IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA171/2023
[2024] NZCA 207

BETWEEN	WHAI RAWA RAILWAY LANDS LP Appellant
AND	BODY CORPORATE 201036 Respondent

Hearing: 15 April 2024

Court: Wylie, Mander and Jagose JJ

Counsel: D M Salmon KC and R M Keane for Appellant
D R Bigio KC, J Heatlie and J M Wood for Respondent

Judgment: 4 June 2024 at 11 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B High Court proceeding CIV-2021-404-1168 is struck out.

C The costs award made in the High Court is set aside. The issue of costs in the High Court is remitted back to the High Court to reassess in light of this judgment.

D The respondent is to pay costs to the appellant for the appeal, assessed for a standard appeal on a band A basis together with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] The appellant, Whai Rawa Railway Lands LP (Whai Rawa), is the current ground lessor of a block of land comprising 7,054 m^2 fronting Ronayne Street, The Strand and Ngaoho Place in Parnell, Auckland (the land). The respondent, Body Corporate 201036 (the Body Corporate), is the current lessee of the land.

[2] The Body Corporate has filed a proceeding in the High Court at Auckland. It seeks that the High Court should either set aside or vary a rental clause contained in the lease between the parties on the basis that the clause is either harsh or unconscionable, or has been used in a harsh or unconscionable manner. Whai Rawa resists this proceeding. It seeks to strike out the Body Corporate's statement of claim and/or summary judgment in its favour.

[3] In a decision issued on 7 April 2022, Associate Judge Taylor, in the High Court at Auckland, declined to strike out the statement of claim and dismissed Whai Rawa's application for summary judgment.[1] Whai Rawa appeals this decision.

The background facts

[4] The following section of this judgment is taken from the pleadings and from two of the affidavits filed. It is also taken in part from a recent decision of this Court.[2] Some of the matters set out are matters of public record; some are not in dispute, others may be. Much of the following has not been tested or explored at a substantive hearing.

The lease, the parties and the development of the land

[5] The lease at issue in this proceeding was entered into on 28 May 1997, between Whai Rawa's predecessor in title, Ngāti Te Whātua Ōrākei Māori Trust Board, and Magellan Orakei Ltd. The lease is registered against the title to the land under

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1 *Body Corporate 201036 v Whai Rawa Railway Lands LP* [2022] NZHC 700 [High Court judgment].

2 *Body Corporate 201036 v Whai Rawa Railway Lands LP* [2024] NZCA 151 [administrator appeal judgment]. This Court dismissed the Body Corporate's appeal against a decision of Gordon J granting Whai Rawa's application for the appointment of administrators to the Body Corporate: *Whai Rawa Railway Lands LP v Body Corporate 201036* [2021] NZHC 2893, (2021) 22 NZCPR 776 [administrator judgment].

number D184412.3 (the lease). It is for a term of 150 years, having commenced on 2 August 1996. At the time the lease was entered into, the land was undeveloped; it had previously been part of a railway.

[6] The lease provides that the lessee can subdivide the land by way of sublease or by the creation of a unit title subdivision under the Unit Titles Act 1972 (which was in force at the time the lease was entered into). The lessor is obliged to consent to any subdivision.

[7] Magellan Orakei Ltd sold its leasehold estate to a developer, Broadway Developments Ltd. Broadway Developments Ltd proceeded to develop the land. It erected six three-story blocks of residential terraced homes on the land, and it deposited a unit plan subdividing the leasehold estate into 81 principal units together with associated common property. The residential complex has become known as the Parnell Terraces.

[8] The Body Corporate was created on the deposit of the unit plan on 17 April 2000. It became the entity entitled to sue and be sued as if it were the lessee under the lease, with all the attendant rights, powers and privileges and subject to the concomitant requirements and liabilities.[3]

[9] The various units were sold to purchasers who, on purchase, became members of the Body Corporate. A number of the units have since been on-sold. The unit owners were, by law, deemed to be guarantors of the Body Corporate's obligations under the lease, although the liability of each unit owner was limited to the unit entitlement of the owner's unit.[4]

[10] In 2008, the Body Corporate (and the unit owners) discovered that the Parnell Terraces complex suffered from serious weathertightness issues. Significant remediation was undertaken. A code compliance certificate for the remediated complex was finally issued by Auckland Council in 2019.

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3 Unit Titles Act 1972, s 23. The Unit Titles Act 1972 was repealed on 20 June 2011, by s 218 of the Unit Titles Act 2010. See also Unit Titles Act 2010 Commencement Order 2011. Section 23 of the Unit Titles Act 1972 has been replaced by s 160 of the Unit Titles Act 2010.

4 Unit Titles Act 1972, s 26; and Unit Titles Act 2010, s 163.

[11] In 2013, while the remediation works were underway, the land was transferred to Whai Rawa and it became the lessor. Whai Rawa is a wholly-owned subsidiary of Ngāti Whātua Ōrākei Whai Rawa Ltd, which in turn, is the commercial investment arm of the Ngāti Whātua Ōrākei Trust Board.

Rental under the lease

[12] The lease defines the rental payable under the lease and it contains a detailed rent review clause.

[13] In effect, the lease provides that the annual ground rent for the first 15 years of the term was a "peppercorn rental" of 10 cents per year (if demanded in writing). Thereafter, the annual ground rental became six per cent per annum of the current freehold market value of the land, disregarding the value and existence of the lessee's improvements.

