**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2021-404-1168**
**[2023] NZHC 389**

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| BETWEEN | BODY CORPORATE 201036<br>Plaintiff/Respondent |
| AND | WHAI RAWA RAILWAY LANDS LP<br>Defendant/Applicant |

On papers

Counsel: J Heatlie and J M Wood for plaintiff/respondent
D M Salmon KC for defendant/applicant

Judgment: 3 March 2023

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**JUDGMENT OF ASSOCIATE JUDGE TAYLOR**
**[Application for leave to appeal]**

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*This judgment was delivered by me on 3 March 2023 at 10am, pursuant to r 11.5 of the High Court Rules*

*Registrar/Deputy Registrar*
*Date:*

Solicitors:
Court One, Auckland for plaintiff/respondent
Lee Salmon Long, Auckland for defendant/applicant

## Background

[1] The Court delivered a judgment dated 7 April 2022 declining the defendant's application for an order to strike out and/or summary judgment against the plaintiff (**the judgment**).[1]

[2] On 9 May 2022 the defendant filed an application for leave to appeal the judgment. On 23 May 2022 the respondent filed a notice of opposition opposing the defendant's application for leave to appeal.

[3] On 3 August 2022 the defendant filed submissions in support of the application. On 5 September 2022 the plaintiff filed submissions in support of opposition to the application. On 30 September 2022 the defendant filed reply submissions.

[4] On 3 October 2022 the plaintiff filed a memorandum objecting to the defendant's reply submissions and on 10 October 2022 the defendant filed a memorandum in response for the plaintiff's memorandum of 3 October 2022.

## Grounds for the appeal

[5] The grounds set out in the notice of application for leave to appeal are:

(a) The proposed appeal discloses arguable errors of fact and law as set out in the draft notice of appeal attached to the application.

(b) The interests of justice require that leave be granted to appeal for the following reasons set out at [5](c) to [5](f).

*Importance to the parties*

(c) The proposed appeal raises issues important to the parties to this proceeding. If relief under s 78(f) of the Residential Tenancies Act 1986 (**RTA**) is not available to the respondent either because there is

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

"no unit title dispute" under s 176 of the Unit Titles Act 2010 (**UTA**) or because it is not arguable that the rent review clause is harsh or unconscionable, the claim must fail.

(d) Any delay to resolve the question of whether the relief sought in the statement of claim is available, before the parties incur the costs of discovery, evidence and trial, is justified in the circumstances.

*Issues of wider significance*

(e) The proposed appeal raises issues of public importance:

(i) There is presently no clear authority from the courts on the interpretation of s 171 of the UTA as to what constitutes a "unit title dispute" including:

(A) the extent to which the dispute must relate to common property and/or units;

(B) whether the dispute about rental review provisions in a lease will amount to a "unit title dispute" under s 171.

(ii) A determination of whether Parliament intended, by ss 171 and 176 of the UTA, to extend the provisions of the RTA to leases between arm's length commercial parties in a way that would allow either party to seek variations of the lease terms (including rent) based on allegations that the lease, or any term, is harsh or oppressive, or that any power under the lease has been exercised in a harsh or oppressive manner, is of commercial importance to all ground lessors and lessees connected with unit title developments in New Zealand.

(f) The correct application in ss 171 and 176 is fundamental to the unit titles jurisdiction and has not been considered by appellate courts.

**Notice of opposition**

[6] In summary, the grounds set out by the respondent in the notice of opposition opposing the application are:

(a) There is no error of law or fact in the judgment.

(b) Even if the Court considers such errors may arguably exist, they are not of general or public importance (or of any precedential value):

(i) The specific facts and circumstances of each case need to be ascertained and necessarily relevant to whether a particular agreement is "an agreement" for the purpose of s 78(f) of the RTA (as read into the UTA).

(ii) The specific facts and circumstances of this case have not been ascertained and are directly relevant to whether the lease in issue is "an agreement" for the purposes of s 78(f) of the RTA (as read into the UTA).

(iii) While the opportunity to neutralise this issue is plainly of significance for the applicant, it is not in the interests of justice to prevent or avoid an enquiry into the facts and circumstances relevant to negotiation and execution of the lease in issue (and possibly other similar leases) through an unwarranted assumption (or presumption) that the lease (and ground leases generally) are agreements entered into at arm's length between commercial parties. There is no legal or other basis for such a contention or presumption.

(c) The circumstances do not warrant incurring further delay (any delay is likely to prejudice the respondent).

(d) The interests of justice will not be served by granting leave.

