IN THE SUPREME COURT OF NEW ZEALAND

SC 20/2013
[2014] NZSC 178

BETWEEN	CHUAN WU Appellant
AND	BODY CORPORATE 366611 First Respondent
	THETA MANAGEMENT LIMITED Second Respondent

Court:	Elias CJ, McGrath, William Young, Glazebrook and Tipping JJ
Counsel:	B P Rooney for Appellant N R Davidson QC for Respondents
Judgment:	5 December 2014

JUDGMENT OF THE COURT

A The application for recall is dismissed.

B The respondents must pay costs of $2,500 to the appellant.

REASONS

Introduction

[1] The main issue in this appeal was whether the respondents had wrongfully interfered with Mr Wu's ability to rent a unit he owns in the Empire Apartments building in Auckland and, if so, whether Mr Wu had taken adequate steps to mitigate his loss. Mr Wu was successful in the High Court where Asher J found the

respondents liable to Mr Wu in nuisance.[1] The Court of Appeal found in his favour on a more limited basis.[2]

[2] This Court, on 9 October 2014, allowed Mr Wu's appeal against the Court of Appeal judgment and dismissed the respondents' cross appeal.[3] The judgment of Asher J on the first cause of action was reinstated (but in trespass rather than nuisance), as were the costs and interest awards made in the High Court.[4] This meant that damages for loss of rental income ran from 1 September 2007.[5]

[3] On 14 October 2014, the respondents applied for a direction from this Court, under r 5(1) of the Supreme Court Rules 2004, that the reinstated damages be adjusted to run from 29 November 2007. This was on the basis that the Court's judgment held that Mr Wu had possession of his unit and joint possession of the common property once the liquidator disclaimed the Academic Accommodation Management (3) Ltd (Academic) lease on 28 November 2007.[6] Therefore, the respondents submit that damages should have run from 29 November 2007 and not from 1 September 2007.

[4] As pointed out by counsel for Mr Wu, Mr Rooney, the respondents' application is not properly made under r 5(1) of the Supreme Court Rules, which confers a power to give directions that seem necessary for the just and expeditious resolution of any matter that arises in a case. The appeal has been heard and judgment given. What is being asserted is that the Court made an error in reinstating the High Court judgment from 1 September 2007.[7] That can only be dealt with by

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1 *Wu v Body Corporate 366611* [2011] 2 NZLR 837 (HC) [*Wu* (HC)].

2 *Body Corporate 366611 v Wu* [2012] NZCA 614, [2013] 3 NZLR 522 (Hammond, Arnold and Heath JJ) [*Wu* (CA)].

3 *Wu v Body Corporate* [2014] NZSC 137 [*Wu* (SC)].

4 The costs and interests awards were made in a supplementary judgment: see *Wu v Body Corporate 366611* HC Auckland CIV-2009-404-5756, 4 October 2011 [*Wu* (HC) (Costs and Interest)] at [17]–[19].

5 Damages for lost rent ran for the period of 1 September 2007 to 30 November 2009: *Wu* (HC), above n 1, at [68]. The interest on the judgment sum ran from 1 December 2009 to 30 May 2011: *Wu* (HC) (Costs and Interest), above n 4, at [19].

6 See *Wu* (SC), above n 3, at [16] and [115]. For the background in relation to the Academic lease, see *Wu* (SC) at [11]–[19].

7 This was made clear in the first and second respondents' joint memorandum dated 21 October 2014.

way of an application for recall and we thus treat the respondents' application as one for recall of our judgment.

Submissions of the parties

[5] In response to the respondents' application, it is submitted, on behalf of Mr Wu, that Mr Wu's entitlement to possession of his unit was not dependent on the disclaimer of the lease by the liquidators of Academic. The lease provided that Mr Wu had a right of re-entry if the rent was unpaid for 28 days or if Academic became insolvent. As at 1 September 2007, both of those were the case.[8] Further, Academic surrendered the lease by its letter of 22 August 2007. This letter stated its resignation would be effective from 31 August 2007.[9]

[6] In addition, it is submitted that all parties acted as if Mr Wu was entitled to re-let his unit from 1 September 2007. Theta Management Ltd (Theta) tried to persuade Mr Wu to enter into a lease with Theta[10] but Mr Wu's evidence before the High Court was that he wanted to find his own tenants.[11]

[7] In any event, it is submitted that the trespass occurred in relation to common property and Mr Wu did not lease his interest in the common property to Academic. This Court's finding related to trespass in relation to the common property[12] and that means that neither the lease nor the disclaimer had any bearing on the trespass by the respondents.

