IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 13/2022
[2022] NZSC 59

BETWEEN	BODY CORPORATE 384911 Applicant
AND	WONG SUN EEN AND ORS Respondents

Court:	O'Regan, Ellen France and Williams JJ
Counsel:	S R Carey for Applicant P L Rice for Respondents
Judgment:	11 May 2022

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondents costs of $2,500.

REASONS

[1] Body Corporate 384911 applies for leave to appeal against a decision of the Court of Appeal.[1] In that decision, the Court of Appeal allowed an appeal against a decision of the High Court dealing with aspects of a dispute between unit holders in a unit title complex.[2]

[2] The applicant is the Body Corporate for a unit title complex comprising 191 units. Sixteen of these are commercial, the remainder are residential. The residential

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1 *Een v Body Corporate 384911* [2021] NZCA 665 (Miller, Katz and Downs JJ) [CA judgment].
2 *Een v Body Corporate 384911* [2021] NZHC 729 (Gordon J).

units are hotel-style rooms rather than apartments. The unit title complex was designed as a hotel and operated as the Westin Hotel for some years.

[3] The owners of the majority of the units now operate a Sofitel Hotel from the units they control, while the units of the respondents (who own 81 of the residential units) are not involved in the Sofitel operation.[3] The litigation leading to the present case is a part of a wider dispute between the owners of the majority of the units and the respondents.

[4] In November 2020, an extraordinary general meeting of the Body Corporate was convened. Two resolutions were proposed. The first was a special resolution, proposing that the Body Corporate approve the manning of the concierge's desk for security and health and safety reasons. This was to be at the cost of the hotel, not the Body Corporate. This special resolution failed because the respondents voted against it. The second resolution was an ordinary resolution, which proposed that the Body Corporate be authorised to contract with a security company to provide 24/7 security services for the Body Corporate and to levy members for the cost. The second resolution was passed, but the respondents voted against it.

[5] The respondents applied to the High Court for relief under s 210 of the Unit Titles Act 2010, which provides that a person who voted against a resolution may apply for relief on the grounds that the effect of the resolution would be unjust or inequitable for the minority. The thrust of the minority's argument in the High Court was that the cost of security should be borne by the majority's hotel, which is the beneficiary of that security, rather than by the Body Corporate.

[6] In allowing the appeal and upholding the minority's claim, the Court of Appeal gave the following reasons:[4]

(a) the minority did not want or need security of this nature (because it was required for the hotel rather than for the whole complex);

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3 The majority owners were the second to fifth respondents in the Courts below but took no active role as the Body Corporate's interest and theirs were effectively the same. The minority formerly owned 85 of the residential units, but four previous members have since sold their units.

4 CA judgment, above n 1, at [35].

(b) the security would not be needed if there was no hotel at the complex;

(c) conventional security for the Body Corporate would cost about $25,000 per annum as opposed to $348,000 per annum for hotel security; and

(d) the outcome is that the minority are subsidising the cost which would ordinarily be borne by the hotel to the extent of over $150,000 per annum.

[7] The applicant wishes to challenge, if leave to appeal is granted, all of the Court of Appeal's reasons. For the most part, this involves challenges to essentially factual findings in a case of a unit title complex which is far from typical of such complexes. Counsel for the applicant argues that a matter of general or public importance arises because the Court of Appeal decision creates a bad precedent, which will apply to the numerous unit title developments in New Zealand.[5] In particular, he argues that it is not a proper ground for relief under s 210 that the minority does not "want" something. However, we do not read the Court of Appeal as saying that it is. We consider that the points raised by the proposed appeal are all essentially factual and there is no matter of general or public importance arising. Nor do we consider there is any risk of a miscarriage of justice, given the limited scope of that concept in the civil context.[6]

[8] Just prior to the intended delivery of this judgment, the applicant adduced an affidavit from the chair of the Body Corporate, recounting an incident involving disorderly behaviour by guests in rooms belonging to members of the minority that had occurred after the delivery of the Court of Appeal's judgment. We gave the respondents an opportunity to respond to this and have now received an affidavit in reply. The objective of the applicant's new evidence was to show that the level of security proposed by the applicant was required. We do not consider that one isolated incident does this.

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5 Senior Courts Act 2016, s 74(2)(a).

6 Section 74(2)(b); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.

[9] The application for leave to appeal is dismissed. The applicant must pay the respondents costs of $2,500.

Solicitors:
Edmonds Judd, Te Awamutu for Applicant
Haigh Lyon, Auckland for Respondents