were to say well there might have been a duty going this far or not, well we might if it was extreme but I understood you to say that the key issue of public policy and general importance here was whether or not the BIA owed a duty of care to build it generally.

O'Callahan Yes, yes it is.

Tipping J Well the Court of Appeal have said it doesn't. Now that was clearly flagged in here and your client didn't turn up to resist it.

Blanchard J Putting it another way, you didn't ever signal in the Court of Appeal that it was wrong to deal with it in what's been described as a 'rolled up way' and in fact you rather endorsed that approach because that was the approach in the submissions and having seen the submissions you said 'fine we'll rest on that'.

O'Callahan Well the submissions, because that's the next stage, while there's some mention of Ellerslie Park Holdings Limited in the points

Blanchard J I mean why didn't your people turn up?

O'Callahan Well the memorandum explains it, it says due to economic reasons.

Blanchard J Well they're finding the economic reasons to come here.

O'Callahan Yes well they have and that's just a development of a practical situation. The

Blanchard J But at the very least shouldn't you have pointed out to the Court of Appeal that the rolled-up approach was not the right way to go?

O'Callahan Well the way

Blanchard J And pointed out to the appellants.

O'Callahan Well the way the appellants dealt with it and in the written submissions having given some alert in the points on appeal that the EPHL claims were under attack and then specifically a further point is made at para.14 which specifically talks about the position of EPHL.

Tipping J I don't understand how the

O'Callahan Then the written, sorry

Tipping J I just don't understand how the plaintiffs could have argued properly that there was a duty of care owed to a builder, because they weren't a builder. I mean it just doesn't seem with great respect to make any sense. How could they have argued unless they had your express authority and request to argue?

O'Callahan Well I can't say anything more than what I observe because I wasn't counsel at that time.

Tipping J No, no you're doing a valiant job but it just seems to me to be awkward in the extreme.

O'Callahan I would seem

Tipping J No don't, I don't want to pressure you unreasonably but is there any basis upon which the plaintiffs, the Body Corporate and the unit owners could have properly argued for a duty of care to a builder without in effect the builder appointing Mr Fardell its counsel for that purpose as well?

O'Callahan Well the problem in my submission is that the submissions of the BIA and the Court of Appeal singularly don't address any of the issues relating to EPHL's claim. The

Tipping J Well because it was approached on the basis that the builder was necessarily subsumed in the plaintiffs. That would seem to me to be the logical thing. If you can knock out the plaintiffs you would ex-hypothesis you're going to knock the builder.

Blanchard J I mean you had an obvious answer to those submissions which would have cost little or nothing to advance, you'd simply have said the Court of Appeal will observe that no argument is being put up by the appellants

O'Callahan Yes.

Blanchard J Dealing with this point and therefore we don't need to appear.

O'Callahan Yes and I suppose that it was hoped that Mr Fardell might have done that.

Tipping J How could he?

Blanchard J Why, I mean was he ever asked to?

O'Callahan I'm not sure.

Blanchard J Well we will have to proceed on the assumption that he was never asked to do so.

Tipping J It has not been alleged in the papers anywhere that I've read that he was asked to do so and failed.

O'Callahan The particular point that it seems to have gone astray and diverged on the positions is the question of "at all' versus "the more specific duty to warn" and when pressed for the plaintiffs' position on the matter Mr Fardell apparently indicated to the effect that that wasn't the plaintiffs' claim.

Blanchard J Well it wasn't,

O'Callahan And it wasn't, it wasn't

Blanchard J And you have accepted that all Mr Fardell was to clarify. He didn't abandon anything that he was intending to put up or that he'd been asked to put up, intending to put up on behalf of the plaintiffs or he'd been asked to put up on behalf of the builder.

O'Callahan In a situation where the parties as in this was were very unhelpful to the Court, it remains, I'll put it in terms of duty, although I don't necessarily mean to involve the implications of that term to its fullest extent but the Court is supposed to get the decision right and where as in this case the appellants advanced no argument in relation to the EPHL's pleadings, although EPHL didn't look after its own interests and go along and point that out in the obvious way that Your Honour suggested nonetheless if the Court gets it wrong that ought not in my submission mean the availability of an appeal is lost.

