IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA171/2023
[2023] NZCA 490

BETWEEN	WHAI RAWA RAILWAY LANDS LP Appellant
AND	BODY CORPORATE 201036 Respondent

Court: Brown and Wylie JJ

Counsel: D M Salmon KC, R M Keane and S G T Ma Ching for Appellant
J Heatlie and J P Wood for Respondent

Judgment: (On the papers) 11 October 2023 at 10.30 am

JUDGMENT OF THE COURT

A The application for leave to appeal is granted.

B Costs on the application are reserved pending the determination of the appeal.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] The respondent (the Body Corporate) is the lessee of the several units comprising the Parnell Terraces located at the corner of Ronayne Street and The Strand in Parnell, Auckland. Whai Rawa Railway Lands LP (Whai Rawa) is the present ground lessor of the Parnell Terraces under a 150-year ground lease which commenced

on 2 August 1996. The rental payable is calculated at 6 per cent per annum of the value of the unimproved land. The Body Corporate brought proceedings with the object of varying the amount of ground rent payable to Whai Rawa, seeking a declaration that the rental clause is harsh or unconscionable.

[2] Whai Rawa filed an application to strike out the claim and, in the alternative, an application for summary judgment against the Body Corporate. Those applications were dismissed in a judgment of Associate Judge Taylor dated 7 April 2022.[1] Whai Rawa's application to the High Court for leave to appeal under s 56(3) of the Senior Courts Act 2016 was declined.[2] Whai Rawa now applies to this Court under s 56(5) for leave to appeal.

The High Court judgment

[3] Whai Rawa submitted that the High Court had no jurisdiction to vary the lease by way of declaratory relief. It contended that the Body Corporate's claim was untenable and reliant on a misapplication of provisions in the Residential Tenancies Act 1986 (RTA).[3] It submitted that in enacting the "harsh and unconscionable" provision in s 78(1)(f) of the RTA, Parliament did not intend to empower the Tenancy Tribunal to amend mechanisms for the agreement of rent in ground leases between arm's-length parties.[4] Whai Rawa also submitted that the relevant clause was neither harsh nor unconscionable.[5]

[4] The Body Corporate submitted that its claim was founded on the plain and unambiguous wording of the legislation, that the pleadings alleged the jurisdictional facts on which the claim was founded, and that the relevant factual allegations are either uncontested or supported by the evidence of an appropriately qualified expert. Consequently it submitted there is a real issue to be tried and the claim ought to proceed to a full hearing.[6]

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1 *Body Corporate 201036 v Whai Rawa Railway Lands LP* [2022] NZHC 700 [Substantive decision].
2 *Body Corporate 201036 v Whai Rawa Railway Lands LP* [2023] NZHC 389.
3 Substantive decision, above n 1, at [39].
4 At [40].
5 At [41].
6 At [47].

[5] The judgment recorded that the parties' submissions dealt at length with the relevant sections of the Unit Titles Act 2010 (UTA) and the RTA.[7] However the Judge reached the view that the scope of s 78 of the RTA, as imported into the UTA by s 176 of that Act, should be determined at a substantive hearing and it was not a suitable question to be resolved in a strike-out or summary judgment context.[8]

[6] The Judge concluded that Whai Rawa had not established that the Body Corporate's claims were speculative and without foundation, nor that they were utterly baseless on the evidence. Whai Rawa had not shown that the Body Corporate's cause of action was untenable.[9] The Judge summarised his conclusions in this way:[10]

> (a) as to the legal interpretation of the relevant provisions of the UTA and the RTA, while the arguments lean in favour of [counsel for Whai Rawa's] submissions, the issue is not free from doubt and needs to be fully tested at a substantive hearing;
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> (b) if the jurisdictional argument is determined in favour of the Body Corporate, whether the formula in the rental clause is harsh or unconscionable needs to be fully tested in a substantive proceeding. There is expert evidence before the Court as to the [Body Corporate's] view, and this issue is unable to be resolved without hearing opposing views; and
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> (c) the Body Corporate claims that the issue of whether the lease was entered into between truly arm's-length parties goes to the issue of whether the rental clause in the lease is harsh or unconscionable. This issue needs to be dealt with through discovery as part of the substantive proceeding.

