

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 20/2007  
[2007] NZSC 43**

BETWEEN                      JOHN ANTHONY WALLER AND  
   RICHARD DALE AGNEW  
   Applicants

AND                              STEPHEN JOHN DAVIES  
   First Respondent

AND                              DAVIES & CO SOLICITORS NOMINEE  
   COMPANY LTD  
   Second Respondent

AND                              GEOFFREY ANDREW HITCHINGS  
   AND TERENCE RICHARD HITCHINGS  
   Third Respondents

AND                              DOUGLAS WALTER EDWARDS AND  
   DENISE ANNE EDWARDS  
   Fourth Respondents

AND                              QING SHENG SHI  
   Fifth Respondent

AND                              NICOLA LOUISE WADEY AND  
   JEREMY ALAN MILTON  
   Sixth Respondents

Court:                      Tipping, McGrath and Anderson JJ

Counsel:                      M J Tingey and J C Caird for Applicants  
   A R Galbraith QC and A R B Barker for First Respondent  
   S R G Judd and J W Appleby for Second to Sixth Respondents

Judgment:                      13 June 2007

---

**JUDGMENT OF THE COURT**

---

- A. The application for leave to appeal is dismissed.**
- B. The applicants are to pay to the first respondent costs in the sum of \$2,000 plus disbursements to be fixed if necessary by the Registrar, and to the second to sixth respondents as a group the sum of \$2,000 plus disbursements to be fixed if necessary by the Registrar.**

### **REASONS**

[1] We do not consider that any of the grounds on which the applicants wish to appeal satisfy the requirements of s 13 of the Supreme Court Act 2003. It is convenient to refer to the principal ones in turn.

[2] The common law mortgage point turns essentially on the facts as found by the High Court which were without material variation in the Court of Appeal. No matter of sufficient general principle arises.

[3] We are satisfied the Court of Appeal was correct when it said that the allegation of fraudulent misrepresentation was not pleaded. We have examined each of the paragraphs in the Amended Statement of Claim referred to in para 34 of the applicants' submissions. Neither singly nor cumulatively do they come anywhere near a pleading of fraudulent misrepresentation. The Court of Appeal recorded that counsel did not consider the facts justified such a pleading. There was therefore no basis upon which the alleged concession could properly have related to the case as presented in the High Court.

[4] It would not be appropriate to give leave against that background. There are, in any event, difficulties in ascribing the "concession" to the respondents represented by Mr Judd. The Court of Appeal's approach to this issue appears to us to be sound. We are not satisfied that a miscarriage of justice may occur if leave is not granted on this ground.

[5] The Court of Appeal's approach to the option point appears sound. We can see no basis upon which it would be in the interests of justice to give leave on this issue.

[6] If the decision of the Court of Appeal is unclear as to precisely how the application for directions has been disposed of, the lack of clarity should be resolved either in the Court of Appeal or in the High Court. The Court of Appeal has dismissed the appeal by the applicants and allowed the cross appeal by the first respondent. The orders made in the High Court have been set aside. It may be that what appears to have been an effective dismissal of the application in the High Court provides its own directions. That may depend on how the application was framed. There is nothing to prevent a further application being made in the High Court for any necessary clarifying purpose.

[7] We are not prepared to give leave simply in order to refer back to the High Court the "lack of proper attestation amounting to fraud" point referred to in paras 6 and 7 of the applicants' supplemental submissions. If the point is otherwise open to the applicants it must be the subject of a further application or other proceeding.

[8] There being no qualifying ground, the application for leave must be dismissed.

[9] The applicants must pay the first respondent, and the second to sixth respondents as a group, the sum of \$2,000 in each case, together with disbursements to be fixed if necessary by the Registrar.

Solicitors:

Bell Gully, Auckland for Applicants

Paddy Orr & Co, New Lynn for First Respondent

Ladbrooks Solicitors, Auckland for Second to Sixth Respondents