McGrath J Mr O'Callahan it seems to me though that you overlooked there a prior point to the hearing, a prior procedural point. If in fact the High Court was wrong to deal with your discrete fleeting point in a rolled up way you were in fact in a position where you have to attack the High Court judgment and you should have filed a notice supporting the High Court judgment on another ground. That would have alerted the Court of Appeal to your point even if you hadn't turned up. Now it seems to me that in those circumstances the Court of Appeal obviously can't be expected, and the rules don't contemplate that it should have to enter

into the point which really is new insofar as the matters addressed by the High Court were concerned.

O'Callahan Well with respect I don't accept that that was the procedural necessity and I say that because what His Honour Justice Williams did in the High Court was specifically say that there was a duty owed to EPHL to not negligently issue the acceptable standard B2/AS1 and it's only in the way that it was subsequently treated as between the appellant and the Court and as a result of that the arguments on behalf of the plaintiffs who chose to appear that that aspect of it got lost.

McGrath J When you say it got it lost the High Court wasn't persuaded by your argument was it that this separate duty should form the basis of a separate sorry that the separate position that your client was arguing should form the basis of a separate duty of care. In the end it noted that you went a bit further in your argument in para.132 but when it disposed of the appeal it dealt with it as part and parcel of the plaintiffs' arguments and you really were saying that was wrong, your discrete point should have been the subject of focus and your special position recognised.

O'Callahan No I don't say that it's part of the plaintiffs' argument the way that Justice Williams dealt with it, the way I say that Justice Williams dealt with it was to see no reason for the purposes of his legal discussion about it to specifically point out the different characteristics of the pleading, because he was satisfied that there was a duty upon at least the homeowners and the builder, a duty owed to at least the home owners and the builder to not negligently approve the standard.

McGrath J Aren't you really now arguing that even if he was wrong in the way he dealt with the plaintiffs' position he should have separately distinguished your position and not let it allied into that of the plaintiffs.

O'Callahan No I'm not attacking his reasoning in that respect because what I'm saying in terms of the way that this appeal will be argued if leave is given is that despite what you say about the duty owed to the plaintiffs as homeowners there is a duty to the builder and despite what you say about a duty to warn, there is a duty to not negligently issue the standard and where its diverged and the position has diverged in that respect, is because of the view taken by the Court of Appeal in relation to those aspects of plaintiffs' claim. Where it was on the rails so to speak was in front of Justice Williams where it was seen as no need because of the view taken in respect of the extent of the duties.

McGrath J I'm only talking about the impractical terms for the standard procedures that alert the Court of Appeal to a situation where a party is resisting an appeal and wants to add a further ground for resistance that's over and above the reasoning of the High Court in disposing of the judgment. I'm just suggesting that before you can criticise the

Court of Appeal for not getting to that issue you were under a duty procedurally to flag it

O'Callahan Yes well

McGrath J No this is before the hearing, it's got nothing to do with what happened at the hearing.

O'Callahan In my submission the only point of the process of the rules of the Court of Appeal and the process in that Court where that ought to have been flagged is at the submission stage because it's only then that, because Justice Williams's judgment is not under attack and there wasn't an alternative ground relied upon. The reasoning Justice Williams was perfectly acceptable in respect of the plaintiffs' claim because he cast the duty wide. The obligation if there was one came at the submission stage to make the very obvious point that Justice Blanchard has articulated that the appellants had not made a single submission about the position of EPHL and the appeal should be dismissed on that basis.

Blanchard J Well your clients not only didn't do that but they compounded the problem by putting in a memorandum saying we're content to rest on what Mr Fardell's putting up at a point when they knew from Mr Fardell's written submissions that he wasn't putting the point up that you now wished to put up.

O'Callahan Yes, what Mr Fardell was doing was responding to the appellants' argument as against the plaintiffs and it's a question

Blanchard J Yes but your client elected to run with the arguments that Mr Fardell was putting up, many of which of course were arguments that you did wish to support.

O'Callahan Yes, that's correct.

