IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 117/2021
[2022] NZSC 12

BETWEEN	PAIHIA PROPERTY HOLDINGS CORPORATE TRUSTEE LIMITED Applicant
AND	BODY CORPORATE 190356 First Respondent
	CHIN YUN HOLDINGS LIMITED Second Respondent

Court:	William Young, Glazebrook and Ellen France JJ
Counsel:	J R Billington QC, L M Van and R A Idoine for Applicant D K Wilson for Respondents
Judgment:	24 February 2022

JUDGMENT OF THE COURT

A The application for an extension of time to apply for leave to appeal is granted.

B The application for leave to appeal is dismissed.

C The applicant must pay one set of costs of $2,500 to the first and second respondents.

REASONS

Introduction

[1] The applicant, Paihia Property Holdings Corporate Trustee Ltd (Paihia Property) seeks leave to appeal against a decision of the Court of Appeal allowing an appeal by the first and second respondents, Body Corporate 190356 and Chin Yun

Holdings Ltd[1] from a decision of the High Court.[2] The High Court was satisfied in terms of s 317(1)(d) of the Property Law Act 2007 that the modification of the easements proposed by Paihia Property would "not substantially injure" the respondents.[3]

Background

[2] The second respondent owns and operates the Paihia Beach Resort & Spa on Marsden Road, a unit title development comprising 28 principal units. The first respondent is the body corporate that owns the common property and the land on which the resort operates. They are collectively referred to as the Resort. Paihia Property owns the property next door to the Resort. In broad terms, the right of way easements in issue run from the far corner of Paihia Property's land on the frontage of Marsden Road, across this land to the boundary with the Resort's land.[4] The modified right of way would start on the near corner of Paihia Property's land on the frontage of Marsden Road and would run down the boundary with the Resort's land.[5] When the right of way was created the two parcels of land were jointly owned.

The High Court judgment

[3] In the High Court, Downs J (after a site visit) did not accept the modification of the right of way would make access to the Resort troublesome, compromise its parking and an existing resource consent, or increase noise. While the Judge acknowledged the "Resort's real concern" may be that "it cannot know what may be built next door", this was described as "beyond [the Court's] purview".[6] The High Court accordingly made the order sought by Paihia Property modifying the easements.

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1 *Body Corporate 193056 v Paihia Property Holdings Corporate Trustee Ltd* [2021] NZCA 411 (Gilbert, Mander and Hinton JJ) [CA judgment].
2 *Paihia Property Holdings Corporate Trustee Ltd v Body Corporate 190356* [2020] NZHC 2462, (2020) 21 NZCPR 385 (Downs J) [HC judgment].
3 HC judgment, above n 2, at [45].
4 See the diagram in CA judgment, above n 1, Appendix 1.
5 See the diagram in CA judgment, above n 1, Appendix 2.
6 HC judgment, above n 2, at [46].

The Court of Appeal judgment

[4] The Court of Appeal agreed with the High Court on matters such as the effects on parking, noise and so on. However, in allowing the Resort's appeal, the Court saw the more significant questions as those relating to the future development of Paihia Property's land and the submission as to the likelihood there would be a building close to the boundary if the right of way was relocated. The submission was that the "luxury resort" would be left with access by way of "a mean looking alleyway between two buildings".[7] The Court said Downs J was wrong to see the concern as to future development as beyond the Court's purview.

[5] The Court stated it was properly conceded by Paihia Property as a matter of law that future development was within the Court's purview.[8] Rather, Paihia Property argued it was a question of fact and evidence and there was none.

[6] The Court of Appeal next addressed the meaning of "substantially injure" in s 317(1)(d), citing this Court's judgment in *Synlait Milk Ltd v New Zealand Industrial Park Ltd*.[9] The Court noted Paihia Property had not offered any evidence as to likely development on its property if the right of way was modified. The Court did not see the lack of evidence as counting against the Resort because the onus was on Paihia Property.

[7] In comparing the position as it is with that following modification, the Court considered the concern at being left with "a mean looking alleyway" was justified. Further, depending on the nature of the development, there may be other loss of amenity. The Court also accepted the Resort's submission that the easements were created when the land was in common ownership and there was freedom of choice and that location was retained when the land was sold. The Court said the inference is that the then owners of the resort saw it as the preferred location. The High Court decision ordering modification of the easements was set aside.

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7 CA judgment, above n 1, at [44].

8 In this context, at [52], the Court discussed *Tujilo Pty Ltd v Watts* [2005] NSWSC 209, (2005) 12 BPR 23,257.

9 *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157, [2020] 1 NZLR 657.

The proposed appeal

[8] The first proposed ground of appeal is whether consideration of "incidental benefits/effects" is part of New Zealand law. This is a reference to the Court of Appeal's discussion of the judgment of the Supreme Court of New South Wales in *Tujilo Pty Ltd v Watts* which dealt with a section in essentially the same terms as s 317(1)(d).[10] Paihia Property says that this idea imbues an easement with restrictive covenants and this is inconsistent with the Property Law Act which treats those interests in land differently.[11] Paihia Property also says this approach expands potential grounds the burdened owner will have to anticipate and deal with.

[9] The second proposed ground is whether reliance on such benefits/effects in this case breached principles of natural justice. The argument is that apart from the "mean alleyway" remark made during the site visit, the risk of development did not feature in argument until raised as part of the Court of Appeal submissions so Paihia Property had no opportunity to prepare evidence or make submissions on it.

[10] Finally, Paihia Property wishes to argue that the Court of Appeal was wrong to draw an inference the previous owners and operators of the benefited land considered the current location of the easements as optimal. Paihia Property says the "sale" was in fact a forced sale of both parcels by separate mortgagees.

Our assessment

[11] We do not consider any of the proposed grounds of appeal raise questions of general or public importance or of general commercial significance.[12] Rather, the proposed appeal would require consideration of the Court of Appeal's application of this Court's recent discussion in *Synlait* of s 317 to the particular facts. Contrary to the submission for Paihia Property, the discussion of *Tujilo* was not central to the reasoning of the Court of Appeal.

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10 The submission is that in *Tujilo*, above n 8, "incidental effects" are referred to as "those activities or uses of the burdened land '*which [are]inconsistent with the occurrence of the types of activities or events which the easement expressly allows to happen on the servient tenement.*'. The 'incidental effect' at issue in *Tujilo* was preventing development of the burdened land due to the presence of various recreational easements."

11 Citing ss 275–318C.

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

[12] Nor do we see any appearance of a miscarriage of justice in the civil sense.[13] While it appears the argument changed somewhat in the Court of Appeal, the issue of future development was referred to in the High Court.[14] It is relevant in this respect that the matter proceeded by way of an originating application so there was no statement of claim. We understand that the site visit was the only "hearing" and there was neither cross-examination nor discovery. In any event, Paihia Property had the onus. Finally, any error in the factual inference challenged by the applicant is not material.

[13] The application for leave is out of time but the delay is explained and the respondents consent to an extension of time.

Result

[14] The application for an extension of time to apply for leave to appeal is granted. The application for leave to appeal is dismissed.

[15] The applicant must pay one set of costs of $2,500 to the first and second respondents.

Solicitors:
Anthony Harper, Auckland for Applicant
Loo & Koo, Auckland for Respondents

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13 Senior Courts Act, s 74(2)(b). See also *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, [2006] 19 PRNZ 369 at [5].

14 CA judgment, above n 1, at [50].