

IN THE SUPREME COURT OF NEW ZEALAND

**SC 76/2008
[2009] NZSC 1**

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| BETWEEN | I A MIKITASOV Applicant |
| AND | B J COLLINS Respondent |

Court: Elias CJ, McGrath and Wilson JJ

Counsel: D R James for Applicant
A H Waalkens QC for Respondent

Judgment: 4 February 2009

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed with costs of \$2500 to the respondent.

REASONS

[1] The applicant seeks leave to appeal to this Court against the dismissal by the Court of Appeal of an appeal to that Court in summary judgment proceedings. The matter concerns an easement dispute between neighbours.

[2] In 2005 the applicant purchased lots one and two in a subdivision of land in Kerikeri owned by the respondent. The respondent retained ownership of lot three. Lots one and three both have a street frontage and are adjacent in the street. Lot two is adjacent to the rear boundary of lot one. It does not have street frontage. Access to lot two is by a right of way over part of lot three, adjacent to lot one. The easement instrument creating the right of way does not give rights of access to the owner of lot one.

[3] The issue in the litigation is whether, nevertheless, the applicant has the right to use the right of way to gain access lot one. His argument is that he acquired such rights as a result of oral negotiations with the respondent, prior to their entering into an agreement for the sale and purchase of lots one and two.

[4] In the High Court, Associate Judge Robinson held that, on the applicant's affidavit evidence, the respondent had not represented to the applicant that he could use the right of way in relation to lot one. Nor had there been an implied grant of an easement through prior use of the land under the rule in *Wheeldon v Burrows*.¹ The Judge gave summary judgment on the respondent's application which included granting the respondent an injunction to restrain use of the right of way by the applicant in respect of access to lot one. A counterclaim by the applicant for a declaration of entitlement to such use was dismissed. The Judge also directed that a caveat lodged by the applicant to support an implied easement should lapse.

[5] The Court of Appeal upheld the Associate Judge both as to the result and these aspects of his reasoning.

[6] In this Court the applicant seeks leave to appeal against the Court of Appeal's judgment on various grounds. He wishes to challenge the findings of the lower Court concerning the content and effect of representations by the respondent said to have been made on his affidavits. The applicant further takes issue with the appropriateness of the case for summary judgment. He also seeks to invoke the Court's equitable jurisdiction under s 6 of the Contractual Remedies Act 1979. None of these matters, however, raise an arguable issue that is a point of general or public importance or otherwise a basis for this Court to hold it is in the interests of justice to hear the appeal under the Supreme Court Act 2003.

[7] We are also satisfied that the rule in *Wheeldon v Burrows* can have no application. The applicant's claim is not based on circumstances indicating there has been an implied grant of an easement under the rule. In *Wheeldon v Burrows*, the manner of use of the whole land in issue, prior to part of it being transferred, was for the benefit of the part transferred. That is not the present case. For these reasons the

¹ (1879) 12 ChD 31 at p 49.

statutory test permitting this Court to grant leave to appeal has not been made out.
The application for leave is dismissed with costs of \$2500 to the respondent.

Solicitors:

Palmer Macauley, Kerikeri for Applicant

Richard Mark, Kerikeri for Respondent