Tipping J I think in the very shortest of terms the problem is that your client, both by silence and actively, gave the appearance of an exact identity of interest with the plaintiffs and you're not seeking to sever yourself if you like from the plaintiffs in a way which you've carefully explained to us but the Court of Appeal would have seen this as an exact identity stance, there's no material difference they would have seen between the plaintiffs and the builder.

O'Callahan Well I have approached this application to leave on the basis that that memorandum did not necessarily have the effect of aligning the positions as clearly as Your Honours have articulated. That it's not as clear in that respect that it can well be interpreted

Tipping J Which memorandum are we talking about. I don't want to unfairly

O'Callahan Mr Carter's memorandum. It's very short, it's very simple.

Blanchard J And I would have said very clear.

Tipping J Oh that one, yes.

Blanchard J Does not propose to appear, doesn't intend to make submissions, it being content to rely on the first and second respondents' submissions.

O'Callahan Yes, it doesn't expressly say that it abandons the position that it has a different pleading and a different duty point that the appellants simply haven't mentioned.

Blanchard J Well it didn't take the trouble to mention this point at any stage after Justice Williams judgment.

Tipping J Have you had any attempt to recall the Court of Appeal's judgment from your clients' point of view on the basis that there was some fundamental misapprehension on the Court's part through no fault of the Court perhaps as your clients?

O'Callahan No, there's been no application to recall it being considered that the application for leave of appeal was the appropriate course.

Tipping J Well I'm not sure about that, because you're really saying that there was a terrible misunderstanding. You see we won't have the views of the Court of Appeal on this issue and we'll have a very awkward situation. You're not challenging presumably the finding vis a vis the plaintiffs.

O'Callahan Well we're not because we say we don't have to.

Tipping J But apparently there can be no duty to warn but there can be a duty not negligently to approve?

Blanchard J Completely inconsistent.

O'Callahan Well it may be that if there perceived such inconsistency then that is a hurdle that will have to be dealt with in terms of the appellant making

Tipping J Well I'm not sure that it's in the point that goes to leave as well as all the other difficulties that

O'Callahan Well if that is thought to be intrinsically part of the necessary argument that the appellant will have to make then really in terms of the effect of EPHL's conduct in relation to the Court of Appeal, it won't have material bearing because this Court does have the views of the Court of Appeal on the duty to warn issue so the policy considerations in respect of that and what the appellant EPHL seeks to do in respect of the appeal to this Court is to subtly re-categorise the duty, take it out of the classes of duty that the Court of Appeal said it was aligned, re-align it

back into what Justice Williams categorised it as and the authorities that align with that and in terms of over-arching questions of policy revisit what the Court of Appeal has said in that respect, so

Tipping J But we would be asked to look at the position of a builder necessarily in isolation from a homeowner and whether finding in relation to a homeowner which cannot be attacked. It's a very unsatisfactory scenario frankly.

Blanchard J The finding was effectively made against you as well.

O'Callahan If Your Honour could

Blanchard J Well you elected to have Mr Fardell present his submissions on behalf of your client, not as your agent but you said that you were content to rely on him.

O'Callahan Well in terms of the content to rely on him, I have approached this on the basis that really is no more than saying 'we're not going to say anything else' because we won't turn up. The question of whether if it wasn't for that sentence in the memorandum whether the Court would have a different view of it and whether that sentence does something additionally, if the memorandum had finished with, due to economic reasons the EPHL will not be appearing then certainly that's not helpful to anybody, and particularly the Court, but it would leave a position where the Court would nonetheless have to deal with as best it could the position of EPHL as apparent from the pleadings in the judgment in light of the appellants' submissions.

Tipping J Well there's no ultimate resolution by this Court of any issue. I'm looking at it more widely than the interests of your client frankly. There's no ultimate resolution by this Court of any issue to do with duties of care on the building industry authority and quite frankly to pick it off in the fragmented and peculiar way that we are now being asked to do I don't think is in the public interest.

O'Callahan Well the allegation is that this standard was negligent by being issued in the first place.

Tipping J No, no, the allegation is that there is a duty of care owed and therefore we look to see. There was a duty to take care in approving therefore we looked to see whether it was negligently done.

O'Callahan Yes, in terms of the strike application one would assume negligence.