[14] The freehold market value of the land, and thus the rental, falls to be reviewed every seven years at the instigation of the lessor. The rent review clause in the lease sets out the process by which the current freehold market value of the land is fixed. The lessor is required to give to the lessee written notice of the amount it considers to be the current freehold market value of the land. The lessee must give notice within 28 days if it disputes the lessor's assessment, specifying the amount it considers to be the current freehold market value. The parties must then confer and endeavour to agree on the freehold market value of the land. If the parties cannot agree, each appoints an arbitrator. The arbitrators appoint an umpire, and the arbitrators then endeavour to jointly determine the current freehold market value of the land. If the arbitrators cannot agree, the freehold market value is determined by the umpire.

[15] Any variation in the rental resulting from such determination takes effect as from the relevant rent review date. A "ratchet clause" in the lease prevents the ground rent from decreasing on any rent review.

[16] As noted, the lease commenced in August 1996 and, through until August 2011, the ground rental was 10 cents per annum, but only if demanded. The

unit plan was deposited in April 2000, so, for the next 11 and a half years, the ground rental was not in issue for either the Body Corporate or the unit owners.

[17] There have been two rent reviews since 2011.

(a) The first rent review occurred over the period 2011 to 2013. The outcome was that, on 19 June 2013, the ground rent was fixed at $740,670 (plus GST, if any) per year, an average $9,144 (plus GST, if any) per unit per year.

(b) The second rent review occurred over the period 2018 to 2019. On 4 June 2019, the ground rent was fixed at $1,375,530 (plus GST, if any) per year, an average of $16,981 (plus GST, if any) per unit per year.

[18] A number of owners defaulted on their levy payments due to the Body Corporate. The levy payments funded the payment of the ground rent as well as other costs incurred by the Body Corporate. The Body Corporate (via the paying owners) was obliged to cover the shortfall resulting from non-payment by the defaulting owners, as well as the costs involved in recovering unpaid levies from defaulting owners.

[19] Following unsuccessful discussions with Whai Rawa in an attempt to re-negotiate the ground rental, the unit owners, at an extraordinary general meeting of the Body Corporate, held on 7 December 2020, resolved that the ground rental should be paid by each unit owner directly to Whai Rawa, so as to discharge each owner's obligation as a deemed guarantor under the lease. The Body Corporate notified Whai Rawa to this effect. Whai Rawa protested at this development and requested that the terms of the lease be complied with. Rental returns to Whai Rawa dwindled and substantial arrears accrued. Whai Rawa advised the Body Corporate that it was considering both the appointment of an administrator and cancellation of the unit plan. The Body Corporate disputed Whai Rawa's right to take these steps and suggested various ways in which it said the impasse over the payment of rental could be overcome.

[20] The Body Corporate remains liable to Whai Rawa as lessee under the lease. The Body Corporate is concerned that, if it is forced to continue paying the ground rent fixed under the lease, it will implode in the short to medium term and unit owners could ultimately suffer significant losses.

The Body Corporate's proceeding

[21] The Body Corporate commenced proceedings in the High Court at Auckland in June 2021 (CIV-2021-404-1168). Underlying its proceedings is its contention that the High Court has the power to set aside or vary the rental clause in the lease, on the ground that it is either harsh or unconscionable, or both, or that it has been exercised in a harsh or unconscionable manner. It relies on s 78(1)(f) of the Residential Tenancies Act 1986 (the RTA) which, it says, is imported into the Unit Titles Act 2010 (the UTA) by s 176 of that Act.

[22] The Body Corporate's statement of claim recited much of the above and sought declarations in the following terms:

> A. A declaration that the Rental Clause is harsh and unconscionable and is set [aside] in its entirety;
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> B. Alternatively to A, a declaration that the Rental Clause is harsh and unconscionable and is varied to provide for a peppercorn rental;
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> C. Alternatively to A and B, a declaration that the Rental Clause is harsh and unconscionable and is varied to provide for a rental that is commensurate to a risk free rate of return on a comparable investment;
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> D. Alternatively to A, B or C, a declaration that the Rental Clause is harsh and unconscionable and is varied to provide for a rental that the Court may otherwise considered appropriate;
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> E. An ancillary order that [Whai Rawa] file with [Land Information New Zealand] a variation to the Lease removing and/or varying the Rental Clause within 10 working days of the order under A, B, C or D.
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> F. An ancillary order that [Whai Rawa] repay any monies it has received pursuant to the Rental Clause in so far as it is in excess of the rental payable under the Rental Clause as varied by this Court.
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> G. Costs.

[23] Whai Rawa, in its statement of defence, admitted much of the Body Corporate's pleading. In addition, and relevantly, Whai Rawa pleaded as follows:

(a) The lease and the rent review process are not harsh or unconscionable nor have they been exercised in a harsh or unconscionable manner.

(b) Whai Rawa was not a party to the sale and purchase transactions between the developer and the unit owners, nor the transactions involving subsequent purchasers.

(c) The lease was negotiated between it and the lessee's predecessor in title as commercial parties at arm's length.

(d) Whai Rawa was not obliged to consider the fairness or otherwise of the rental clause, or the position of down-stream purchasers.

(e) The terms of the lease relating to the determination of the ground rental are "market standard for ground leases and well understood by market participants".

(f) Unit owners knew, or ought to have known, the terms of the lease, including the terms of the rental clause, when they acquired their units.

(g) Ground rental has been charged and reviewed in accordance with the lease and, in each case, set by agreement between the parties, after negotiation.

(h) When the ground rental was reviewed in 2011 to 2013 and again in 2018 to 2019, the Body Corporate and its members did not claim that the application of the lease was harsh or unconscionable.

(i) The Body Corporate and its members unanimously approved the current ground rental with the benefit of independent valuation advice.

(j) The Body Corporate's financial difficulties, and those of its members, have been caused not by the application of the lease but rather by significant cost overruns incurred in remediating the weathertightness issues.

