

IN THE SUPREME COURT OF NEW ZEALAND

SC 75/2013  
[2013] NZSC 117

BETWEEN                      ARCADIA HOMES LIMITED (IN  
LIQUIDATION)  
Applicant

AND                              MORE TO THIS LIFE LIMITED AND  
ANDREW GEORGE CLARK AS  
TRUSTEES OF THE ULTIMATE  
LIFESTYLE TRUST  
Respondents

Court:                      Elias CJ, Glazebrook and Arnold JJ

Counsel:                      G P Curry and C R Andrews for Applicant  
C S Withnall QC for Respondents

Judgment:                      11 November 2013

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**JUDGMENT OF THE COURT**

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- A    The application for leave to appeal is refused.**
- B    The applicant must pay the respondents costs of \$2,500 plus reasonable disbursements, to be fixed, if necessary, by the Registrar.**
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**REASONS**

[1]    Mr Andrew Guest, who was according to the Companies Office records the sole director of the applicant company, Arcadia Homes Ltd (in liquidation) (Arcadia), signed a contract (in the form of the eighth edition of the REINZ/ADLS agreement) for the purchase of a holiday home from the respondents. Mr Guest signed the contract on behalf of Arcadia alongside the description “Director”. The contract was expressed to be “subject to and conditional upon” the approval of

Arcadia's directors by a specified date.<sup>1</sup> Clause 8.7 of the contract relevantly provided that any condition was a condition subsequent and that a party for whose benefit the condition was inserted was obliged to "do all things that may be reasonably necessary to enable the condition to be fulfilled by [the due date]".<sup>2</sup>

[2] Several weeks after the contract was made, Arcadia's solicitors wrote to the respondents' solicitors advising that the contract was at an end as Arcadia's directors, following inspection, valuation advice and their due diligence, were not satisfied as to the purchase. The respondents did not accept this and called on Arcadia to settle. When Arcadia refused, the respondents cancelled the contract and put the property on the market again. It subsequently sold, but at a significantly reduced price. The respondents sued Arcadia for the difference.

[3] The respondents succeeded before French J in the High Court.<sup>3</sup> The Judge held that Mr Guest was Arcadia's sole director at all relevant times, rejecting an argument that Mr Guest's brother was, effectively, also a director;<sup>4</sup> that the directors' approval clause was a condition subsequent, not a condition precedent as argued by Arcadia;<sup>5</sup> and that the clause was inoperative as it was effectively a stratagem by Mr Guest to lock the respondents into holding the property without providing any consideration, given that there was no other director to give approval to the transaction.<sup>6</sup> French J also held that, in the event that the directors' approval clause did operate, Arcadia could not take advantage of it as its directors had not in fact discharged their obligations under cl 8.7 (by undertaking valuations, investigations and the like).<sup>7</sup>

[4] The Court of Appeal rejected Arcadia's appeal, although it disagreed with French J as to the effect of the directors' approval clause.<sup>8</sup> While accepting that there was force in French J's view that it made no sense to interpret the clause as giving

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<sup>1</sup> *More To This Life Ltd v Arcadia Homes Ltd* [2012] NZHC 165 [*Arcadia* (HC)] at [2].

<sup>2</sup> *Arcadia* (HC), above n 1, at [102].

<sup>3</sup> *Arcadia* (HC), above n 1, at [120].

<sup>4</sup> At [78].

<sup>5</sup> At [83]–[84].

<sup>6</sup> At [95].

<sup>7</sup> At [103]–[107].

<sup>8</sup> *Arcadia Homes Ltd (in liquidation) v More To This Life Ltd* [2013] NZCA 286, [2013] NZCCLR 22.

Mr Guest the opportunity to approve what he had already agreed to, the Court preferred the view that the clause did give Mr Guest that opportunity.<sup>9</sup> The Court drew a distinction between Mr Guest signing the agreement as a director and approving it as a director. However, the Court went on to agree with French J that, in fact, Mr Guest had not undertaken the reasonable steps which he was required by the cl 8.7 to undertake, so could not avail himself of the benefit of the directors' approval clause.<sup>10</sup>

[5] In its application for leave to appeal, Arcadia submits that this is the first case in which a directors' approval clause has been considered by the New Zealand courts. It says such clauses are important in commercial terms and notes that the High Court and Court of Appeal differed as to the interpretation of this particular clause. Arcadia challenges the Court of Appeal's conclusion that Mr Guest did not comply with his obligations under cl 8.7.

[6] We are not satisfied that it is necessary in the interests of justice to hear and determine the proposed appeal. We readily accept that directors' approval clauses may raise issues of general or public importance and/or matters of general commercial significance. But the fact that the High Court and Court of Appeal interpreted the clause at issue differently was ultimately immaterial as both Courts concluded, having examined the evidence in detail, that Mr Guest failed to take reasonable steps as required by cl 8.7. As a result, Arcadia was not entitled to rely on the directors' approval clause. Given that there are concurrent findings on that aspect and that they are essentially factual, this is not a case where consideration of directors' approval clauses by this Court is justified.

[7] The application for leave to appeal is dismissed. The applicant must pay the respondents costs of \$2,500 plus reasonable disbursements, to be fixed, if necessary, by the Registrar.

Solicitors:  
McVeagh Fleming, Auckland for Applicant  
Lucas & Lucas, Dunedin for Respondents

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<sup>9</sup> At [52]–[53].  
<sup>10</sup> At [76]–[78].