

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 121/2019
[2020] NZSC 7**

BETWEEN DAVID EDWARD THOMAS
 Applicant

AND IAN ALLEN THOMPSON
 Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: S A Grant for Applicant
 W A McCartney for Respondent

Judgment: 19 February 2020

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay costs of \$2,500 to the respondent.**
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REASONS

[1] The applicant, Mr Thomas, is the liquidator of DD Construction Ltd (DDC). DDC was engaged to undertake repairs to unit-titled townhouses owned by the respondent, Mr Thompson. The townhouses were in a unit title development that had weathertightness issues. The remedial costs exceeded the estimates DDC had provided. Mr Thompson became concerned about this and refused to pay four invoices from DDC amounting to just over \$20,000.

[2] The parties agreed that sum would be held on trust by a solicitor until the dispute between DDC and the respondent was resolved. This trust arrangement was part of a settlement designed to ensure that mortgages against the titles that had been

registered by DDC were discharged. The respondent not only asserts that the \$20,000 is not owing, but he is also seeking damages against DDC of over \$260,000.

[3] The respondent asked the Court to release the funds held in the solicitor's trust account when the respondent became aware of DDC's liquidation. The Court asked the applicant to respond to this request, and the applicant refused to agree to the release of the funds. The respondent then applied to the High Court under s 284(1)(b) of the Companies Act 1993 for review of the decision of the liquidator. Associate Judge Osborne decided that the decision was unreasonable and overturned it.¹

[4] The applicant then appealed to the Court of Appeal which dismissed his appeal.² He now applies for leave to appeal to this Court against the decision of the Court of Appeal.

[5] The applicant says the proposed appeal involves a matter of general public importance, namely the threshold at which the Court should intervene in an ordinary day to day decision of a liquidator. The applicant seeks to argue that the decision was commercially prudent and that the Court of Appeal was wrong to take into account the fact that he had not obtained legal advice. The argument is that the effect of this latter observation by the Court of Appeal is that liquidators will have to take legal advice even on matters of minor importance.

[6] We do not consider the application meets the criteria in s 74 of the Senior Courts Act 2016 for the grant of leave. No point of public importance arises and there is no appearance of a miscarriage of justice.

[7] The narrative of facts leading to the agreement that the \$20,000 would be held in a solicitor's trust account is complex and there are a number of procedural problems as well, all of which are described in the Court of Appeal judgment. The case is very fact-specific. The standard applied by the High Court and Court of Appeal in dealing with the appeal against the applicant's decision under s 284(1)(b) was not novel: rather, both Courts applied existing authority.³ The applicant's counsel accepted in

¹ *Thompson v Thomas* [2018] NZHC 1495.

² *Thomas v Thompson* [2019] NZCA 503 (Stevens, Mallon and Moore JJ) [CA judgment].

³ See CA judgment, above n 2, at [40] and [47].

the Court of Appeal that the Associate Judge had applied the right standard.⁴ The applicant's complaint is that the test was not correctly applied to the facts of the case.⁵ Accordingly, no point of public importance or point of commercial significance arises.⁶

[8] Nor do we consider that the Court of Appeal suggested that the absence of legal advice was the reason the decision was unreasonable. The Court simply found that the absence of legal advice was a relevant factor in assessing whether the liquidator had given the decision proper consideration.⁷ It is hard to see why that is a controversial statement. We do not agree that this will require liquidators to obtain legal advice when making decisions on minor matters.

[9] We do not consider a substantial miscarriage of justice will arise if leave is not granted. We are mindful of the relatively small amount at stake. We do not consider the respondent should be faced with the cost and delay of a further appeal.

[10] The application for leave to appeal is dismissed.

[11] The applicant must pay costs of \$2,500 to the respondent.

Solicitors:
Gillian Thomas, Tauranga for Applicant
Pidgeon Law, Auckland for Respondent

⁴ As recorded by the Court of Appeal: at [47].

⁵ At [47].

⁶ Senior Courts Act 2016, s 74(2).

⁷ At [50(c)].