**Submissions for the applicant**

[7] Mr Salmon, for the applicant, submits that the relief sought in the respondent's statement of claim depends on:

(a) whether its statement of claim discloses a "unit title dispute" under s 171 of the UTA such that it can apply for relief under s 78(f) of the RTA, by virtue of 176 of the UTA;

(b) if a "unit title dispute" is established, whether the rent review clause in the lease was harsh or oppressive or has been exercised in a harsh or oppressive manner as pleaded in the statement of claim for the purposes of s 78(f) of the RTA.

[8] Mr Salmon submitted that the High Court erred in finding that:

(a) the legal interpretation of the relevant provisions of the UTA and the RTA needs to be "fully tested" at a substantive hearing at ([93](a));

(b) the "scope" of s 78 of the RTA needs to be addressed at a substantive hearing ([77]);

(c) policy considerations to be taken into account in the interpretation of the relevant sections of the UTA and the RTA need to be addressed in a substantive hearing ([78] and [79]);

(d) in effect it was unable to determine whether the respondent's claim was a "unit title dispute" and/or whether it would be entitled to apply for relief under s 78(f) of the RTA.

[9] Mr Salmon submitted that the High Court erred in the following respects:

(a) In finding (in effect) the respondent's allegation that the rental clause in the lease is harsh and/or unconscionable or exercised in a harsh and/or unconscionable manner was arguable ([93](b) and [94]).

(b) In finding Dr McDermott's views were not speculative, without foundation or baseless ([87]).

(c) When it expressed an "inclination to agree" that it would be unrealistic for a purchaser of a unit to have understood, and been able to calculate effectively, the changes in the ground lease rental and apply this calculation in the purchase price of the units ([88]).

(d) In finding that discovery in respect of the respondent's challenge to the original parties to the lease not being truly arm's length was required to assess whether the rental clause is harsh or unconscionable ([84]).

(e) In awarding costs to the respondent on a 2B basis ([96]). Mr Salmon submits that because the merits on an unsuccessful application for strike out or summary judgment were in favour of the applicant ([72] and [77]) the costs would have more appropriately been reserved pending trial.

**Respondent's submissions**

[10] Mr Wood, for the respondent, submits that the applicant has misconstrued the standard of review in leave to appeal applications as:

(a) it has focused on whether its arguments for striking out or for granting summary judgment should have succeeded;

(b) it ought to have, and has not, identified an error of law or fact in the judgment when it applied the standards for strike out or granting summary judgment.

[11] Mr Wood submits that an application for leave to appeal under s 56(3) of the Senior Courts Act 2016 is not an opportunity for the applicant to relitigate the subject matter of the failed application. He refers to the Court of Appeal decision in

*Greendrake v District Court of New Zealand* where the Court of Appeal set out the tests as follows:[2]

(a) a high threshold exists;

(b) the applicant must identify an arguable error of law or fact;

(c) the alleged error should be of general or public importance warranting determination, or otherwise of sufficient importance to the applicant to outweigh the lack of general or precedential value;

(d) the circumstances must warrant incurring further delay; and

(e) the ultimate question is whether the interests of justice are served by granting leave.

[12] Mr Wood submits that the judgment was consistent with the established principles of the summary judgment and strike out:

(a) For strike out the Court must decide that it has been demonstrated that the causes of action are so clearly untenable that they cannot succeed.[3]

(b) There was no allegation by the applicant that the Court failed to apply the standard of review to the question of whether s 78 of the RTA (as read into the UTA) by ss 171 and 176 provides an avenue for relief to the respondent. Instead, the Court addressed the test for strike out and appropriately considered both parties' positions and considered each had merit (at [77]).

(c) The applicant focuses on whether the Court could have, and therefore should have, determined the interpretation of those sections. On the strike out the Court may determine the complex issues of law but is not required to do so. In an exercise of its judicial discretion, it declined to

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2 *Greendrake v District Court of New Zealand* [2020] NZCA 122 at [6].
3 *Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314 at 316–317.

do so and left that to be determined at the substantial hearing of this matter.

(d) While the exercise of a discretion is capable of appeal, the test is higher than that of a general appeal, and the applicant must show the Court acted on a wrong principle, took into account irrelevant matters or omitted to factor irrelevant ones, or made a decision that was plainly wrong.[4]

(e) The Court declined to resolve the policy considerations that the applicant put forward in its submissions. It was appropriate for the Court to do so as those policy considerations were all dependent on findings of fact that could only be ascertained following discovery and at a hearing:

(i) were the original parties to the lease bargaining at arm's length (the factual finding necessary to invoke policy considerations (a), (b) and (c) put forward by the applicant);

(ii) were potential purchasers able to ascertain the nature and extent of their obligations, and/or were they in a vulnerable position (the limited evidence now provided by the applicant suggests that the lessor had a profit share in the land sales) (the factual finding necessary to invoke the policy consideration (c) put forward by the applicant);

(iii) how much input and control did the lessor have over the progress of the development (the factual finding necessary to invoke the policy consideration (d) put forward by the applicant)?