[24] At the same time as it filed its statement of defence, Whai Rawa filed an application seeking to strike out the statement of claim and/or for summary judgment in its favour. It there asserted that the Body Corporate's statement of claim has no basis at law; that, as a matter of fact, the terms of the lease are not harsh and unconscionable; and that it has not exercised the powers conferred by the lease in a harsh or unconscionable manner. It alleged that the Body Corporate's statement of claim discloses no reasonably arguable cause of action and/or case appropriate to the nature of the pleadings or, in the alternative, that the cause of action relied on by the Body Corporate cannot succeed.

[25] The Body Corporate filed a notice of opposition to Whai Rawa's application. The matter proceeded to hearing before Associate Judge Taylor in the High Court at Auckland on 10 March 2022. The Associate Judge's reserved decision issued on 7 April 2022. He declined to strike out the statement of claim and dismissed Whai Rawa's applications for strike out and for summary judgment.[5]

[26] Whai Rawa sought leave to appeal to the High Court under s 56(3) of the Senior Courts Act 2016. This application was declined.[6] Whai Rawa then applied to this Court for leave to appeal under s 56(5). Leave was granted on 11 October 2023.[7]

[27] Since the Associate Judge's decision, the Body Corporate has filed an amended statement of claim. It now alleges that the ground rent payable under the rental clause is harsh or unconscionable and/or that the power conferred by the rental clause has been exercised by Whai Rawa in a harsh or unconscionable manner, inter alia, because Whai Rawa and/or its predecessor in title, was "fully and/or over-compensated" for the leasehold rights when they were transferred to Magellan Orakei Ltd in May 1997

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5 High Court judgment, above n 1.
6 *Body Corporate 201036 v Whai Rawa Railway Lands LP* [2023] NZHC 389 at [32].
7 *Whai Rawa Railway Lands LP v Body Corporate 201036* [2023] NZCA 490 at [21].

and by sharing in the profit of on-sales of the leasehold rights by Magellan Orakei Ltd. Detailed particulars of this allegation are given.

[28] In addition, the Body Corporate asserts in its amended statement of claim that the ground rent, on its own, is onerous and excessive, and unfairly exploits it as lessee. It claims as follows:

(a) The parties to the lease, when it was entered into, anticipated that the land would be developed but did not consider whether the rental would be fair to those on whom the obligation to pay would ultimately fall.

(b) The 15-year rent free period enticed members of the public to purchase units in the Parnell Terraces.

(c) Purchasers could not reasonably have ascertained the fairness or otherwise of the rental formula in the lease, or predicted the increase in the value of the base land.

(d) Payment of the ground rent has and/or will result in significant overpayment by the purchasers.

(e) The ground rent has already doubled in the seven years between the two rent reviews.

(f) The market value of the Parnell Terrace units has, as a result of the onerous ground rent, been significantly depressed when compared to the market value of similar freehold properties and owners are unable to leverage their units to obtain appropriate or any funding from banks or financiers.

The relief sought remains the same as in the first statement of claim.

[29] These various amended pleadings are, in large part, denied by Whai Rawa.

Whai Rawa's proceeding

[30] Whai Rawa responded to the Body Corporate's proceeding by making an application under s 165 of the UTA seeking the appointment of administrators to the Body Corporate. Gordon J, in November 2021, granted this application.[8] Her decision has since been upheld by this Court.[9]

The High Court judgment

[31] The Associate Judge summarised the background, in part, as set out above. He referred to Whai Rawa's applications and to the affidavit filed by Whai Rawa's General Manager, Property, Neil Donnelly. He also referred to the notice of opposition filed by the Body Corporate and to affidavits filed in support of that notice by Dr John McDermott, an economist, and Michael Rehm, a unit owner and the chair of the Body Corporate.[10] He also noted that there was an affidavit in reply from Steven Dunlop, a valuer, reviewing and commenting on the affidavits filed by Dr McDermott and Mr Rehm. The Associate Judge noted that there are disputes between the parties as to the admissibility of some of this evidence.

[32] The Associate Judge recorded the submissions of the parties in considerable detail.[11] In summary:

(a) Whai Rawa was submitting that the High Court has no jurisdiction to vary the lease by way of declaratory relief. The Body Corporate's claim is untenable and reliant on a misapplication of various provisions in the RTA. The harsh and unconscionable provision in s 78(1)(f) of the RTA, is not intended to empower the Tenancy Tribunal to amend mechanisms for the payment of rent contained in ground leases entered into between arm's length commercial parties. Further, the rental clause in the lease is neither harsh nor unconscionable.

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8 Administrator judgment, above n 2.
9 Administrator appeal judgment, above n 2.
10 Mr Rehm's affidavit was filed in a related proceeding. It is however referred to in the affidavits filed in this proceeding.
11 High Court judgment, above n 1, at [39]–[52].

(b) The Body Corporate was submitting that its claim is founded on the plain and unambiguous wording of the legislation, that the pleadings allege the base facts on which the claim is founded and that the relevant allegations are either uncontested or supported by the evidence of Dr McDermott, an appropriately qualified expert. Consequently, there is a real issue to be tried and the claim ought to proceed to a full hearing.

