IN THE SUPREME COURT OF NEW ZEALAND

SC 123/2011
[2012] NZSC 9

BETWEEN	MFT PROPERTIES LIMITED Applicant
AND	COUNTRY CLUB APARTMENTS LIMITED Respondent

Court: Blanchard, Tipping and McGrath JJ

Counsel: R S Pidgeon for Applicant
L J Turner for Respondent

Judgment: 29 February 2012

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed with costs of $2,500 to the respondent.

REASONS

[1] Country Club Apartments Ltd took an assignment of a lease under which the applicant, MFT Properties Ltd, was the lessor. The applicant now accepts that the lease was renewed in September 2006 although the renewal was not documented. At that time there was a negotiation between representatives of MFT and Country Club about whether there would be a variation of lease reducing the rent. Country Club claims, and the Court of Appeal has found,[1] that there was agreement to reduce the rent for the period of the five year renewal to $8,420 per month inclusive of GST and that the lessor would meet the monthly outgoings on the premises. One of the proposed issues for the intended appeal to this Court concerns whether the Court of

[1] *Country Club Apartments Ltd v MFT Properties Ltd* [2011] NZCA 560.

Appeal's finding to that effect was in error. The High Court Judge appears to have been of the same view,[2] as is implicit in the fact that he went immediately to a consideration of whether the agreement on the reduction in rent was the subject of a memorandum in writing sufficient for compliance with s 2 of the Contracts Enforcement Act 1956. In any event, the issue sought to be raised is entirely factual and does not merit further review by this Court.

[2] The Court of Appeal concluded that there was a sufficient memorandum in writing of the variation agreed to in 2006. That is, again, both a factual issue and, subject to the point dealt with in the next paragraph, one on which there was an ample basis for the Court of Appeal's conclusion. The rental figure appeared in an email from Mr McNabb of MFT to Mr Latta of Country Club sent in May 2009. It was common ground in the Court of Appeal that the printing of Mr McNabb's first name at the bottom of the email could constitute a signature for the purposes of s 2. In view of s 22 of the Electronic Transactions Act 2002, that was understandable. The contested issue was about whether it constituted a signature on behalf of MFT. That too was a factual question which the Court of Appeal resolved against MFT.

[3] The Court of Appeal also held that, although the email in May 2009 did not accurately record what it found to be the agreement concerning GST (the email referred to the rent being exclusive of GST), that was capable of rectification for the purpose of enforcement of the variation of lease. That conclusion was in accordance with long established case law,[3] and accordingly raises no question of principle requiring determination by this Court. As Dr McMorland says, rectification can bring about compliance with the statutory requirement by any instrument that was formerly not adequate either as a written contract or as a written record.[4]

[4] A further proposed ground of appeal concerning set-off of rental payable for accommodation provided by Country Club to an associate of Mr McNabb, at the request of Mr McNabb, also turns on the particular facts of the case.

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2 *MFT Properties Ltd v Country Club Apartments Ltd* HC Auckland CIV-2010-404-5913, 13 April 2011.

3 *United States of America v Motor Trucks Ltd* [1924] AC 196 (PC).

4 D W McMorland *Sale of Land* (3rd ed, Cathcart Trust, Auckland, 2011) at [4.13].

[5] There is accordingly, no arguable question of public or general importance raised by the proposed appeal, nor is there any appearance of a substantial miscarriage of justice. The criteria for leave are therefore not met.

[6] It has not been necessary for us to consider the Court of Appeal's alternative finding that, if the memorandum had been insufficient, Country Club could have relied upon the doctrine of part performance.

Solicitors:
Pidgeon Law, Auckland for Applicant
Whaley & Garnett, Auckland for Respondent