Tipping J Yes, absolutely.

O'Callahan And as Your Honour says the question is, is there a duty owed to builders who rely on the standard. Now that in my submission is an important point. Is a duty owed to builders? Now it may be that in

coming to a view about that the Court disavows itself of aligning the position of the builder with any other person, or it could be that the Court necessarily sees the positions of other parties as necessarily useful in terms of getting to the Court's view on the matters. But whatever it is the result must be as ratio descindi whether there is a duty to a builder and given the context of this widespread and the litigation that exists in the Courts in relation to it that's an important point.

Tipping J Well someone else might seek to bring it. I'm just looking at both the justice inter-parties and the public interest in the Court being required to do it in this very unusual scenario and if someone else brings it to us on a more satisfactory basis without prejudice then we might take it.

O'Callahan Well if for example there was another case in which for whatever reason only the builder came before this Court, in my submission it wouldn't be proper to deny the builder the opportunity of saying duty of care is owed to me only because the Court can't in the same sweep, sweep up the rest and the fact that the homeowners are a party to this litigation and because of the point I've just made I say that because the homeowners were party to this litigation and have for their own reasons, I don't know what they are, have chosen not to seek to appeal to this Court, that shouldn't have itself been a material consideration in respect of the application for leave.

Tipping J I understand the point you're making I think.

O'Callahan Because, and I'll emphasise this, because even though this Court serves an important public purpose and part of its criteria for leave is matters of general public importance and of general significance, it nonetheless also does justice between parties and it wouldn't be a safe precedence in my submission to say that the justice between the parties ought to await a time when there is an occasion where the Court can be of greater use

Tipping J Well I wouldn't hammer justice inter-parties too much if I were you Mr O'Callahan, because frankly in my view it goes completely against you.

O'Callahan Yes, well justice inter-parties in terms of actually getting the right result.

Tipping J I understand getting the right result but your clients are the authors of their own misfortune in my view on this procedural tangle they've got themselves into.

Blanchard J Is there anything really you can add now? I think we've probably understood the arguments?

O'Callahan In terms of this procedural tangle I just want to emphasise that in respect of this being a strike-out application there's an element of saying as a converse to the unhelpful way that the appellants, the EPHL, chose to deal with the matter in the Court of Appeal that as a strike-out application challenging a judgment of the High Court the appellants in the Court of Appeal, that is the BIA, ought to have made at least some submission about how EPHL's claims ought to be treated rather than just what has happened

Blanchard J The appellant should

Tipping J The Attorney General should.

O'Callahan In the Court of Appeal because they're challenging a decision by the High Court to not strike out a claim against it.

McGrath J But the High Court didn't deal with that issue separately, it dealt with it together with the way the plaintiffs had put it and surely all the appellant in the Court of Appeal has to do is to show that that decision was wrong.

O'Callahan Well back to Justice Williams' judgment. He clearly

McGrath J It may then have to reply to what's said by way of additional support for the High Court judgment but that depends on what the submissions

O'Callahan Yes. Justice Williams clearly says that in his view there is a duty owed to the plaintiffs and to EPHL to not negligently approve these documents, the s.49 documents, which in this case BS/AS1 and the appellants in my submission of one reading the whole of their submissions just make no mention of anything to do with one of the people who are claiming against them and refer only and solely to the position of and the specific allegations made by the plaintiffs and in my submission in terms of the justice between the parties, it was incumbent on them in the Court of Appeal to have expressly identified the position, even if it was to say 'well for these reasons we say that the position of the two parties and their claims are no different and they should be dealt with on this over-arching basis for these reasons' and even that in my submission is absent from the appellants' submissions in the Court of Appeal.

McGrath J That Mr O'Callahan takes me back to what I was talking to you about 20 minutes ago that the Judge dealt with the two parties together and you didn't file a cross-notice indicating that you wanted to have your position considered separately and the Judge was wrong not to do that.

O'Callahan Well, I've given Your Honour my reply on that, I can't say anything different to what I said on that, I would just be repeating myself.

Blanchard J Thank you Mr O'Callahan.

O'Callahan If Your Honours could allow me one moment. Right those are my submissions Your Honours.

