IN THE SUPREME COURT OF NEW ZEALAND

SC 91/2007
[2008] NZSC 17

BETWEEN	G C DURY AND ORS Applicants
AND	PALMERSTON NORTH CITY COUNCIL & ORS Respondents

Court: Elias CJ, Blanchard and Tipping JJ

Counsel: H F Drake, one of the Applicants in person
J W Maassen for First Respondent
G A Paine for Second and Third Respondents

Judgment: 1 April 2008

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed with costs of $1,000 to the first respondent and $1,000 jointly to the second and third respondents.

REASONS

[1] We have received and considered written submissions from all parties, including the further submissions dated 4 March 2008 from the applicants. It is not necessary to have an oral hearing in order to decide whether leave should be granted as it is plain that it should not be. The proposed grounds of appeal are either insufficiently arguable and/or fact specific, giving rise to no issue of public or general importance, i.e. no issue of concern to anyone other than the parties.

Furthermore, there is no error in the Court of Appeal reasons sufficiently apparent and substantial as to give rise to a miscarriage of justice in a civil case.[1]

[2] The proposed appeal relates to a decision of the first respondent to proceed to hear and decide a resource consent application without notification. Since the High Court decision, which was in favour of the present applicants and was overturned by the Court of Appeal, the second and third respondents, the owner and lessee of the subject property, have obtained another resource consent after making a fresh and notified application to the Council. But that other consent imposes rather more restrictive conditions on the use of the property than does the original consent which has subsequently been restored by the decision of the Court of Appeal.

[3] There may be a temporary awkwardness in having two extant consents but the second and third respondents were entitled to have the original consent restored in circumstances where it should not have been set aside by the High Court and the other consent was validly issued in the circumstances pertaining when that was done. The second and third respondents can now notify the Council under s 138 of the Resource Management Act 1991 that they are surrendering the other consent. If they do not do so, the original consent must be treated as the most recent (by reinstatement) and the second and third respondents would certainly be entitled to rely on it.

[4] Contrary to the submissions of the applicants, in our view the Court of Appeal has not misinterpreted the decision of this Court in *Discount Brands Ltd v Westfield (New Zealand) Ltd*.[2] The relevant issue on the proposed appeal could only be whether that Court has misapplied *Discount Brands* in the particular circumstances of this case, where, the applicants assert, the Council dispensed with notification without having enough information about traffic movements and parking. That issue has no significance for anyone other than the parties and is of no public or general importance. Nor is it plain that the Court of Appeal has erred in this respect.

---

1 *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] 3 NZLR 522n.
2 [2005] 2 NZLR 597.

[5] The refusal of the Court of Appeal to take into account evidence concerning traffic movements after the orthodontic practice commenced business was justifiable given that the validity of the non-notification decision had to be determined in light of the material considered or available to the Council at the time that decision was made. The proposed evidence from the neighbours could at best raise a concern that perhaps further enquiries by the Council at the time might have shown that there would be problems of the kind which are said to have arisen. But that is both speculative and fact specific. The Court of Appeal had a discretion concerning admission of the evidence and we are not persuaded it was wrongly exercised.

Solicitors:
Cooper Rapley, Palmerston North for First Respondent
Bruce Andrews, Palmerston North for Second Respondents