[33] After discussing the principles relevant to strike out and summary judgment applications and noting the various sections in the RTA and the UTA relied on by the parties,[12] the Associate Judge concluded that both of Whai Rawa's applications should be declined.[13] Unfortunately, the Associate Judge did not analyse the statutory provisions relied on by the parties; nor did he seek to resolve the conflicting arguments as to the interpretation of these provisions. Rather, he noted that there was considerable force in Whai Rawa's arguments, but that the issue was "not free from doubt".[14]

[34] The Associate Judge found that Whai Rawa had not established that the Body Corporate's claims were speculative and without foundation, nor that they were baseless on the available evidence nor untenable. The Judge summarised his conclusions as follows:

> [93] In my judgment:
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> (a) as to the legal interpretation of the relevant provisions of the UTA and the RTA, while the arguments lean in favour of [Whai Rawa's] submissions, the issue is not free from doubt and needs to be fully tested at a substantive hearing;
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> (b) if the jurisdictional argument is determined in favour of the Body Corporate, whether the formula in the rental clause is harsh or unconscionable needs to be fully tested in a substantive proceeding. There is expert evidence before the Court as to the plaintiff's view, and this issue is unable to be resolved without hearing opposing views; and
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> (c) the Body Corporate claims that the issue of whether the lease was entered into between truly arm's-length parties goes to the issue of whether the rental clause in the lease is harsh or

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12 At [53]–[62].
13 At [94]–[95].
14 At [72]–[73].

> unconscionable. This issue needs to be dealt with through discovery as part of the substantive proceeding.

[35] The Associate Judge awarded costs against Whai Rawa and in favour of the Body Corporate on a 2B basis.[15]

Submissions

For Whai Rawa

[36] The focus of Mr Salmon KC's arguments on behalf of Whai Rawa was whether or not the High Court has jurisdiction to grant the relief sought by the Body Corporate. He addressed the context in which the dispute has arisen, detailed the relief sought by the Body Corporate and summarised the legal basis for the Body Corporate's claim. He then set out why Whai Rawa says that the High Court has no jurisdiction to grant any of the declarations sought.

[37] First, Mr Salmon argued that the Body Corporate's claim is not a "unit title dispute", as those words are used s 171 of the UTA. Next, he argued that the Tenancy Tribunal's powers, set out in s 78 of the RTA, were only ever intended to be available for low value disputes and not disputes about the "title to land". He submitted that s 78(1)(f) of the RTA is not directed at the "cost of rent" and that the Tribunal's jurisdiction to re-fix the rent for a residential tenancy exists separately, in s 25 of the RTA. He referred to ss 25 and 77(2)(d) of the RTA and submitted that had Parliament intended to extend the Tenancy Tribunal's powers to permit it to review and modify rent clauses in ground leases, it would have effected this intention directly.

[38] Next, Mr Salmon argued that if the Body Corporate's claim is to succeed, it needs to establish that, through the introduction of the UTA, Parliament intended to establish a new regime between ground lessees and ground lessors, whereby each can seek to review existing lease terms on harsh or unconscionable grounds simply by virtue of the existence of a unit title subdivision. He argued that this would reflect a major change in the law, noting that under ordinary contract law principles, there is no

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15 At [96].

cause of action that allows a lessee to seek to delete or rewrite contract terms negotiated with the lessor on the ground that they are harsh and/or unconscionable.

[39] Mr Salmon summarised Whai Rawa's case as follows:

(a) The ground lease was struck between commercial parties 27 years ago. It predates the UTA and the RTA, which the Body Corporate asserts apply. It also predates the existence of the unit title subdivision and the Body Corporate.

(b) The effect of the Body Corporate's argument is that Parliament intended s 78(1)(f) of the RTA to be a "Trojan horse", permitting the High Court to rewrite commercial bargains set by predecessors in title to the parties before it, without any limitation period at all, but only for a subset of ground leases (those with unit titles).

(c) The language and statutory context of the relevant provisions do not support the Body Corporate's argument and the policy drivers behind the legislation are at odds with it.

(d) Wider policy considerations point against the Body Corporate's interpretation. It would see widespread commercial uncertainty in relation to ground leases; there would be no applicable limitation period; landowners would be disincentivised from making their land available by way of ground lease for development; and the courts would become involved in a level of supervision of commercial bargains that Parliament cannot sensibly have intended.

It was put to us that the Body Corporate's interpretation is creative but untenable and that its proceeding should have been struck out.

For the Body Corporate

[40] Mr Bigio KC, for the Body Corporate, noted that the only issue to be determined on this appeal, is whether the relevant provisions in the UTA provide

the High Court with jurisdiction to intervene in the lease. He referred to ss 171–173 and 176 of the UTA, and argued that they confer on the High Court, as the relevant decision-maker, jurisdiction to deal with disputes relating to unit title developments. He submitted that s 176 of the UTA imports into that Act s 78(1)(f) of the RTA, which provides that the Tenancy Tribunal can intervene in harsh or unconscionable contracts. He referred to relevant principles of interpretation by reference to the judgment of the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd*.[16] He referred to the text of the relevant provisions and to the application and purpose of the UTA. He argued that the dispute in this case is a dispute between the Body Corporate as lessee and Whai Rawa as lessor, and that it is a unit title dispute as contemplated by the relevant provisions in the UTA.

[41] In summary, Mr Bigio submitted that the UTA provides an avenue for relief for the Body Corporate permitting it to challenge the lease, because:

(a) The UTA allows for the creation of stratum estates in leasehold.

(b) Under the plain wording of s 78(1)(f) of the RTA, as incorporated into the UTA by s 176, the lease is an agreement. It forms the basis of the stratum estate in leasehold that the Body Corporate holds.

(c) There is a unit title dispute for the purposes of the UTA between the Body Corporate as the ground lessee and Whai Rawa as the ground lessor. Unit title disputes include all disputes that arise between bodies corporate and lessors of base land.

(d) The relevant provisions are set in pt 4 of the UTA, which deals with dispute resolution. Section 176 in the UTA incorporates by reference into the unit title dispute regime the specific types of relief available under pt 3 of the RTA, including the power to grant relief against harsh or unconscionable agreements.

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[16] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.

(e) The High Court has a discretionary power to declare the lease, or parts of it, harsh or unconscionable and to either set it aside or vary it.