Relevant principles

[7] The requirement for leave in s 56(3) of the Senior Courts Act serves as a filtering mechanism to ensure that unmeritorious appeals of interlocutory orders, or appeals of interlocutory orders of no great significance to either the parties or more generally, do not unnecessarily delay the proceedings in which the orders were made.[11] In *Greendrake v District Court of New Zealand* this Court recognised the following considerations as being relevant on an application for leave to appeal:[12]

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7 At [58].
8 At [77].
9 At [94].
10 At [93].
11 *Finewood Upholstery Ltd v Vaughan* [2017] NZHC 1679 at [13].
12 *Greendrake v District Court of New Zealand* [2020] NZCA 122 at [6].

(a) a high threshold exists;

(b) the applicant must identify an arguable error of law or fact;

(c) the alleged error should be of general or public importance warranting determination or otherwise of sufficient importance to the applicant to outweigh the lack of general or precedential value;

(d) the circumstances must warrant incurring further delay; and

(e) the ultimate question is whether the interests of justice are served by granting leave.

Whai Rawa's submission

[8] While Whai Rawa accepts that the High Court correctly identified the relevant tests for strike out and summary judgment,[13] it contends that the Court misdirected itself as to the correct approach under those tests by accepting that an arguable interpretation of the relevant legislative provisions provided a basis for declining strike out and requiring that a trial proceed. It submits that it is well established that the Court's jurisdiction to strike out is not excluded by the need to decide difficult questions of law requiring extensive argument.[14]

[9] While acknowledging that the Court should be slow to strike out claims in a developing area of the law, Whai Rawa submits that its application raised "two simple points" that needed to be considered:

(a) whether an application under s 78(1)(f) of the RTA was available to the Body Corporate; and

(b) whether s 78(1)(f) could provide the relief sought.

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13 Substantive decision, above n 1, at [53]–[56].

14 Citing *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

[10] Whai Rawa submits that the Court erred in law or principle when concluding that:

(a) there were policy considerations relevant to the meaning of the UTA and RTA that needed to be considered at a substantive trial;

(b) as such it could not determine at the strike-out stage whether the Body Corporate's pleading disclosed a "unit title dispute" entitling it to seek relief under s 78(1)(f); and

(c) it could not determine at the strike-out stage whether, if the Body Corporate's factual allegations were presumed true, s 78(1)(f) permitted the type of orders sought.

It submits that any "policy considerations" were established when the UTA was enacted by Parliament and that such considerations do not depend on the parties, discovery, evidence or a trial.

[11] In its submissions Whai Rawa raises a new point, which is not included in the draft notice of appeal annexed to its application, to the effect that there is no ability for the Body Corporate to obtain the relief it seeks because the proceeding relates to the title of land, a matter in respect of which the Tenancy Tribunal has no jurisdiction.

The Body Corporate's submission

[12] Drawing attention to [68] of the substantive judgment, the Body Corporate emphasises that in the High Court Whai Rawa leaned heavily on the theory that the ground lease was a commercial bargain struck by parties at arm's length, and put forward specific policy considerations that it said the Court needed to consider.[15] The Body Corporate argues that the Judge fairly and rationally exercised his discretion to defer to a trial the interpretation of the legislation in view of the policy considerations which Whai Rawa had advanced. The Body Corporate characterises Whai Rawa's leave application as an attempt to relitigate its failed applications in the

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[15] Substantive decision, above n 1.

High Court, observing that Whai Rawa has reformulated its arguments to sanitise them of the policy considerations which it previously argued were relevant to a proper interpretation of s 78(1)(f).

[13] The Body Corporate submits that the decision to defer the interpretation of the legislation was not an error of law or principle. It observes that on an application for strike out or summary judgment the Court "may" determine complex issues of law, but is not required to do so. The Court may, in its discretion, leave those issues to be determined at the substantive hearing where it considers it appropriate to do so.