[8] The respondents submit that Mr Wu is asking the Court to uphold the High Court's measure of damages on a basis that is inconsistent with this Court's judgment, which held that Mr Wu had possession of his unit once the liquidator disclaimed the Academic lease. They say he is not entitled to do this.

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8 We accept Mr Wu's submission that insolvency is an inference that can be drawn from the evidence as Academic, a short time later, went into liquidation and was in arrears of rent.

9 See *Wu* (SC), above n 3, at [16].

10 See at [18] and [27]–[29].

11 See at [19].

12 This was on the basis of trespass where a co-owner expels or ousts another from the land. See at [114]–[118].

[9] In addition, they submit that there is no evidence of re-entry, even if there had been a right of re-entry for non-payment of rent or insolvency. In relation to Academic's surrender of the lease, the respondents point out that, by letter of 30 August 2007, Mr Wu, through his lawyers, expressly affirmed the lease.

[10] The respondents accept that only the unit, not the common property, was leased.[13] They submit that this is irrelevant, however, because the damages sought were for lost rental income for the unit, which remained subject to the Academic lease until disclaimed on 28 November 2007.

Discussion

[11] We deal first with the respondents' contention that it is not open to Mr Wu to resist the application for recall of the judgment by referring to material that was not in the judgment. We do not accept that submission. The respondents are asserting that the judgment should be recalled because there is an error in the judgment as to the proper starting date for damages. It must be open to Mr Wu to resist that application by arguing, on the basis of the evidence before the Court, that there was no such error.

[12] Further, while in the respondents' notice of appeal in the Court of Appeal, one of the grounds of appeal was that damages should have been calculated not from 1 September 2007 but from the time the liquidators of Academic disclaimed the leases, that was not an express ground in the cross appeal before this Court. Nor was it pursued in the submissions to this Court.[14] Mr Wu therefore has not had an adequate opportunity to address the point and it is appropriate that he be able to do so in the context of this application where the issue is now of central importance.

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13 This was made clear in their joint submissions in reply dated 21 October 2014.

14 It was raised briefly in the schedule to the first and second respondents' submissions in reply to the appellant's submissions on the substantive appeal. These were filed two days before the hearing. In the schedule, the respondents stated "On 31 August 2007, and until 28 November 2007, Mr Wu's unit remained under lease to Academic. Mr Wu had no right to let it to anyone else, or to demand access be provided by the respondents." However, the respondents did not explicitly argue that this affected damages. Mr Rooney mentioned the issue in passing at the hearing. However, the issue was never squarely put before this Court.

[13] Turning now to Mr Wu's submissions, it is accepted by the respondents that the Academic lease did not extend to the common property.[15] Assuming this is the case, it means that Mr Wu had never relinquished possession of the common property and therefore the conclusion in the judgment that Mr Wu had joint possession of the common property only once the liquidator disclaimed the Academic lease is incorrect.[16] Liability in trespass therefore ensued from the time entry to the common property was denied when, on 31 August 2007, all the existing electronic access cards were deactivated so that they no longer worked.[17]

[14] The respondents are correct, however, that this is not the end of the matter. The damages are for lost rental income. In the High Court, Asher J fixed the date for the start of damages at 1 September 2007, being the day after the cards were deactivated. This was presumably on the basis that, had the cards not been deactivated, Mr Wu would have been able to let his unit from that date.

[15] The respondents argue that the Academic lease (and Mr Wu's affirmation of it) would have stopped Mr Wu from letting his unit until the liquidator's disclaimer. We do not accept this submission.

[16] It is true that a letter was sent on 30 August 2007, on behalf of Mr Wu, affirming the Academic lease. This was on the basis that there had been a purported unilateral cancellation of the lease and therefore repudiation of the lease by Academic. The right to sue for damages was expressly preserved.