(f) The ability to give such relief extends to all first instance decision-makers under the UTA, including the High Court.

(g) The availability of such relief fits within the overall purpose of the UTA, namely to provide a legal framework for the ownership and management of land and associated building and facilities, on a socially and economically sustainable basis by communities of individual owners.

[42] Mr Bigio acknowledged that the unit owners and the Body Corporate are seeking an "extraordinary remedy" and that there may be a number of hurdles in their path. But he submitted, it cannot be said that the Body Corporate's pleading discloses no reasonably arguable cause of action or case appropriate to the nature of the pleading.

Analysis

Strike out principles

[43] There was no dispute between counsel as to the relevant strike out principles. It was common ground that they were correctly summarised by the Associate Judge.

[44] In short, r 15.1(1) of the High Court Rules 2016 provides that the court may strike out all or part of a pleading if it discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading. A strike out application proceeds on the assumption the pleaded facts are true, unless those pleaded facts are entirely speculative or without foundation. The impugned cause of action must be clearly untenable. The jurisdiction to strike out is to be exercised sparingly and only in clear cases. The jurisdiction is not excluded by the need to decide difficult questions

of law, but the court should be slow to strike out a claim in any developing area of the law (particularly where a duty of care is alleged in a new situation).[17]

[45] Recently, the Supreme Court has observed that pre-emptive elimination is only appropriate where it can be said that whatever the facts proved or arguments and policy considerations advanced at trial, the case is bound to fail.[18]

The relevant statutory provisions

[46] This appeal turns on whether the High Court has jurisdiction to grant the relief sought by the Body Corporate. Counsel acknowledged that there is no authority directly on point and that the issues raised by the Body Corporate's pleadings are novel.

[47] It was common ground that there is no inherent or common law power vested in the High Court to set aside or vary the terms of a lease.[19] To obtain the relief it seeks, the Body Corporate has to resort to s 78(1)(f) of the RTA.

[48] Relevantly, s 78 of the RTA provides as follows:

> **78 Orders of Tribunal**
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> (1) Without limiting the generality of section 77 or the nature or extent of orders that the Tribunal may make in the exercise of its jurisdiction, the Tribunal may, in respect of any claim within its jurisdiction (but subject to section 78A, if that section applies), make 1 or more of the following orders:
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> …
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> (f) where it appears to the Tribunal that an agreement between the parties, or any term of any such agreement, is harsh or unconscionable, or that any power conferred by an agreement between them has been exercised in a harsh or unconscionable manner, an order varying the agreement, or setting it aside (either wholly or in part):

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17 See *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] 2 NZLR 284 at [38]; aff'd *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5 [*Smith v Fonterra* (SC)] at [74] per Williams and Kós JJ. See also *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267; and *Couch v Attorney-General (on appeal from Hobson v Attorney-General)* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] per Elias CJ and Anderson J.

18 *Smith v Fonterra* (SC), above n 17, at [85] per Williams and Kós JJ; and see generally [73]–[85].

19 There are express statutory powers giving such jurisdiction in defined circumstances, such as: Credit Contracts and Consumer Finance Act 2003, pt 5; Fair Trading Act 1986, ss 26A and 26B; and Residential Tenancies Act 1986, ss 25 and 78(1)(f).

[49] The Body Corporate says that it can take advantage of this provision because it is imported into the UTA by s 176 of that Act and that the jurisdiction is conferred on the High Court by the interaction between ss 171 and 173.

[50] Relevantly, these various sections in the UTA provide as follows:

> **171 Jurisdiction of Tenancy Tribunals**
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> (1) Except as provided in this section, a Tenancy Tribunal (a **Tribunal**) constituted under section 67 of the Residential Tenancies Act 1986 has jurisdiction to hear and determine all disputes arising between any persons of the kind listed in subsection (2) in relation to a unit title development (a **unit title dispute**).
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> …
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> (2) The persons mentioned in subsection (1) are—
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> …
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> (d) a body corporate:
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> …
>
> (k) a lessor of base land:
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> …
>
> (4) The Tribunal does not have jurisdiction—
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> …
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> (c) to hear any dispute relating to the title of land.
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> …
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> **173 Jurisdiction of High Court**
>
> (1) The High Court has jurisdiction to hear and determine any unit title dispute if—
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> (a) the order sought requires any person or body to pay any sum, or to do any work to a value, or otherwise incur expenditure, in excess of $350,000; or
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> (b) the dispute relates to the title of land.
>
> …

> **176 Certain provisions of Residential Tenancies Act 1986 to apply**
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> (1) Part 3 of the Residential Tenancies Act 1986 applies with all necessary modifications in respect of the hearing and determination of a unit title dispute by a Tenancy Tribunal except the following sections:
>
> (a) section 77 (which relates to the Tribunal's jurisdiction):
>
> …

[51] The Body Corporate points to s 4(1)(h) of the UTA, which, by way of overview, records that the Tenancy Tribunal (established under s 67 of the RTA) is the dispute resolution body for unit title disputes below a certain monetary amount that do not relate to the title to land,[20] that for disputes that involve higher monetary amounts, the District Court and the High Court have jurisdiction[21] and that, if a unit title dispute relates to the title of land, only the High Court has jurisdiction to hear it.[22] The Body Corporate noted that ss 171–176 fall within the sub-pt 1 of pt 4 in the UTA, relating to disputes. It relies on ss 171(1) and 173(1), saying that these sections confer jurisdiction under s 78(1)(f) of the RTA on the High Court. Crucially, the Body Corporate says that the dispute the subject of its proceeding is a unit title dispute arising in relation to a unit title development and that it and Whai Rawa fall within the classes of persons set out in s 171(2) of the UTA.

