IN THE SUPREME COURT OF NEW ZEALAND

SC 70/2016
[2016] NZSC 125

BETWEEN	DEREK PETER WHEELDON AND CAROL ANN WHEELDON, ANTHONY JOHN BUTCHER AND RUTH BARBARA ROGERS, LARRY LAWRENCE SMALL AND KM TRUSTEE SERVICES LIMITED, IVOR ANTHONY MILLINGTON AND NEVILLE EADE Applicants
AND	BODY CORPORATE 342525 Respondent

Court:	William Young, O'Regan and Ellen France JJ
Counsel:	B E Brill for Applicants T J G Allan for Respondent
Judgment:	14 September 2016

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants are to pay the respondent costs of $2,500.

REASONS

[1] This application for leave to appeal arises from a dispute between the Body Corporate for an apartment complex that has weathertightness issues and the owners of five (out of 22) units in the complex. The Body Corporate proposes a comprehensive repair; the applicants say this is outside the powers of the Body Corporate under the Unit Titles Act 2010 (the Act) and that only targeted repairs to some units are necessary.

[2] The applicants sought declarations and injunctive relief to prevent the comprehensive repair work proceeding. They were unsuccessful in the High Court[1] and the Court of Appeal.[2] They seek leave to appeal against the Court of Appeal decision.

[3] The Court of Appeal dealt with six grounds of appeal from the High Court decision. It found against the applicants on all of them. The applicants now seek to contest five out of those six grounds of appeal. We will deal with the application by reference to each of those five grounds.

[4] The first concerns the relationship between s 138(1)(d) and s 80(1)(g) of the Act. Section 138(1)(d) requires a body corporate to repair and maintain "any building elements and infrastructure that relate to or serve more than 1 unit". Section 80(1)(g) requires an owner of a unit to repair and maintain the unit to ensure that no damage or harm is or has the potential to be caused to the common property, any building element, any infrastructure, or any other unit in the building. The applicants wish to argue that the latter takes priority over the former and that, on the facts of the present case, that means that they as owners should determine what repairs to make to their respective units, rather than having a comprehensive repair undertaken by the Body Corporate.

[5] We accept that this issue of statutory interpretation could potentially be a matter of public importance, but we do not consider there is sufficient prospect of disturbing the findings of the Court of Appeal and the High Court on this point to warrant the grant of leave.

[6] We do not see the applicants' argument based on common law rights of fee simple owners as assisting the determination of the issue, which we see as one of statutory interpretation, reading the relevant provisions in light of the scheme of the Act as a whole and in light of the legislative history. Nor do we see the alternative argument based on overlapping obligations as having any prospect of success.

---

1 *Wheeldon v Body Corporate 342525* [2015] NZHC 884 (Muir J) [*Wheeldon* (HC)].

2 *Wheeldon v Body Corporate 342525* [2016] NZCA 247 (Winkelmann, Courtney and Clifford JJ) [*Wheeldon* (CA)].

[7] The second point is a subset of the first. As noted, s 138(1)(d) refers to building elements and infrastructure that relate to or serve more than one unit. It does not mention building elements and infrastructure that relate to the common property. In the High Court, Muir J read into s 138(1)(d) the additional words "or common property or both".[3] The Court of Appeal considered it was unnecessary to read in these words because under s 138(1)(a), the body corporate must repair and maintain the common property.[4] That provided the authority for the Body Corporate to carry out work required to address water ingress into the common property (the carpark). There is no doubt that the Body Corporate must repair and maintain the common property and the issue that arises in the present case is one which is specific to the layout of the building concerned and therefore not a matter that raises any point of public importance.

[8] The third ground was whether s 138(1)(d) was engaged in relation to exterior panels and decks. As the Court of Appeal found,[5] the question of whether a building element or infrastructure relates to more than one unit is essentially a factual question, and we do not see it as raising any generic point that would warrant leave to appeal to this Court.

[9] The fourth ground relates to the onus of proof. Did the Body Corporate need to prove that its obligation to repair under s 138(1)(d) was engaged, or was the burden on the applicants to prove that the jurisdictional requirements of the provision were not satisfied? The Court of Appeal found that as plaintiffs seeking declaratory relief, it was for the applicants to establish their case.[6] The applicants did not make specific submissions on this point and we do not see it as an appropriate point for the grant of leave. The outcome of the case would be affected only if the points in issue were in equipoise and that could be established only after a full review by this Court of the factual findings. We do not see that as practical and, in any event, we see it as unlikely to lead to any different conclusion from that reached in the Courts below.

---

3 *Wheeldon* (HC), above n 1, at [60].
4 *Wheeldon* (CA), above n 2, at [47].
5 At [55].
6 At [78]–[81].

[10] The fifth point (which was the sixth ground of appeal in the Court of Appeal) arose from the fact that one of the applicants obtained a building consent from the relevant local authority to re-tile the deck of his apartment after the High Court decision, but before the hearing in the Court of Appeal. He sought to produce this as evidence in the Court of Appeal to support the proposition that the limited work he proposed to undertake would meet the standards of the local authority, and that this meant the more extensive work as proposed by the Body Corporate was not required to meet the building code. The Court of Appeal refused to admit the evidence.[7] We do not see any point of public importance arising from this aspect of the case: it is entirely facts-specific. In addition, we do not see any real prospect that the applicants would succeed in establishing, contrary to the Court of Appeal's view,[8] that this evidence was cogent. Nor do we see any reason to regard the Court of Appeal's finding as a criticism of the local authority.

[11] Having considered each of these grounds individually and all of them collectively, we do not consider that there is any point of sufficient importance to justify the giving of leave, nor do we see any likelihood of a miscarriage of justice if leave is not granted.

[12] We therefore dismiss the application for leave to appeal.

[13] We award costs of $2,500 to the respondent.

Solicitors:
B E Brill Ltd, Paihia for Applicants
Grove Darlow & Partners, Auckland for Respondent

---

7 At [114].
8 At [111].