

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 59/2022
[2022] NZSC 104

BETWEEN KEITH MERVYN GEORGE HUNTER
Applicant

AND AUCKLAND COUNCIL
First Respondent

PHILIP MARTIN BURLEY
Second Respondent

ACL TRUSTEES LIMITED
Third Respondent

Court: Glazebrook, Ellen France and Williams JJ

Counsel: Applicant in person
A J Cumming for First Respondent
J H Clark for Second and Third Respondents

Judgment: 2 September 2022

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay one set of costs of \$2,500 to the respondents.**
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REASONS

Introduction

[1] The present application relates to a challenge by way of judicial review brought by the applicant, Keith Hunter. The proceedings challenged a resource consent obtained by the second and third respondents, Philip Burley and ACL Trustees Ltd (together Burley) from an Auckland Council Hearing Panel. The application for

judicial review was dismissed by the High Court.¹ The applicant appealed unsuccessfully from that decision to the Court of Appeal.² He now seeks leave to appeal to this Court.

Background

[2] The resource consent enabled the development by Burley of a villa in Auckland. The villa is within the Single House Zone under the Auckland Unitary Plan (AUP) and is subject to both a Special Character Areas Overlay and an Historic Heritage Overlay. The applicant owns a villa immediately to the south of Burley's property. He opposes the development primarily because of the resultant shading of the northern side of his property and the effect on his tenant who occupies a flat on the property.

[3] Burley initially obtained a resource consent for the development on a non-notified basis. The applicant had asked the Council to notify him about any application for development of the Burley property but the Council did not do so. The applicant brought judicial review proceedings seeking a declaration that the grant of the resource consent was invalid and setting aside that order. The applicant subsequently discontinued those proceedings. He did so on the basis he understood that Burley would file a new application materially different from the original one. A fresh application was made. The parties do not agree on the extent to which the new application differed from the original. Following a hearing before the Panel in September 2019, a further resource consent was granted.

[4] The applicant then issued the current proceedings but was unsuccessful in the High Court and Court of Appeal. In dismissing the appeal, the Court of Appeal upheld the approach taken by Woolford J. Further, the Court considered there was no apparent procedural error in the approach of the Panel and nor any apparent error of law. The Court said it saw the applicant's complaint as "essentially that he disagrees with the panel's assessment of how serious the adverse effect on his amenity value would be."³

¹ *Hunter v Auckland Council* [2020] NZHC 1720 (Woolford J) [HC judgment].

² *Hunter v Auckland Council* [2022] NZCA 205 (Kós P, Courtney and Collins JJ).

³ At [30].

The proposed appeal

[5] The key issues that the applicant wishes to raise on the proposed appeal can be summarised in this way.

[6] First, the applicant says that the proposed appeal would raise issues of public importance about the approach to interpretation of the relevant parts of the AUP regulating the zone. In this respect, the applicant's case is that the development would destroy the amenity values of his property contrary to the requirements of its zone. The applicant says that these adverse effects will occur solely so that Burley can park its cars on the property, a purpose contrary to the purpose of the zone which is to maintain and enhance amenity values.⁴

[7] Second, the applicant wishes to raise various issues about the process followed by the Council. For example, the applicant notes that the Council's independent planner recommended against the development, but says that other planners were then engaged. He also queries the arrangements for payment of the costs of the Panel.

[8] Third, the applicant argues that the events he has outlined in his affidavit add up to criminal fraud but the Courts below have simply ignored that state of affairs.

[9] Fourth, the applicant says that equitable principles are in play in this case. He refers in particular to the equitable principle that a person must come to equity with clean hands. The submission is that this principle has been ignored by the Courts below. Finally, there are various allegations of judicial bias.

Our assessment

[10] Resolution of the proposed appeal would require the Court to consider various factual matters particular to this case. Issues about the approach to the relevant parts of the AUP, for example, those relating to amenity values, are at heart a challenge to

⁴ The applicant also says that Mr Burley accepted in evidence that car parking was his fundamental purpose and that this evidence has been ignored.

the assessment of the evidence on this issue and to the merits of the Panel's decision. No question of general or public importance accordingly arises.⁵

[11] Nor is there any appearance of a miscarriage of justice in the assessment of the Court of Appeal.⁶ The process followed by the Panel is explained in the submissions for the Council. The Council says, for example, that it is standard practice for an applicant for a resource consent (rather than the general ratepayers) to cover the costs of the Panel process.

[12] The allegations of criminal fraud centre primarily on the discontinuance of the original judicial review proceedings. The High Court in dealing with this aspect made the point that that the applicant's motivation for discontinuance had no effect on whether the Panel's decision was lawful.⁷ In any event, given the Council had reconsidered Burley's application, the applicant was in fact in the same position as he would have been in had he been successful in earlier proceedings.⁸ In terms of the reliance on equitable principles, as the Court of Appeal noted, the focus on judicial review is different. Further, there is nothing apparent on the face of the material before the Court that substantiates the allegations of bias.

Result

[13] For these reasons, the application for leave to appeal is dismissed.

[14] The applicant must pay one set of costs of \$2,500 to the respondents.

Solicitors:

A J Cumming and L P Allison, Auckland Council, Auckland for First Respondent
Clark and Co Lawyers, Auckland for Second and Third Respondents

⁵ Senior Courts Act 2016, s 74(2)(a).

⁶ Senior Courts Act, s 74(2)(b).

⁷ HC judgment, above n 1, at [14].

⁸ At [15].