[52] Whai Rawa says first that there is no qualifying unit title dispute. It notes that a unit title dispute is a dispute arising out of a unit title development. It relies on s 5 of the UTA, which defines a unit title development as follows:[23]

> **Unit title development** means the individual units and the common property comprising a stratum estate

It says that the Body Corporate is not seeking to raise a dispute about a unit title development, because the dispute outlined in its proceeding does not relate to the individual units and the common property comprising a stratum estate. Rather, it says, the Body Corporate is seeking to set aside or vary the terms of the ground lease pursuant to which it has an interest in the land. It says that as a result, there is no unit

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20 Unit Titles Act 2010, s 4(1)(h)(i).
21 Section 4(1)(h)(ii).
22 Section 4(1)(h)(iii).
23 Section 5 definition of "unit title development", para (1).

title dispute and the dispute resolution provisions contained in the RTA (including s 78(1)(f)) do not apply.

[53] Secondly, it argues that there is no ability for the Body Corporate to obtain the relief it seeks, because its proceeding relates to the title to the land, a matter in respect of which the Tenancy Tribunal has no jurisdiction. Finally, Whai Rawa asserts that s 78(1)(f), even if available to the Body Corporate, was never intended to provide jurisdiction to adjust the quantum of rent, nor the mechanism by which rental is set. It argues that the Tenancy Tribunal's jurisdiction to adjust rent for a residential tenancy exists separately, pursuant to s 25 of the RTA.

The interpretation of the relevant statutory provisions

[54] In interpreting statutes, the starting point is s 10 of the Legislation Act 2019. It requires that the meaning of legislation must be ascertained from its text and in light of its purpose and context.[24] The text of legislation includes the indications given in the legislation.[25]

[55] The equivalent legislative direction under earlier legislation, the Interpretation Act 1999, was discussed by the Supreme Court in *Commerce Commission v Fonterra*,[26] where the Court noted as follows:[27]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

The text of the relevant statutory provisions

[56] The relevant provisions have been set out above. To take advantage of s 171(1) of the UTA, there must be a dispute in relation to a unit title development. As noted,

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24 Legislation Act 2019, s 10(1).
25 Section 10(3).
26 *Commerce Commission v Fonterra Co-operative Group Limited*, above n 16.
27 Footnotes omitted.

a unit title development means the individual units and the common property comprising a stratum estate.

[57] The issue the Body Corporate wants the High Court to determine centres on the terms of the lease, whether they are harsh or unconscionable or have been exercised in a way that is harsh or unconscionable, and whether they should be set aside or varied. While this dispute is between the Body Corporate and the lessor of the base land, it is, in our judgement, not a dispute in relation to a unit title development as those words are defined in s 5 of the UTA and as they are used in s 171(1) of that Act. It is not a dispute in relation to the unit title development, because it is not a dispute about the individual units and the common property comprising the stratum estate.

[58] We acknowledge the submission advanced by Mr Bigio that the term "stratum estate" is defined in s 5 of the UTA, but we do not consider that the definition, or the sections referred to in it (ss 18 and 22) advance the Body Corporate's argument. Both sections refer to the deposit of a unit plan and the resulting creation of a stratum estate, either in freehold or in leasehold, and go on to discuss what the stratum estate in each unit created by the deposit of the unit plan comprises. We cannot see that under either provision, a stratum estate in leasehold created by the deposit of a unit plan subdividing an estate held as lessee under a memorandum of lease, extends to or includes the terms of Body Corporate's contractual relationship with the ground lessor.

[59] Our view is reinforced by reference to s 16 of the UTA. It provides that an estate in fee simple, as well as an estate as lessee under a memorandum of lease, can be subdivided to create a unit title development.[28] There is a distinction drawn between a stratum estate in freehold and a stratum estate in leasehold. There is however nothing in the Act which suggests that a dispute between a lessee and a lessor about the terms in a ground lease is a dispute in relation to a unit title development as defined.

[60] There is an additional difficulty with the interpretation of the UTA contended for by the Body Corporate.

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[28] Unit Titles Act 2010, s 16(1)(a) and (b).

[61] Section 171(1) of the UTA confers jurisdiction on the Tenancy Tribunal to hear unit title disputes. Section 176(1) provides that pt 3 of the RTA applies with all necessary modifications in respect of the hearing and determination of a unit title dispute by the Tenancy Tribunal. Section 78(1)(f) of the RTA is found in pt 3 of that Act. It is however clear from s 171(4)(c) of the UTA that the Tenancy Tribunal has no jurisdiction to hear any dispute relating to "the title of land". The Body Corporate's proceeding in the High Court seeks to set aside or vary the terms of the lease which, as noted, is a registered lease. The lease is the basis for the Body Corporate's leasehold title. It is a "title of land". On its face, s 78(1) does not apply, at least in so far as the Tenancy Tribunal is concerned. Pursuant to s 173(1)(b) of the UTA, only the High Court has jurisdiction to hear and determine any unit title dispute in relation to the title of land, and s 176(1) does not apply to the High Court. The High Court has its own statutory provisions, the Senior Courts Act,[29] and its own procedural code, the High Court Rules. Neither the Senior Courts Act nor the High Court Rules confer the power to set aside or vary agreements that might be considered to be harsh or unconscionable, or to have been exercised in a harsh or unconscionable manner. Nor do the High Court's inherent common law powers.

[62] In our view, s 176(1) does not give the High Court jurisdiction to grant the relief sought by the Body Corporate.

[63] We turn to cross-check this conclusion by reference to the purposes of the UTA and the RTA.