Blanchard J Thank you. Mrs Scholtens.

Scholtens May it please Your Honours most of the points that I was intending to make have already been the subject of discussion between the Bench and my learned friend. In particular the point that it appeared to the Attorney General that the applicant was essentially adopting the submissions that were made by Mr Fardell and that was unsurprising in the circumstances given the way the High court had dealt with the matter. Mr friend does seem to place some importance on the fact that the BIA's submissions to the Court of Appeal, written submissions, didn't expressly deal with EPHL's position and with respect His Honour Justice McGrath has pointed out that there was a procedure that would have alerted us to their view of the separate of their position, but of course we also had the advantage of anticipating submissions from EPHL in response to our written submissions and in which case then an opportunity to deal with that before the Court of Appeal. What we got was the very brief memorandum that you have seen and matters essentially proceeded from there.

Blanchard J Was there any other communication from EPHL's lawyers other than that memorandum?

Scholtens No, no Sir.

Tipping J That memorandum came in after your submissions did it?

Scholtens Yes Sir.

Blanchard J It was after both sets of submissions I think.

Scholtens The chronology was at the back of the respondent's submissions on this appeal, the 21 October, was following both sets of submissions.

Tipping J But in particular yours, that was the focus, yes.

Scholtens Yes that's right. Ours were on the 28 September. The plaintiffs were on the 12 October. This was the 21 October and the hearing 25th, 26th, 27th and at the very beginning of the hearing Mr Fardell read that memorandum out to the Court.

Blanchard J Were there any exchanges from the Bench and counsel about the position of EPHL in the appeal?

Scholtens Not explicitly Sir. There was an exchange with me as to whether anybody in the Sacramento proceeding was arguing that the acceptable solution was itself wrong and in my view that's where the, I think

that's where the statement that the Court makes comes from when they deal with this at paras.63 through to 66. I responded to the Court that I did not think anybody was saying that Acceptable Solution was of itself intrinsically false or wrong and there was a debate about whether that was right or not and my recollection is that Mr Fardell interrupted at that stage and said he certainly wasn't arguing that, and

Blanchard J On behalf of the plaintiffs?

Scholtens Oh right, he wasn't arguing that, yes. He didn't make the distinction, and Sir, Your Honours I submit that those paragraphs 63 to 66 of the court of Appeal's judgment essentially show why that sort of argument can't be made anyway. I mean the Court rightly says it's a red herring. In para.64 they say it's important to recognise that the complex did not conform to the Acceptable Solution as it didn't ensure content was less than 18% and then the Court records that the Body Corporate accepts that untreated pinus radiata is suitable for framing timber provided it is used within the constraints provided for in the New Zealand Standard.

Tipping J And of course apparently the present applicant doesn't accept that that's the nub of the problem.

Scholtens Yes that is the problem so we've got the Body Corporate through Mr Fardell accepting that and the Court stating that so essentially the solution itself can't be intrinsically false or wrong.

Tipping J Well from the point of view of the Body Corporate.

Scholtens That's right Sir, yes and the Court recorded that.

McGrath J And is the first sentence of 66 in point here too?

Scholtens Yes, very much Sir. The Court was right to say that the claim couldn't sensibly be looked at on a stand-alone basis and that's what my learned friends' are asking this Court to do and I submit that what the Court of Appeal says there in para.66 is right. The arguments about this document are a sub-set of the arguments that the BIA ought to have been warning the industry and the public of the dangers of the systems over untreated timber.

Tipping J But a duty to warn implies that you know or at least have grounds to suspect that what you've put out isn't going to do the trick. I find all this a little surprising. I understand that the claim presented by the Body Corporate was on a duty to warn basis rather than a head-on attack that you shouldn't have approved the acceptable solution at all. But how could they say that it couldn't be looked at on a stand-alone basis simply as a matter of what was in issue in this case. You could sensibly look at it on a stand-alone basis in the abstract I would have thought. No problem at all. You could simply say this acceptable solution no responsible building industry authority could have remotely

regarded this as an acceptable solution. You could have argued that but what I understood them to mean was that in the way this case was presented it was as it were not a stand-alone point. It was an introductory, if you like, at best to the duty to warn.