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15 As stated above at n 13, this concession was made in the respondents' joint submissions in reply. The deed of lease states "[The Lessor] leases to the Lessee and the Lessee takes on lease the Premises (if any) described in the First Schedule on the covenants, terms and conditions set out in the attached schedules". However, the only property identified in cl 1 of the first schedule is "Principal Unit 810 on Deposited Plan 366611 being the unit comprised in certificate of title 270406." As a result, it is arguable that the common property was never leased. We do note that, in the second schedule, under cl 1.1 (where "premises" is defined) and cl 7.1, there is provision for the "lessor's non-exclusive right to the use of the Common Property" and the lessee's quiet enjoyment of the premises. In light of the respondents' concession, however, we do not need to decide on the significance of the quiet enjoyment clause.

16 See *Wu* (SC), above n 3, at [115] and n 95.

17 See at [26] and n 15. In addition (as we discuss below), even assuming Mr Wu had leased the common property to Academic, if Mr Wu had been given entry, he would likely have sought to terminate the lease on the basis of the Academic breaches. If the lease had been terminated, he would have had an immediate right to possession of the common property and therefore could have brought action for trespass by relation. See Bill Atkin "Trespassing on Land" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) 467 at 477–478.

[17] It appears from his evidence before the High Court that Mr Wu thought that Academic and/or Theta were continuing to rent out his unit, despite the purported cancellation by Academic.[18] If Mr Wu had had access to the common areas from 1 September 2007 (which he did not because of the trespass by ouster), then he would have been able to ascertain that his unit was not rented out and would have been able to find his own tenants, his evidence before the High Court being that this was his intention. Academic (and its liquidators) would not have sought to restrain Mr Wu from treating the lease as at an end, given that Academic had already attempted to surrender the lease and was in any event in arrears of rent and insolvent, giving rise to a right of re-entry.[19]

[18] It is argued by the respondents that there was no attempt at re-entry by Mr Wu. That is incorrect. Mr Wu's solicitors sent an email letter dated 25 September 2007 on behalf of Mr Wu and a number of other owners requesting access cards for the units owned by its clients. There were also the other attempts to get access to the building, as outlined in our judgment.[20]

[19] It may well be, as a practical matter, that, even if Mr Wu had been given access to the building by the respondents on 1 September 2007, he would not have been able to rent his unit from that date and there may have been a delay of a week or two in tenanting the unit. This practical issue was not, however, the focus of the leave given in this Court. Nor was it the focus of argument (even on this application).

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[18] For example, Mr Wu's affidavit, dated 6 August 2009 at [38], states "I have not received any rent for my apartment since Theta took over. I do not know what has happened to the rent paid by the tenants I assume to have been living in the apartment at the time."

[19] The respondents, in their submissions in reply dated 21 October 2014, stated that, even if there was a right of re-entry under the lease, Mr Wu could not have attempted re-entry as he never issued the requisite notice under s 118(1) of the Property Law Act 1952 (in force at the time). However, s 118(7) explicitly recognises that this section (requiring notice) "shall not affect the law relating to re-entry or forfeiture in case of non-payment of rent".

[20] See also the letter of 22 October 2007 set out in *Wu* (SC), above n 3, at [27]. Further, in an attempt to get access, Mr Wu and a number of other owners applied to the District Court for injunctions: see *Mai v Body Corporate No 366611* DC Auckland CIV-2008-004-14, 16 January 2008 and *Mai v Body Corporate No 366611* DC Auckland CIV-2008-004-14, 14 February 2008.

Conclusion

[20] The circumstances in which this Court may grant a recall application were considered in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*.[21] The Court affirmed the three categories of cases set out in *Horowhenua County v Nash (No 2)* as to when a judgment may be recalled.[22] The only relevant ground is the third, which allows for a recall "where for some other very special reason justice requires that the judgment be recalled".[23]

[21] In the current case, that threshold has not been met. The point that the respondents seek to raise was not squarely raised before this Court. A recall application is not the proper time to attempt to raise new points and particularly ones that may require resolution of new factual and legal questions.

Result

[22] The application for recall is dismissed.

[23] Costs of $2,500 are awarded to the appellant.

Solicitors:
Terry Hibbitt, Auckland for Appellant
Clendons, Auckland for First Respondent
Minter Ellison Rudd Watts, Auckland for Second Respondent

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21 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76 at [2].

22 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633.

23 At 633.