The purposes of the UTA and the RTA

[64] The purpose of the UTA is set out in s 3 of that Act. It seeks to provide a legal framework for the ownership and management of land and associated buildings and facilities on a socially and economically sustainable basis by communities of individuals. It seeks to allow for the subdivision of land and buildings into unit title developments comprising units that are owned in a stratum estate, either in freehold or leasehold, or by license by unit owners, and common property that is owned by a body corporate on behalf of the unit owners. It creates bodies corporate and seeks to

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[29] Senior Courts Act 2016, ss 12–18.

establish a flexible and responsive regime for the governance of unit title developments and to protect the integrity of such developments as whole.

[65] The broad purpose is concerned primarily with the creation of the appropriate legal framework for the ownership and management of unit title developments. It does not target the relationship between the body corporate and the owner of the underlying land where that land is leased to the body corporate.

[66] Nor, with one exception, is there anything in sub-pt 1 of pt 4 of the UTA, dealing with disputes, which is aimed at the relationship between the body corporate and the lessor of the base land in respect of which a unit title plan of subdivision has deposited. The exception is in s 171(2), which records the types of persons who can take their unit title disputes to the Tenancy Tribunal under s 171(1). One of the listed persons is a "lessor of base land".[30] The term "base land" is defined in s 5 and includes a parcel of land that is subdivided into a unit title development.[31] This however does not compel the conclusion that a dispute between a body corporate and a lessor of the base land relating to the terms and application of a ground lease is a unit title dispute. There are other disputes between bodies corporate and the lessors of base land that can be unit title disputes as defined — for example, disputes about the maintenance of buildings erected on the base land, disputes about the insurance of units on the base land, and disputes about the application of insurance proceeds received when a unit title development suffers an insured loss. Such disputes do relate to the individual units and the common property comprising the stratum estate and could well be unit title disputes as defined.

[67] Further, in our view, the Body Corporate's interpretation of the relevant provisions would render other sections in the UTA otiose.

[68] Sections 139 and 140 of the UTA contain provisions which enable bodies corporate to challenge service contracts entered into for unit title development during what is known as the "control period",[32] when the unit title development is

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30 Unit Titles Act 2010, s 171(1)(k).
31 Section 5 definition of "base land", para (1).
32 Section 6 definition of "control period", para (1).

under the control of the original owner (the developer). Section 139 requires original owners (and their associates), during the control period, to exercise reasonable skill, care and diligence, and to act in the best interests of the body corporate, as constituted after the date on which the control period ends, when entering into service contracts.[33] They must ensure that the terms of the service contracts achieve a fair and reasonable balance between the interests of the service contractor and the body corporate.[34] The section protects subsequent purchasers who obtain their units subject to the agreements entered into. The Tenancy Tribunal and the courts can order compensation to bodies corporate when these obligations are breached and also allow the bodies corporate to terminate the service agreements, where it appears to the decision-maker that the agreements are "harsh or unconscionable".[35] There is a limitation period; an application must be made within three years of the expiry of the control period.[36]

[69] These provisions would be redundant under the Body Corporate's interpretation of the UTA. They would be overtaken by and subsumed within the much wider power under s 78(1)(f) of the RTA to set aside or vary any and all agreements and subject to no time limitation at all.

[70] We have also cross-checked purpose by considering the RTA.

[71] Section 78(1)(f) is found in pt 3 of the RTA, dealing with the Tenancy Tribunal. As noted above, the Tenancy Tribunal is established pursuant to s 67 of the RTA. Its primary jurisdiction is conferred by s 77 of the RTA. Section 77 provides that the Tenancy Tribunal has jurisdiction to determine any dispute that exists between a landlord and a tenant, or between a landlord and a guarantor of a tenant, and that relates to any tenancy to which the RTA applies.

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33 Section 139(2).
34 Section 139(2)(a).
35 Section 140(5).
36 Section 140(4).

[72] The Tenancy Tribunal also has the additional jurisdiction conferred on it by the UTA. Section 77 of the RTA does not apply to the jurisdiction conferred on the Tenancy Tribunal by the UTA.[37]

[73] Section 78 of the RTA is directed to the nature or extent of the orders that the Tenancy Tribunal can make in the exercise of its jurisdiction. While s 78(1)(f) is very wide in its terms, it is not expressly directed at the cost of rent or rent review provisions in leases. Rather, rental issues fall to be dealt with under ss 25 and 77(2)(d) of the RTA. Section 25(1) provides that the Tribunal can, if satisfied that the rent payable or to become payable for a tenancy exceeds the market rent by a substantial amount, make an order reducing the rent to an amount that is in line with the market rent. There is a timeframe for making an application under s 25; three months from the commencement of the tenancy or the from the date of the last rent review.[38] Section 77(2)(d) of the RTA empowers the Tenancy Tribunal to determine whether rent is in excess of market rent and to make such order in relation to the rent as it considers just.

[74] Section 25 of the RTA is contained in pt 2 of that Act. Part 2 of the RTA is not imported into unit title disputes by s 176 of the UTA; s 176 adopts only pt 3 of the RTA. Had Parliament intended to extend the Tenancy Tribunal's power to review and modify rent or rent review provisions in ground leases, it might be expected that it would have done this directly, by importing into the UTA ss 25 and/or 77(2)(d) of the RTA. As noted, Parliament expressly excluded s 77 of the RTA from applying to unit title disputes by s 176(1)(a) of the UTA.

[75] We consider that there is considerable force in Mr Salmon's submission that interpreting the power conferred on the Tenancy Tribunal by s 78(1)(f) as extending the power to set aside and/or vary a contractual bargain would cut across Parliament's purpose in excluding ss 25 and 77(2)(d) of the RTA from applying to unit title disputes. It would attribute to Parliament an unlikely intention — namely that there is a strict three-month limitation period within which residential tenants can seek market adjustment of their rent, but there is no timeframe for bodies corporate and ground

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37 Section 176(1)(a).
38 Residential Tenancies Act, s 25(2).

lessors seeking rental adjustments and the setting aside and variation of rental clauses in their ground leases under s 78(1)(f).