Scholtens Yes, but

Tipping J I mean if one of the parties had said look my case Your Honours is that they should never have approved this standard or this solution at all. Full stop, bang. That's a perfectly tenable stand-alone proposition.

Scholtens Well yes, except essentially it's the same reasons behind the duty to warn and the arguable duty not to issue the solution in the first place. That is BIA had certain information that meant they shouldn't either put out the solution or they shouldn't put out the solution without a whole lot of bells and whistles around it highlighting the dangers, so in some ways it's a timing issue. In 1998 they issued the solution

Tipping J I understand your point because in a sense as we were discussing with Mr O'Callahan, to argue that there was a stand-alone duty not to approve as against the duty to warn, there is something inconsistent there and it's awkward, but I'm just trying to get a feel for whether you're being entirely right to suggest that when the Court of Appeal cannot sensibly be looked at on a stand-alone basis they must mean surely in the light of the pleaded cause of action which is in breach of a duty to warn. It's probably not going to take us anywhere Mrs Scholtens but

Scholtens Yes, and perhaps it's probably importantly in light of the Body Corporate accepting in para.64 that this sort of untreated timber is suitable provided it meets the conditions because EPHL are saying it can never meet those conditions.

Tipping J That's right. So it's a contextual observation that couldn't sensibly be looked at on a stand-alone basis, not an abstract proposition, that's all I'm trying to say.

Scholtens Yes, I think you're right, yes Sir. I'm not sure whether there's much else I can add. Obviously the Crown's position is that there's certainly nothing coming anywhere near a substantial miscarriage of justice in the situation that their applicants have brought the situation upon themselves that the Crown faces significant proceedings in relation to leaky buildings that rest on the outcome of the Sacramento decision in the Court of Appeal and everything's currently on hold while we sort this matter out. There's no matter of general commercial significance here and it submitted this issue of whether there's a duty of care owed to the builder really has been dealt with on its merits by the Court of Appeal.

Tipping J That has to be an important issue in the abstract and never mind the particular circumstances in which it's sought to bring it here now. I mean whether the BIA has a duty of care owed to the builder or anyone else for that matter is a major point of public importance.

Scholtens Yes, and that's what we were doing in the Court of Appeal, talking about that.

Tipping J But say the plaintiffs had been seeking leave to appeal

Scholtens Yes.

Tipping J You couldn't have resisted that on the premise could you that it wasn't a matter of public importance?

Scholtens No Sir.

Tipping J No.

Scholtens But in terms of the duty of care owed to the builder my submission is that if you read the Court of Appeal's judgment you are left compelled to answer that there isn't one on the same reasoning as the Court has made in respect of homeowners and users of buildings generally.

Blanchard J Well we would have to conclude that the contrary was simply not arguable before we could have refused leave to the plaintiffs.

Tipping J The awkwardness is that if we're going to look at the builder without looking at the plaintiffs we're in an extremely awkward vacuum if not for principle purposes at least for practical purposes.

Scholtens Yes absolutely you are and I say that's not our fault. I don't know whether this is relevant at all but there are the other proceedings behind the Sacramento proceedings where the Crown has applied to strike out, now there's been a suggestion that perhaps there may be a plaintiff in one of those other proceedings that may want to bring the matter, seek to bring the matter to this Court and I don't know whether EPHL are involved in any of the other cases but it seems to me there are other opportunities to do this properly.

Tipping J Well there may be and it shouldn't be done on this sort of hand half behind your back basis.

Scholtens Absolutely not. That's right.

Tipping J And is your client's case essentially that you had every reason to take the view as appears the Court of Appeal that EPHL was sinking or swimming with the plaintiffs.

Scholtens Yes Sir that's what we were told.

Tipping J That's really it isn't it?

Blanchard J You say you were told that in that memorandum?

Scholtens Yes Sir and practicality meant we simply didn't have enough pages left to address EPHL in our initial written submissions.

Blanchard J Well I'm sure you could have got some

Scholtens We were squeezed up enough as it was. Unless there's anything else I can assist?

Blanchard J Thank you Mrs Scholtens. Anything in response Mr O'Callahan?