[14] With reference to Whai Rawa's new argument that the dispute relates to the title of land, the Body Corporate submits that, that issue not having been raised or dealt with by the High Court, it cannot constitute an error relevant to the grant of leave. It disputes the proposition that the proceeding is about the title of land but argues that, in any event, that consideration does not affect the High Court's jurisdiction to hear unit title disputes under s 173 of the UTA.

Discussion

[15] Soon after the introduction of the summary judgment procedure in 1986, this Court signalled that the procedure was apt for addressing claims that turned on questions of law. In *Pemberton v Chappell*[16] this Court said:

> Where the only arguable defence is a question of law which is clear-cut and does not require findings on disputed facts or the ascertainment of further facts the Court should normally decide it on the application for summary judgment, just as it will do so on an application to strike out a claim or defence before trial on the ground that it raises no cause of action or no defence …

[16] One of the authorities cited in support of that proposition was *European Asian Bank AG v Punjab & Sind Bank (No 2)*, where Robert Goff LJ stated:[17]

> … this court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under [the summary judgment provision], even if the question of law is at first blush of some complexity and therefore takes "a little longer to understand". It may offend against the whole purpose of [the summary judgment provision] not to decide a case which raises a clear-cut issue, when full argument has been addressed to the court, and the only result

16 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 4.
17 *European Asian Bank AG v Punjab & Sind Bank (No 2)* [1983] 1 WLR 642 (CA) at 654.

> of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal …

The approach taken in *Pemberton* was reiterated only days later in *International Ore & Fertilizer Corporation v East Coast Fertiliser Co Ltd*.[18]

[17] However that approach is subject to the qualification most recently explained by Elias CJ in *Sandman v McKay*:[19]

> But where the cause of action is novel or where established principle must be applied to novel circumstances, peremptory determination in the absence of full understanding of context established at a hearing of the facts is often not appropriate. A court may refuse summary judgment if amendment to the statement of claim reasonably in prospect would raise a cause of action upon which the court is not satisfied the plaintiff could not succeed.

[18] It is common ground that the Body Corporate's claim is novel. However this is not a claim in tort or in equity where the factual matrix provides important context for the decision whether a new duty or obligation should be recognised. Rather it is a claim which has statute law as its launching pad, indeed the interaction of two statutes. Unless the Body Corporate can establish that the statutes in combination confer jurisdiction on the High Court to entertain its claim and grant the relief it seeks, its claim must founder. It is that threshold question that is the target of Whai Rawa's applications for strike out or summary judgment. That issue is one of statutory interpretation. If it is resolved in Whai Rawa's favour that would be the end of the proceeding.

[19] The Body Corporate submits that discovery and a trial are necessary, emphasising that there are disputed facts which have been amplified as a consequence of the amended statement of claim filed subsequent to the substantive decision. In *Select 2000 Ltd v ENZA Ltd* this Court allowed an appeal against a decision that a claim for breach of statutory duty was unsuitable for summary judgment.[20] In response to a submission that the factual background created by evidence at trial would be useful "backlighting", this Court considered that was more likely to distort

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18 *International Ore & Fertilizer Corporation v East Coast Fertiliser Co Ltd* [1987] 1 NZLR 9 (CA) at 16.

19 *Sandman v McKay* [2019] NZSC 41, [2019] 1 NZLR 519 at [113] (footnotes omitted).

20 *Select 2000 Ltd v ENZA Ltd* [2002] 2 NZLR 367 (CA).

what must be an objective and rigorous statutory construction exercise.[21] We consider that the same approach is apt in this case.

[20] As Whai Rawa's submissions correctly observe, there is no clear authority on the interpretation, and more particularly the interaction, of the material sections of the UTA and RTA. In these circumstances we consider that the Judge should have determined the statutory interpretation issue. It is an issue which potentially has broader significance than the present case. Whai Rawa submits that findings on the scope and meanings of the relevant provisions of the UTA and RTA are likely to have significant ramifications for ground lessors and lessees connected with unit title developments throughout New Zealand. Consequently we consider that the high threshold recognised in *Greendrake* is crossed.

Result

[21] The application for leave to appeal is granted.

[22] Costs on the application are reserved pending the determination of the appeal.

Solicitors:
Lee Salmon Long, Auckland for Appellant

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21 At [27].