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4 *May v May* [1982] 1 NZLR 165 at 169–170.

(f) Given the policy considerations involved question-begging the factual background, it was appropriate not to decide them in the absence of a Court fully exploring that background.

(g) On a summary judgment in favour of a defendant, the Court may give its judgment if it is satisfied that none of the causes of action can succeed. The applicant takes no issue with the standard the Court applied nor with the statement that the power is ultimately discretionary.

(h) The applicant's approach is to "flip" the test around and say that the respondent has to sufficiently establish the lease is harsh or unconscionable.

(i) The respondent says that it is plain, given the conflicting affidavits of Dr McDermott and Mr Dunlop on the issue of whether the lease was harsh or unconscionable, that evidence could not be resolved on summary judgment.

(j) The applicant did not file any evidence with its application and the evidence it filed was a response from an expert in a different field. The applicant was left in a position of only being able to criticise Dr McDermott's evidence from the bar. The Court was not able to be satisfied that Dr McDermott's evidence was baseless or without merit.

[13] Mr Wood submits that even if the alleged errors are found to be arguable the circumstances of this case do not warrant the inevitable delay of the trial and that any delay in having this substantive matter considered will be severely prejudicial to the respondent and could quite possibly lead to the implosion of the Parnell Terraces development. He submits that the implications of delay must in this case, as they did in *Vance v Vey Group Ltd*,[5] trump the other considerations referred to in *Finewood Upholstery Ltd v Vaughan* (and dealt with in the applicant's submissions).[6]

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5 *Vance v Vey Group Ltd* [2022] NZHC 1861.
6 *Finewood Upholstery Ltd v Vaughan* [2017] NZHC 1679.

[14] Mr Wood then analyses the suggested errors of law in the judgment and the suggested errors of fact. I will not repeat those submissions here as they are largely repetitive of the submissions at the hearing.

[15] Mr Wood further submits that the appeal will delay the respondent's claim from being heard and subject the respondent to ongoing oppression. He submits for the reasons set out below that the Court of Appeal will be in no better position than the High Court to assess whether the thresholds for summary judgment or strike out have been met given the manner in which the applicant couched its draft notice of appeal:

(a) it will be in the same position having two competing interpretations of the UTA that have merit;

(b) it will not be able to decide the policy considerations the applicant has put forward to support its interpretation as they are dependent on factual findings which cannot be made on the evidence before it;

(c) it will not be able to assess by way of credible opinion evidence that the views of Dr McDermott on the economic effect of the lease are baseless and without merit.

[16] Mr Wood submits that it is not in the interests of justice that leave be granted because:

(a) the application or non-application of s 78 of the RTA to the particular agreement cannot be determined without having regard to the facts and circumstances relevant to the negotiation of that agreement;

(b) the legal and factual issues are complex.

*Reply submissions for the applicant*

[17] The applicant filed submissions in reply to the respondent's submission dated 30 September 2022.

[18] Mr Salmon submits that the *Greendrake* decision must be considered alongside the decisions in *Li v Chief Executive, Ministry of Business, Innovation and Employment*[7] and *Yu v Bradley.*[8] Mr Salmon refers to the passages from Palmer J's judgment in *Li* and from Moore J's judgment in *Yu*, which indicate the inherent prejudice to the applicant in declining leave to appeal unsuccessful summary judgment decisions.

[19] Mr Salmon submits that a number of facts the respondent has described in its submissions as "undisputed facts" are in fact disputed and these are set out at [10] to [20] of his submissions.

[20] Mr Salmon submits that the respondent has made new submissions in support of its argument that the respondent is entitled to relief under s 78(f) of the RTA by virtue of its claim being a "unit title dispute" under ss 171 and 176 of the UTA. Mr Salmon notes this submission was not made in the original hearing but submits that it does not materially affect the proposed appeal.

[21] Mr Salmon makes further submissions on:

(a) the purpose of the UTA;

(b) the relevance of whether Parliament has provided "oppression remedies" in other contexts;

(c) the submission of new evidence in the form of affidavit evidence by Mr Rehm which is rebutted by the applicant;

(d) whether the delay will be prejudicial to the respondent as alleged by the respondent.

