IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA126/2023
[2023] NZCA 484

BETWEEN	LISA ROCHELLE LEWIS Applicant
AND	HAMILTON COSMOPOLITAN CLUB INCORPORATED Respondent

Court: French and Brown JJ

Counsel: F A King for Applicant
T C Tran for Respondent

Judgment: (On the papers) 5 October 2023 at 11.30 am

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements. This costs order has no effect if the applicant is in receipt of a grant of legal aid for the purposes of this application.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Ms Lewis obtained a damages award of $10,000 in the District Court against her neighbour, Hamilton Cosmopolitan Club Inc (the Club), for nuisance.[1] The Club appealed to the High Court. The appeal was allowed by Brewer J who quashed the judgment in favour of Ms Lewis and upheld the Club's counterclaim against her for trespass.[2] The Judge subsequently declined Ms Lewis leave to appeal his decision.[3]

[2] Ms Lewis now seeks leave from this Court to bring her proposed appeal under s 60(1) of the Senior Courts Act 2016. Leave is required because the appeal would be a second appeal. In order to obtain leave, Ms Lewis must satisfy us that her proposed appeal raises some seriously arguable question of law or fact, of sufficient private or public importance to warrant the cost and delay of a further appeal.[4]

Background

[3] Since 2013, Ms Lewis has occupied a rental property situated adjacent to the Club's car park. The property she rents was previously owned by the Club before being subdivided off and sold to a third party. Due to various impediments including a lamp post, a power pole and bollards, vehicular access to the property is only possible via the Club's car park.

[4] The Club had no objection to Ms Lewis accessing her property via the car park until 2017 when her relationship with the Club deteriorated following the appointment of a new manager. There were numerous incidents, complaints and counter-complaints. These events culminated in the service of a trespass notice on Ms Lewis in September 2020 and then the erection of a large metal fence preventing her from accessing her property in November 2020. Police were involved and brokered an agreement that Ms Lewis could access her property via a slightly different route than before but still involving the car park.

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1 *Lewis v Hamilton Cosmopolitan Club Inc* [2022] NZDC 1569 [District Court decision].
2 *Hamilton Cosmopolitan Club Inc v Lewis* [2022] NZHC 2555 [Decision under appeal].
3 *Lewis v Hamilton Cosmopolitan Club Inc* [2023] NZHC 154 [Leave decision].
4 *Waller v Hider* [1998] 1 NZLR 412 (CA) at 413, citing *Rutherfurd v Waite* [1923] GLR 34 and *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343 at 346–347.

[5] However, the problems continued.

[6] In December 2020, Ms Lewis filed proceedings in the District Court against the Club for nuisance. The statement of claim detailed Ms Lewis' complaints which included excessive noise from club patrons, tooting of horns late at night, verbal abuse, urination and defecation on the boundary fence, obstruction of her vehicle, the illegal parking of motor homes on the car park,[5] and excessive light from floodlights used to illuminate the car park. The Club counter-claimed for trespass.

[7] The key findings made by the District Court Judge were that:

(a) the Club had committed a nuisance in a number of respects, with the "essential nuisance" being the Club's attempts to prevent Ms Lewis' legitimate accessway to her residence;[6]

(b) the trespass notice was invalid because it was not authorised under the Club's constitution and issuing it was in itself an act of nuisance;[7] and

(c) the behaviour of car park occupants, matters relating to motorhomes and excessive lighting of the car park provided context as to Ms Lewis' position, but were not acts of nuisance.[8]

[8] In the High Court, Brewer J allowed the Club's appeal on two main grounds.[9] First, that the District Court Judge had erred by deciding the case outside the pleadings, Ms Lewis having never pleaded that the denial of access to the car park and the issuing of the trespass notice constituted actionable nuisances.[10] The second error was that in any event the Club's actions blocking access were not capable as a matter of law of amounting to a nuisance given that Ms Lewis did not have an actionable right to cross

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5 This activity was purported to be illegal because the Club did not have the necessary resource consent to use its car park for that purpose.
6 District Court decision, above n 1, at [19].
7 At [15] and [19].
8 At [22].
9 Decision under appeal, above n 2.
10 At [69].

the Club's land.[11] At best, all she had was a bare permission given orally which was revocable at will.[12]

[9] The Judge did not address the fact that the police-brokered agreement occurred *after* service of the trespass notice and the removal of the fence which would arguably suggest the bare licence had been reinstated. We assume he did not address that point because on his analysis, the Club would in any event be free to resile from that second agreement at any time and on the evidence the Club had so resiled.

The proposed appeal

[10] Counsel for Ms Lewis, Mr King, seeks to advance a number of appeal grounds. The key aspects can be briefly summarised as follows.

[11] First, Mr King challenges the High Court's reliance on the pleading point, and further contends that Brewer J failed to take into account the possibility of Ms Lewis having the benefit of an equitable easement over the car park.

[12] Second, he contends Brewer J should have reconsidered the District Court's decision not to hold the Club liable in nuisance for the offensive behaviours of car park users, club members and employees.

Analysis

[13] We agree it is reasonably arguable the District Court erred in regarding the allegations about excessive noise and light as not capable of amounting to actionable nuisances. In making that finding, the Judge appears to have relied on the difficulties of controlling visitors in combination with the fact the Club had systems in place to minimise disturbances and had generally followed up on Ms Lewis' complaints.[13] However, nuisance is a tort of strict liability and it is well established that an occupier of land can be strictly liable for nuisances created on their land by people under their

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11 At [70].
12 At [72].
13 District Court decision, above n 1, at [22].

direct control, such as guests and employees.[14] Patrons, club members, club staff and people in motorhomes who were granted permission to park in the Club's car park were arguably all under the Club's direct control.

