

IN THE SUPREME COURT OF NEW ZEALAND

SC 114/2015
[2015] NZSC 158

BETWEEN DOUGLAS BANKS AND CHRISTINE SANDRA BANKS
Applicants

AND GREY DISTRICT COUNCIL
Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: Applicants in person
J Shackleton for Respondent

Judgment: 28 October 2015

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B Costs of \$2,500 are payable to the respondent.**
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REASONS

[1] Mr and Mrs Banks apply for leave to appeal against a judgment of the Court of Appeal,¹ which dismissed an appeal against two decisions (substantive and costs) of Fogarty J in the High Court.²

Background

[2] Mr and Mrs Banks are the registered proprietors of a ground lease of residential property in Greymouth, from the Grey District Council. The first lease

¹ *Banks v Grey District Council* [2015] NZCA 417 (Ellen France P, Harrison and Winkelmann JJ) [*Banks* (CA)].

² *Grey District Council v Banks* [2013] NZHC 1485 [*Banks* (HC Substantive)]; and *Grey District Council v Banks* [2013] NZHC 2304 [*Banks* (HC Costs)].

for the land was granted in 1916 by the then lessor, the Greymouth Harbour Board. In 1929 the lease was transferred to Mr Banks' grandfather, Mr Ellery. In 1937 the Harbour Board again leased the land to Mr Ellery for a term of 21 years. That lease was extended in 1958 until 1979.

[3] In 1979 a new form of lease was entered into by Mr Ellery and the Harbour Board, containing for the first time a provision for rent reviews every seven years. In 1981, the 1979 lease was inherited, on Mr Ellery's death, by Mr Banks' mother. In the same year it was transferred to Mr and Mrs Banks by way of registered Memorandum of Transfer.

[4] The lease term under that 1979 lease expired in 2000 but a new lease was not entered into until 2006 (the 2000 lease).³ The lessor was now the Grey District Council.⁴ Like the 1979 lease, the new lease provided for seven yearly rent reviews. The rent payable by Mr and Mrs Banks under the new lease came up for review on 1 November 2007.

[5] The Council advised Mr and Mrs Banks that the reviewed rent had been valued at \$3,260 per annum. Mr and Mrs Banks were asked to advise the Council whether they accepted the renewal of lease at that rate, whether they required the rent to be determined by arbitration, or whether they did not want to renew the lease. Mr and Mrs Banks chose none of these options but refused to pay rent at the new rate.

[6] By July 2011 the outstanding rent totalled \$10,580. Because of the failure to remedy their continuing breach, the Council issued a notice under the Property Law Act 2007.⁵ Mr and Mrs Banks did not pay the arrears in response to this notice, which led to the Council filing an originating application for the cancellation of the lease.

³ The Banks remained in possession of their house on the site in the intervening period. The Banks "vigorously negotiated" the term of the lease and did not take up the alternative offer of a lease based on historical lease terms: see *Banks (CA)*, above n 1, at [8].

⁴ The Council was constituted under the Local Government (West Coast Region) Reorganisation Order 1989. All the assets of the Harbour Board were transferred to it.

⁵ The Council issued a notice in 2008 formally notifying the Mr and Mrs Banks of the breach but had not acted on that notice.

[7] In the High Court, Fogarty J held that Mr and Mrs Banks were bound by the terms of their lease and so were liable for payment of the arrears.⁶ That decision and Fogarty J's costs orders were upheld on appeal. The Court of Appeal also declined an order for additional discovery.⁷

Court of Appeal decision

[8] As the Court of Appeal noted, the arguments on appeal largely rehearsed the arguments considered and rejected by Fogarty J.⁸ Mr and Mrs Banks first argued that the 1979 and 2000 lease should have been documented as renewals of the 1937 (perpetually renewable) lease.⁹ As successors in title, Mr and Mrs Banks argued that they should have the benefit of the 1937 lease. Secondly, Mr and Mrs Banks argued that the terms of the 1937, 1979 and 2000 leases are not binding as they were either illegal contracts or entered into beyond the Harbour Board's, and later the Council's, authority. Thirdly, Mr and Mrs Banks argued that notations on the Land Transfer Act register indicating that the successive leases were renewals of the previous leases means the current lease terms are those from the 1937 lease.

[9] As to the alleged misrepresentation by the Harbour Board to Mr Ellery, the Court of Appeal agreed with Fogarty J that Mr and Mrs Banks had not discharged the required evidential burden.¹⁰ As to the alleged illegality of the earlier leases, the Court of Appeal held they were not illegal and, even if they were, it was not satisfied that Mr and Mrs Banks would be entitled to relief under the provisions of the Illegal Contracts Act 1970.¹¹ With regard to the Land Transfer Act argument, this was rejected by the Court because a notation on the register could not transform the nature of the registered interest.¹²

[10] Despite it not being dispositive of the appeal, the Court, for completeness, also considered whether the 1937 lease was perpetually renewable. The Court was

⁶ *Banks* (HC Substantive), above n 2, at [72]. Mr and Mrs Banks had paid the arrears before the Court of Appeal hearing: see *Banks* (CA), above n 1, at [3].

⁷ *Banks* (CA), above n 1, at [71]–[74].

⁸ At [16].

⁹ This was on the basis of an alleged misrepresentation to Mr Ellery.

¹⁰ At [32].

¹¹ At [33] and [52]–[63].

¹² At [37]–[39].

satisfied it was not.¹³ However, even if it was perpetually renewable, the Court said that there was no evidence that the 2000 lease did not reflect the common intention of the parties. There could therefore be no rectification of the 2000 lease to reflect the terms of the 1937 lease.¹⁴

Grounds of proposed appeal

[11] Mr and Mrs Banks seek leave to appeal against the Court of Appeal's decision, effectively on the same grounds as they advanced both in the High Court and the Court of Appeal. They also say that the additional discovery order should have been made on the basis that the Court of Appeal wrongly concluded that legal privilege applied to the material sought.¹⁵

Discussion

[12] The proposed appeal relates to the very particular circumstances of this lease. As such, it raises no issue of general or public importance or of general commercial significance.¹⁶ Nor does anything put forward by Mr and Mrs Banks suggest a risk that the Court of Appeal decision on the points raised may have been in error or that there is a risk of a miscarriage of justice.¹⁷ Mr and Mrs Banks negotiated and signed the current lease in 2006 and there is no appearance of injustice in requiring them to be bound by its terms.

Result

[13] The application for leave to appeal is dismissed. Costs of \$2,500 are payable to the respondent.

Solicitors:
Simpson Grierson, Wellington for Respondent

¹³ At [51].

¹⁴ At n 18.

¹⁵ If leave is not given on the substantive matters, the discovery point is academic.

¹⁶ Supreme Court Act 2003, s 13(2)(a) and (c).

¹⁷ See s 13(2)(b) and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].