IN THE COURT OF APPEAL OF NEW ZEALAND

CA589/2017
[2018] NZCA 57

BETWEEN	DESMOND WILLIAM COOK Appellant
AND	HOUSING NEW ZEALAND LIMITED Respondent

Hearing: 19 March 2018

Court: Kós P, Brown and Williams JJ

Counsel: Applicant in person
K R A Muirhead for Respondent

Judgment: 27 March 2018 at 11 am

JUDGMENT OF THE COURT

A The application for special leave to appeal is declined.

B The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Kós P)

[1] Mr Cook is a Housing New Zealand Corp (HNZ) tenant. He brought a civil proceeding against HNZ in the District Court at Auckland. He claimed HNZ breached statutory duties under ss 3B and 18 of the Housing Corporation Act 1974 to provide him with "suitable housing". He also claimed in negligence, alleging breach of a duty of care to provide him with "suitable rental accommodation". Mr Cook has significant coronary health issues. He said HNZ failed him in its statutory and common law duties

by failing to provide him with housing that was reasonably quiet, safe, free from damp and cold, and suitable for a caregiver to live in (that is, two bedrooms rather than one). Mr Cook sought general damages of $150,000 and exemplary damages of $50,000, plus costs.

[2] HNZ applied for the claim to be struck out. It said the claims were untenable and an abuse of process. Judge Hinton granted that application on 17 January 2017.[1] Mr Cook appealed the strike-out decision. His appeal was dismissed by Downs J on 31 July 2017.[2]

[3] The reasoning of Downs J and Judge Hinton did not diverge in any material sense. In essence it was as follows. The breach of statutory duty claim was untenable. The statutory scheme indicated clearly that Parliament did not intend to confer a private civil right of action for alleged breaches of the Housing Corporation Act. Reliance was placed on an analogous English decision in *O'Rourke v Camden London Borough Council*.[3] Public law remedies were provided by statute in the Housing Restructuring and Tenancy Matters Act 1992. In addition, both public and private remedies were available pursuant to the Residential Tenancies Act 1986, via the Tenancy Tribunal. These rights Mr Cook had exercised, albeit without success in respect to the matters that he now seeks relief for. The statutory enactments "covered the field" and enabled no further right of action either in breach of statutory duty or negligence.

[4] As to abuse of process, Downs J noted that Mr Cook had exercised his rights in the Tenancy Tribunal, appealed one of the decisions there from the District Court to the High Court and unsuccessfully sought leave to appeal to the Court of Appeal.[4] Subsequent orders were sought in relation to obtaining two-bedroom accommodation being sought from the Tenancy Tribunal (which declined jurisdiction) and an appeal to the State Housing Appeals Authority (which dismissed that appeal).[5] Downs J

---

1 *Cook v Housing New Zealand Corp* [2016] NZDC 676.
2 *Cook v Housing New Zealand Corp* [2017] NZHC 1781, [2018] NZRMA 39 (High Court judgment).
3 *O'Rourke v Camden London Borough Council* [1998] AC 188 (HL).
4 High Court judgment, above n 2, at [44] citing *Cook v Housing New Zealand Corp* [2014] NZCA 504.
5 See generally High Court judgment, above n 2, at [44].

concluded that the proposed claim was an attempt by Mr Cook to "revive and recast the same complaints beyond the proper statutory avenues".[6] It was an abuse of process.

[5] At the end of his judgment, Downs J said this:[7]

> I acknowledge this result will disappoint Mr Cook, who obviously feels strongly about this cause. However, the only issue is whether Mr Cook's claim is capable of being sustained in *law*. For the reasons expressed in this judgment, which largely restate those given by Judge Hinton in the court below, Mr Cook's claim against [HNZ] could not succeed. Consequently, the Judge was correct to strike out the claim.

[6] On 3 October 2017 Downs J refused leave to appeal his decision to this Court.[8]

[7] Mr Cook seeks special leave to appeal to this court. As the proceeding pre-dates the coming into force of the Senior Courts Act 2016, it is governed by s 66 of the Judicature Act 1908.

[8] Leave of this Court is required for a second appeal. Such appeals do not exist as a matter of right. The result after one appeal is otherwise presumed final, so that litigants can get on with their lives outside the confines of a courtroom.

[9] The test for whether leave should be given for a second appeal was set out by this Court in *Waller v Hider*:[9]

> The appeal must raise some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal.
>
> …
>
> Upon a second appeal this Court is not engaged in the general correction of error. Its primary function is then to clarify the law and to determine whether it has been properly construed and applied by the Court below. It is not every alleged error of law that is of such importance, either generally or to the parties, as to justify further pursuit of litigation which has already been twice considered and ruled upon by a Court.

---

6 At [45].
7 At [47] (emphasis in original).
8 *Cook v Housing New Zealand Corp* [2017] NZHC 2405.
9 *Waller v Hider* [1998] 1 NZLR 412 (CA) at 413.

[10] Mr Cook appeared on his own behalf. His proposed further appeal grounds really boil down to four complaints:

(a) Downs J failed to take into account particular evidence (and considered some evidence said to be of a "hearsay" nature);

(b) Downs J erred in reaching conclusions as to whether the abuse of process ground for strike-out was challenged by amicus curiae in the High Court;[10]

(c) Downs J failed to deal fairly with the hearing (advancing a number of process complaints); and

(d) the Judge was generally wrong to strike out the claim.

[11] An applicant for leave to appeal must, first, demonstrate seriously arguable error by the court below. That is, an error relating to some question of law or fact capable of bona fide and serious argument. Secondly, he or she must demonstrate that the interests involved, either public or private, are of sufficient importance to depart from the general proposition that a judgment pronounced is final after the exercise of one right of appeal.

[12] None of those alleged errors are in our view capable of serious or bona fide argument when the issue is, as here, one of strike-out. The first complaint is of a failure in relation to evidence. But a strike-out application proceeds on the presumption that the facts pleaded are true. No evidence is heard on the strike-out application itself.[11] As to the second complaint, whether the amicus who appeared for him in the District Court (and in the High Court) challenged the HNZ allegation of abuse of process is beside the point given the Judge's own subsequent analysis, proceeding as if counsel had done so.[12] Thirdly, process complaints about the manner in which the Judge is said to have heard the strike-out application (even if one were

---

10 At [43].

11 Mr Cook persisted in attempting to deliver evidence from the bar to us. We treated his attempts to do so with leniency.

12 High Court judgment, above n 2, at [44]–[45].

provisionally to assume they were true) do not alter the fundamental reality of this case. And that is that the private-law tort claims advanced in the statement of claim were entirely untenable as a matter of law. We see no error in the Judge's reasons on that issue, and no prospect of a miscarriage of justice in the decision of the High Court standing intact.

[13] It follows that the present application must fail, and the application for special leave will be dismissed accordingly.

[14] We endorse the observation of Downs J noted above at [5]. Mr Cook has had his day in court. He has had a second day - on appeal. He is not permitted to persist in mounting more and more appeals in the absence of demonstrative legal merit.

[15] Any remedies for the situation he finds himself in must lie in attempting to persuade HNZ that his condition requires the care he asserts. And then, and only then, potentially in a public law claim.

Result

[16] The application for special leave to appeal is declined.

[17] The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.

Solicitors:
Meredith Connell, Auckland for Respondents