O'Callahan Yes if I may. One point that my learned friend made after discussion with His Honour Justice Tipping is that the question of the intrinsically false or wrong leaving aside the terminology is different to how we put the terminology - we say at all. My learned friend says that that has been dealt with on its merits in the Court of Appeal and my learned friend attempted to say to Your Honours that that must be the case that there is no room for an allegation that matters intrinsically false or wrong and certainly despite the position that may have been indicated by Mr Fardell on behalf of the plaintiffs, the Court of Appeal given that discussion and given the contextual discussion that Justice Tipping had, it may well be quite plain that the Court of Appeal were of the view as demonstrated in those paragraphs that there couldn't be a claim that B2/AS1 was intrinsically false or wrong.

Tipping J I think with respect that you're not quite on the point. The point as I understood Mrs Scholtens was that if the Court of Appeal are right in it's view that there's no duty of care owed to the plaintiffs there would be no possible logical room for a view that there is a duty of care to the builders. It's at that level that she was addressing my questions I thought rather than on the facts. That's right isn't Mr Scholtens.

Scholtens Yes.

O'Callahan Well yes the Court of Appeal has indicated in strong language that there's no stand-alone basis for looking at the question of an argument that B2/AS1 is intrinsically false or wrong. If the Court of Appeal has come to that view in that way then the question is really in respect of any conduct of EPHL that might militate against leave in terms of this Court being concerned that it doesn't have the views of the Court of Appeal on the argument in a way that's intended to be put one might suppose that the Court of Appeal if that matter had been made to them given the views expressed would have come to the same conclusion nonetheless and perhaps in exactly the same way and that the question ought to be principally in my submission whether the matter is of general public importance and I re-emphasise my response to His

Honour Justice Tipping earlier in my address in respect of the question of whether this ought to go ahead in this Court on a builder-only basis without plaintiffs, without people in other positions such as the home owners, and the fact that there may be other cases that come before the Court or there may be some lined up to do so that is in my submission speculation and that the Court has an opportunity to deal with the position of a builder in this appeal and that the criteria for leave is made out for those reasons.

Tipping J You accept at the least that it would be unfortunate to be forced to make a ruling as for a builder in a vacuum vis a vis other possible claimants for a duty of care?

O'Callahan Yes it would be unfortunate but who is to say that that position won't be the case on the next application for leave if there is one and on the next one because the parties may well have different economic positions, may be differently represented, may make different decisions about their positions in relation to complex and ongoing litigation.

McGrath J Well you're really saying that had you appeared in the Court of Appeal and we're here today seeking leave, it wouldn't have been much of an argument against you.

O'Callahan No and in fact it's highly likely that we wouldn't have been in any real different position and that in terms of the case law that my learned friends referred to in their submissions on the question of a new point and I've been loathe to categorise this as a new point; it's just a slightly different way of putting it and so in that respect this Court isn't really hampered in the way that sometimes it might thought to be hampered by a new or fresh point on appeal and so that's not a strong consideration and it's at that point that EPHL's conduct becomes important or relevant.

Tipping J If you were here alone or if you were here together with the plaintiffs we would at least have the Court of Appeal's clear views as to whether there was any material distinction between the two categories of claimant for a duty of care and all the points that you wish to urge in favour of the builder as opposed to plaintiff would have been out on the table and properly discussed. It defeats the whole purpose of having a second level of appeal to have to do it without any discussion in the Court of Appeal other than a sort of global rolled up basis when you now want to sever yourself from that global rolled up basis.

O'Callahan Yes, the Court of Appeal was obviously by its judgment quite content to deal with it either consciously or unconsciously on a rolled up basis and I suppose my point is that the nub of the judgment in respect of the point that's being advanced was that the Court of Appeal is clearly of the view that there was no stand-alone basis for looking at the claim and its really that where matters start to depart quite significantly from the argument, or from the position that EPHL would urge the Court on

appeal to reach. So those are my submissions. If Your Honours have any questions?

Blanchard J Thank you Mr O'Callahan. We'll take time to consider our decision on the application. Court will now adjourn.

Court Adjourned 11.15am