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7 *Li v Chief Executive, Ministry of Business, Innovation and Employment* [2018] NZHC 1171.
8 *Yu v Bradley* [2018] NZHC 2312.

*Respondent's objections to the reply submissions of the applicant*

[22] The respondent filed a memorandum dated 3 October 2022 in response to the applicant's reply submissions.

[23] The main points made in response by the respondent are:

(a) the authority of the *Li* decision is challenged as being prior to the Court of Appeal's decision in 2020 in *Greendrake* and accordingly is not binding authority on this Court;

(b) the applicant's attempt to introduce wholly new material in [38] to [43] of its reply submissions is not related to the respondent's submissions.

**Decision**

*Preliminary matters*

[24] I first deal with some preliminary matters. First, I adopt the respondent's submission that the description of the principles to be applied in granting leave to appeal in the present case is as set out by the Court of Appeal in its decision in *Greendrake.*

[25] Secondly, in relation to new evidence introduced by the respondent and new submissions made by both the applicant and the respondent, the leave to appeal decision is based on evidence before the Court in respect of which the judgment was delivered.

*Analysis*

[26] I am of the view that the applicant's application for leave to appeal the judgment should be declined. This is for the reasons set out at [22] to [31] of this judgment.

[27] In respect of the jurisdictional argument as to whether the respondent's claim was "a unit title dispute" under s 176 of the UTA therefore making relief available to

the respondent under s 78(f) of the RTA, the Court applied the correct test in respect of whether or not a summary judgment or strike out judgment should be given in favour of the defendant. Under r 15(1) of the High Court Rules 2016 in order to succeed in a strike out application, an applicant/defendant must show that the plaintiff's pleading shows no reasonably arguable cause of action. The Court applied this test and concluded that the applicant had not demonstrated that the respondent's cause of action was not reasonably arguable. As noted in the judgment, the plaintiff's interpretation of the relevant provisions of the UTA and the RTA were not without some merit. Accordingly, a strike out judgment was not appropriate. The Court did not err by applying the wrong test or take into account irrelevant factors, or not take into account relevant factors, in deciding whether a strike out application should be granted.

[28] Under r 12.2 of the High Court Rules 2016, the relevant test for a summary judgment to be granted in favour of a defendant is whether the Court is satisfied that none of the causes of action in the plaintiff's statement of claim can succeed. As with the test for strike out, the Court was not satisfied that the respondent's interpretation of the provisions of the UTA and RTA could not succeed. The Court did not err by applying the wrong test or take into account irrelevant factors, or not take into account relevant factors, in deciding whether summary judgment should be granted.

[29] As to the issue of whether the rent review clause in the lease was harsh or oppressive or had been exercised in a harsh or oppressive manner, the threshold of the Court being satisfied, for the purposes of strike out, that the respondent's claim was not reasonably arguable and, for the purposes of summary judgment, that the respondent's cause of action could not succeed, was not met because:

(a) In relation to the inception of the lease, whether the parties were truly arm's length and required elucidation by discovery.

(b) Dr McDermott's evidence, while criticised by the applicant, was not shown to be baseless or without merit. This is particularly so as the corresponding evidence from the applicant was from an expert in a different field.

[30] Consequently, it was not possible for the Court to be satisfied that the respondent's position was not reasonably arguable and that the cause of action in the plaintiff's claim could not succeed.

[31] As to delay, in my view the balance of the interests of justice favours the respondent and that delay in proceeding to the substantive trial is more prejudicial to the respondent than to the applicant. As submitted by the respondent, the respondent continues to be subject to the current rental regime in the existing lease. On the respondent's evidence the ongoing situation puts the respondent in a financially fragile position. In my view, the interests of justice are best served by the substantive hearing occurring as soon as possible.

**Result**

[32] As a result of the conclusions I have reached in the preceding paragraphs, the applicant's application for leave to appeal is declined.

**Orders**

[33] I make the following orders:

(a) the applicant's application for leave to appeal is declined;

(b) costs are reserved.

[34] Counsel are directed to endeavour to agree costs in respect of the applicant's application. If costs cannot be agreed within 20 working days of the date of this judgment, then counsel for the respondent shall file a memorandum as to costs (not exceeding five pages) within five working days of the expiry of the 20 working day period, and counsel for the applicant shall file a reply memorandum (not exceeding five pages) within five working days of receipt of the memorandum from counsel for the respondent.

**Associate Judge Taylor**