[76] It is noteworthy that counsel were not able to refer us to any Tenancy Tribunal (or court) decision where s 78(1)(f) of the RTA has been used to vary rent or to rewrite rent review clauses between parties to a tenancy agreement or lease. The decisions which deal with the power to set aside or vary have focused on other agreements and actions by landlords/tenants that are alleged to be harsh or unconscionable.[39]

The legislative context

[77] Finally, we have considered the legislative context.

[78] As noted above, there is no inherent or common law power permitting the courts to set aside or vary contracts on harsh or unconscionable grounds. While, as also noted, there are statutory powers conferred on the courts in respect of certain types of contracts, each of those statutory powers reflects targeted intervention, with a focus on consumer protection.

[79] We agree with Mr Salmon that permitting the parties to ground leases to apply to the Tenancy Tribunal (or the courts) to set aside or vary rental clauses outside of agreed contractual mechanisms would be contrary to existing practice and law, would imperil commercial certainty and could cut across long-standing contractual agreements entered into between parties. We agree that it would be an extraordinary step to attribute to Parliament the intention of disturbing arrangements between lessors and lessees in this context, or of allowing rights in ground leases to be set aside or

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[39] See for example *Smith v Accessible Properties New Zealand Ltd* [2018] NZHC 1010; aff'd *Smith v Accessible Properties New Zealand Ltd* [2019] NZCA 38, (2019) 20 NZCPR 557 (unsuccessful application by a tenant to set aside a landlord's termination notice; application for special leave to appeal declined by this Court); *LSA Property Ltd T/A Quinovic Property Management — Mount Manganui v [The respondent]* [2023] NZTT 4553153, 4563209 (partially successful application to vary a limitation on occupancy in a tenancy agreement); *Kāinga Ora — Homes and Communities v Martin* [2023] NZTT Blenheim 4406302 (successful application setting aside an agreement making one tenant solely responsible for pre-existing rental arrears involving another tenant); *[The applicant/s] v [The respondent/s]* [2022] NZTT 4330145 (unsuccessful application to vary a fixed tenancy agreement to make it periodic); *LAJ Rentals Trust v Severinsen* [2019] NZTT Whangārei 4189332, 4185663 (application relating to agreement to end a fixed tenancy); and *Yu v Olliver* [2021] NZTT Tauranga 4271712, 4283543 (application relating to agreement between landlord and tenant as to how a bond was to be distributed).

varied, purely by virtue of the lessees' decision (which the lessor was obliged to agree to), to deposit a unit plan. Were the courts to accede to the Body Corporate's interpretation, they would be giving effect to a new regime that would allow lessors and lessees to apply at any time to set aside or vary ground leases on which a unit title development has occurred, and to continue doing so whenever one of them considers the lease terms are harsh or unconscionable in their effect. Ground leases are generally for an extended term (the lease at issue in this dispute is for 150 years) and conferring an unlimited power to apply to set aside or vary the terms of leases over their term would be extraordinary.

[80] There is nothing in the Parliamentary debate on the Unit Titles Bill 2008 which suggests that such a significant change was intended. Rather, the explanatory note to the Bill suggests that it was Parliament's intention to improve access to justice by lowering the costs of dispute resolution for those connected with unit title developments. The explanatory note records that one of the key features of the Bill was the introduction of a new cost-effective dispute resolution service so that anyone with an interest in a unit title development could resolve disputes.[40] The clause-by-clause analysis in the Bill further recorded that it was proposed that the jurisdiction of the Tenancy Tribunal would be extended so that it could hear and determine most disputes about unit titles, with a monetary limit of (then) $50,000, but with no jurisdiction to hear disputes relating to the title of land. The regulatory impact statement in the Bill noted that a key problem with the then existing legislation was a lack of appropriate dispute resolution processes.

[81] These background documents suggest that Parliament's intention was to reduce the barriers to accessing justice for unit holders and other persons connected to unit title developments. There is nothing to suggest there was any intention to disturb or modify existing relationships or rights, nor any intention to create a new statute-based cause of action between ground lessees and ground lessors where a unit title development has occurred on the land the subject of the ground lease.

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40 Unit Titles Bill 2008 (212-1) (explanatory note).

Conclusion

[82] For the reasons we have set out, we are satisfied that the High Court has no jurisdiction to grant any of the declarations sought by the Body Corporate in its proceeding. The issue is purely one of statutory interpretation and whatever the facts proved or arguments and policy consideration advanced at trial, the Body Corporate's case is, in our view, bound to fail. There is no reasonably arguable cause of action disclosed by the proceeding, or case appropriate to the nature of the pleading. Accordingly, we allow the appeal, and strike out the Body Corporate's proceeding.

[83] We do not need to go on to consider the Body Corporate's application for summary judgment in its favour. Counsel did not address this and, given our conclusions, we need not do so either.

Costs

[84] Given our conclusions, it follows that the costs order made in the High Court must be set aside. The issue of costs is remitted back to the High Court to reassess in light of this judgment.

[85] Counsel were agreed on the appropriate costs on this appeal.

Result

[86] The appeal is allowed.

[87] High Court proceeding CIV-2021-404-1168 is struck out.

[88] The costs award made in the High Court is set aside. The issue of costs in the High Court is remitted back to the High Court to reassess in light of this judgment.

[89] The respondent is to pay costs to the appellant for the appeal, assessed for a standard appeal on a band A basis together with usual disbursements. We certify for second counsel.

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