

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2011-404-007321**

**IN THE MATTER** of an appeal from the oral judgment of  
Judge M-E Sharp given on Tuesday,  
18 October 2011 in the District Court at  
Auckland

**AND**  
**IN THE MATTER** of a breach of the Fair Trading Act 1986

**BETWEEN** ECC LIGHTING & LIVING LIMITED  
Appellant

**AND** DV KELLY PTY LIMITED  
Respondent

Counsel: I Finch for the Appellant  
No appearance by the Respondent

Judgment: 6 December 2011

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**MINUTE OF WYLIE J**

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*Distribution:*  
*I Finch: ianf@jaws.co.nz*  
*C Kelly: Craig.Kelly.MP@aph.gov.au*

[1] The appellant has appealed against an oral judgment of Judge M-E Sharpe given in the District Court at Auckland on 18 October 2011. The judgment concerned the Fair Trading Act 1986 and in particular, whether letters written by lawyers for the appellant were “in trade” for the purposes of s 9 of that Act.

[2] I have received memoranda from both parties. The matter was scheduled for a telephone conference this morning, but unfortunately, there were some misunderstandings. Mr Finch appeared in chambers. Mr Kelly could not be contacted by telephone.

[3] First, I record those matters in respect of which the parties are agreed.

[4] The appeal will be heard at 10.00 am on Thursday, 26 April 2012.

[5] The time for the hearing is estimated to be one day.

[6] The appeal is classified as category 2 for costs purposes.

[7] Neither party has been granted legal aid under the Legal Services Act 2000, or has applied for legal aid. Accordingly, I direct that the appellant is to pay security in the sum of \$1,880. Such security is to be paid not later than 10 working days after the date of this minute. **It should be noted that if security is not paid by that date, then under s 74(2) of the District Courts Act 1947, the appeal must be treated as having been abandoned and it will be dismissed without any further call before the Court.**

[8] Mr Kelly in his memorandum has not suggested that more detailed points on appeal are required, and I do not therefore make an order in that regard at present. If Mr Kelly considers that more detailed points on appeal are required, then I reserve leave to him to make application in that regard.

[9] The appellant is to file and serve a common bundle of numbered and indexed copies of all relevant documents not later than 20 working days after the date of this minute.

[10] The appellant is to file and serve its submissions and a chronology (if relevant) not later than 5.00 pm on Friday, 27 January 2012.

[11] The respondent is to file and serve its submissions and a separate chronology if there is disagreement not later than 5.00 pm on Friday, 17 February 2012.

[12] The appellant is to be responsible for preparing a common bundle of authorities and for filing and serving the same not less than two working days prior to the hearing of the appeal.

[13] The remaining provisions of the Sixth Schedule are to apply to this appeal.

[14] I now turn to the one matter in respect of which the parties disagree.

[15] Mr Kelly in his memorandum has suggested that the appeal should be served on the Solicitor-General. He points to the fact that New Zealand has international obligations which are set out in a revised memorandum of understanding between the Governments of New Zealand and Australia on the coordination of business law, and which was signed on 23 June 2010. Mr Kelly notes that the New Zealand Fair Trading Act 1986 is substantially modelled on the Australian Trade Practices Act 1974. He acknowledges that there are some differences, and in particular, the New Zealand Fair Trading Act provides a definition of the word “trade”, unlike the Australian Act. He relied on various Australian authorities in support of the propositions which he advanced in the District Court. He submits that if the interpretation of the Fair Trading Act contended for by the appellant is to be preferred, it will undo the initiatives already underway on business law coordination between New Zealand and Australia and undermine the existing harmonised interpretation of New Zealand and Australia’s consumer laws.

[16] Mr Finch on behalf of the appellant suggests that this case is no different to any other involving the Fair Trading Act and that it turns upon an interpretation of the Fair Trading Act in this country. He will be submitting that Australian

authorities said to be in point were wrongly decided, and that they do not bind the Courts in this country.

[17] I have read Judge Sharpe's decision. I cannot see that it is necessary to serve the Solicitor-General. There are differences between the New Zealand Fair Trading Act and the Australian Trade Practices Act. Authorities in Australia do not necessarily apply in New Zealand, given the differences in the legislation. Whether or not the authorities on which Mr Kelly relies should be applied in this country is a matter of law. It does not require the Solicitor-General to be served. I cannot see that even if the Court were to conclude in favour of the contentions advanced by the appellant, that there would be a breach of the memorandum of understanding referred to above. Accordingly, I decline to direct service on the Solicitor-General.

[18] There is one other matter which needs to be noted.

[19] As I understand it, Mr Kelly is not admitted as a barrister and solicitor either in this country, or in Australia. He is a director of the respondent company. I note that Judge Sharpe recorded in her decision that she was prepared to hear Mr Kelly. Normally, a director is not entitled to appear on behalf of a corporate entity. Mr Kelly will either have to obtain representation for the respondent, or alternatively, apply to the Court for leave to appear on its behalf.

[20] I record that Mr Kelly was not present before me, and as I have noted above, the Registrar was unable to contact him by telephone. I reserve leave to Mr Kelly to come back to the Court by way of memorandum if there are any matters in this minute which require revision after he has had the opportunity to consider the same.

A handwritten signature in black ink, consisting of a stylized 'W' followed by a horizontal line and a small flourish.

Wylie J