[14] This point was never argued in the High Court. Mr King says that is because Brewer J wrongly held that as a result of Ms Lewis' failure to file a notice of cross-appeal she was prevented by r 20.11 of the High Court Rules 2016 from being able to raise it. This, Mr King contends, was wrong because the Judge in fact had broad powers under r 20.11(4) to dispense with the need for a formal notice of cross-appeal or adjourn the hearing for one to be filed.

[15] Because the parties did not agree what had happened in the High Court, we obtained a transcript of the hearing and provided it to counsel. Contrary to a further submission made by Mr King, it is very clear from the transcript that Brewer J was cognisant of his discretion under r 20.11(4). The Judge indicated more than once that he was willing to give Mr King the opportunity to advance an argument about the other alleged nuisances but that it would mean adjourning the appeal to "some time in the future". Mr King chose not to take that option.

[16] In our view, this is fatal to any attempt to resurrect the argument on a second appeal. It is not in the interests of justice for a second appeal to be used as an opportunity to revive an argument that a party has made a deliberate choice to abandon in the court below.

[17] Turning then to the issue of access and what Mr King describes as "the vehicle blockage nuisance". While the statement of claim may not have specifically identified the prevention of access as a nuisance, we note that the trespass notice, the fence incident and the obstruction incidents were described in some detail and so brought to the Club's attention. Those incidents also appear to have been the subject of evidence and submissions from both parties. In those circumstances, it is reasonably arguable the High Court may have overstated the prejudice to the Club caused by any pleading failures.

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[14] Bill Atkin "Nuisance" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at [9.2.6(2)] and [9.2.7].

[18] However, while a degree of leniency towards pleadings is possible, it can only go so far. Mr King now wishes to advance an argument about the existence of an equitable easement: either an equitable easement arising from Ms Lewis' own long-standing usage of the car park or an equitable easement arising in favour of the rented property by way of an implied grant dating back to 1989.

[19] The statement of claim made no claim about the existence of an equitable easement. The existence of such an easement was never argued in the District Court and never argued in the High Court. It was raised in the application to Brewer J for leave to appeal to this Court by way of an affidavit from a representative of the trust which owns the property rented to Ms Lewis.

[20] The affidavit gives a brief history of the two properties. It refers to the Club's installation of services on the accessway at the time it owned both properties. The installations are said to have impeded vehicular access from at least 1989 to the property now occupied by Ms Lewis, rendering use of the car park as a means of access reasonably necessary. The affidavit goes on to state that the property now occupied by Ms Lewis was subdivided off and sold by the Club in 2005. The trust purchased the property in 2013 and contends that the vehicular use of the car park from the property must in all the circumstances have been at least impliedly granted and expected to continue because the vehicle accessway was still blocked and not properly formed.

[21] Since that affidavit was filed, the trust has issued proceedings in the High Court seeking a declaration that the property owned by the Club is subject to an equitable easement of right of way in favour of the property the trust owns. The proceeding has recently survived the Club's application to strike it out.[15] Associate Judge Brittain, who allowed the trust's claim to go to trial, found that the contentions about an implied grant were reasonably arguable on the available evidence.[16]

[22] Mr King relies on this recent High Court decision to support his application for a second appeal in this proceeding. Mr King also notes that in declining leave to

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15 *Neutrino Trust Ltd v Hamilton Cosmopolitan Club Inc* [2023] NZHC 2475.
16 At [53].

appeal, Brewer J made no reference to the trust's affidavit, the implication being that it was overlooked and would or should have made a difference to the outcome of the application.[17]

[23] However, this Court will only in exceptional and rare circumstances consider entertaining a new argument on a second appeal.[18] We are not persuaded that the circumstances of this case warrant that indulgence. Indeed, in our view it would be very wrong for this Court on a second appeal to consider a new issue when that very same issue is at the heart of an extant High Court proceeding and is one which requires evidence.

[24] That leaves the issue of the validity of the trespass notice, which Mr King submits is an issue of general or public importance because it will impact on other clubs elsewhere in the country. However, on its own, that issue is actually of peripheral importance in this case and would not be determinative. We also reject the suggestion that publicity around the dispute between Ms Lewis and the Club makes it of sufficient public importance for there to be a second appeal. The publicity appears to largely stem from the bitterness of the dispute, not the importance of the legal issues.

[25] For all these reasons we have decided the application for leave to appeal should be declined.

[26] As regards the costs of the application, subject to one matter, there is no reason why these should not follow the event, meaning that the unsuccessful party must pay the costs of the successful party. The one matter is the question of whether Ms Lewis is legally aided. This Court has not been advised that such a grant has been made. However, in the application for leave to appeal to the High Court, counsel advised that legal aid had been obtained. In order to preserve the position, we therefore make a costs order that is contingent on Ms Lewis not being in receipt of legal aid.

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17 Leave decision, above n 3.

18 See *Harvey v Tasman District Council* [2020] NZCA 91 at [10].

Outcome

[27] The application for leave to appeal is declined.

[28] The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements. This costs order will not take effect if the applicant is in receipt of a grant of legal aid for the purpose of this application.

Solicitors:
McKenna King Dempster, Hamilton for Applicant
Webb Gould Law, Hamilton for Respondent