

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 49/2022
[2022] NZSC 95**

BETWEEN **ROBERT JAMES CUMMINS**
Applicant

AND **BODY CORPORATE 172108**
Respondent

Court: Ellen France, Williams and Kós JJ

Counsel: K P Sullivan for Applicant
J B Orpin-Dowell and T J G Allan for Respondent

Judgment: 10 August 2022

JUDGMENT OF THE COURT

- A The application for an extension of time is granted.**
 - B The application for leave to appeal is dismissed.**
 - C The applicant must pay the respondent costs of \$2,500.**
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REASONS

Introduction

[1] The applicant, Mr Cummins, is the sole director and shareholder of Manchester Securities Ltd (Manchester). Manchester is the registered proprietor of Unit 12A of the Hobson Apartments. In that capacity, Manchester has been involved in a long-running dispute with the respondent, Body Corporate 172108, the body corporate of the Apartments, over the responsibility for repairs to make the Apartments weathertight. Manchester has not paid body corporate levies for some time or its share of the costs of repairs undertaken by the Body Corporate. The Body Corporate sought

to enforce payment by statutory demand. After Manchester did not pay, it was placed into liquidation on the application of the Body Corporate in February 2020.¹

[2] After Manchester was placed into liquidation, the applicant sought joinder to two proceedings in the High Court relating to Manchester's obligation to pay its share of the repair costs for common property.² The applicant says Manchester holds Unit 12A as trustee of Manchester Securities Trading Trust and he is now the successor trustee.³ Mr Cummins said in his evidence that he did not intend to call for the title to be transferred to him at this stage because he would be potentially liable to the Body Corporate for payment of the levies. Both the High Court⁴ and the Court of Appeal⁵ found that joinder would only be appropriate if the applicant took the following steps:

- (a) registered a transfer or transmission of the title to Unit 12A to himself; and
- (b) paid the Body Corporate all of the amounts owed by Manchester to the Body Corporate at the time of liquidation.

[3] The proposed appeal to this Court would challenge these conditions on joinder.

Background

[4] To put the present application in context, we need to make brief reference to the events leading up to the joinder decisions. The narrative begins in 2010 when the Body Corporate obtained the Court's approval for a scheme for integrated repairs to

¹ *Body Corporate 172108 v Manchester Securities Ltd* [2020] NZHC 198.

² The Court of Appeal in *Cummins v Body Corporate 172108* [2022] NZCA 68 (Goddard, Woolford and Mander JJ) [CA joinder decision] at [34] described the two proceedings as first, an application by the Body Corporate for orders under s 48(6) of the Unit Titles Act 1972 varying a remediation scheme approved by the High Court. Manchester in its cross-application also sought to vary the scheme. The second proceeding is an appeal by the Body Corporate against an arbitral award determining a preliminary question as to jurisdiction. This relates to an arbitration Manchester sought to commence under the remediation scheme.

³ We understand that the deed providing for Manchester's retirement and removal as trustee recorded Manchester would continue to hold the trust property as a bare trustee to the order of Mr Cummins.

⁴ *Body Corporate 172108 v Manchester Securities Ltd* [2021] NZHC 365 (Powell J) [HC joinder decision].

⁵ CA joinder decision, above n 2.

all levels of the building including level 12.⁶ Under the approved scheme Manchester was able to carry out the repairs to level 12 itself and its liability was capped. However, by 2017 Manchester had done little, if anything, to repair level 12 and the Body Corporate had completed the repair of common property on levels one to 11. Manchester had not paid any amount levied by the Body Corporate for the latter repairs reflecting its view it was in fact owed money by the Body Corporate.

[5] In 2017 the Body Corporate successfully sought a variation of the scheme.⁷ As part of that change, the cap on Manchester's liability was removed. Fogarty J ordered Manchester to pay a provisional sum to the Body Corporate with that sum to be adjusted on completion of remediation.⁸ Manchester's failure to pay gave rise to statutory demands and an unsuccessful application by Manchester to set this aside in the High Court.⁹ The applicant appealed to the Court of Appeal against this on the basis Manchester had a set-off and so the statutory demands should have been set aside.

[6] The claimed set-off relates to sums Manchester says it is owed by the Body Corporate for costs incurred in repairs. In dismissing the appeal, the Court of Appeal declined to exercise the discretion against setting aside a statutory demand.¹⁰ That was because the applicant was effectively seeking to relitigate the earlier order, upheld by the Court of Appeal, to pay the sums owing. Manchester was subsequently placed in liquidation not having paid the amount ordered to be paid.¹¹

⁶ *Body Corporate 172108 v Meader (Nos 2 & 3)* (2010) 12 NZCPR 181 (HC). See also *Body Corporate 172108 v Meader* (2010) 12 NZCPR 101 (HC). The scheme was necessary because otherwise the Body Corporate could only carry out repairs to common property. Unit 12A occupies most of the area on the top floor of the building. The remaining areas on that floor are common property.

⁷ *Body Corporate 172108 v Manchester Securities Ltd* [2017] NZHC 329.

⁸ Manchester appealed unsuccessfully from this decision: *Manchester Securities Ltd v Body Corporate 172108* [2017] NZCA 527, (2017) 19 NZCPR 65. This Court declined leave to appeal: *Manchester Securities Ltd v Body Corporate 172108* [2018] NZSC 19.

⁹ *Manchester Securities Ltd v Body Corporate 172108* [2018] NZHC 169. Levies were also outstanding.

¹⁰ *Manchester Securities Ltd v Body Corporate 172108* [2018] NZCA 190, [2018] 3 NZLR 455 at [49]. The Court did not consider the claimed set-off necessarily strong and was not able to fully evaluate it given the lack of detail.

¹¹ *Body Corporate 172108 v Manchester Securities Ltd*, above n 1; and *Cummins v Body Corporate 172108* [2021] NZCA 145, [2021] 3 NZLR 17.

[7] In the decision to which the present application relates, the Court of Appeal said that even if Mr Cummins had acquired some equitable interest in respect of the unit as a result of his arrangements with Manchester that fell “well short of being a change or transmission that would make it necessary or desirable” for him to be made a party in place of Manchester.¹² The Court continued that:¹³

Consistent with the scheme of the Unit Titles Act, it is necessary for the legal owner of each unit to be a party to proceedings concerning a scheme. For so long as it continues to hold legal title, Manchester must remain as a party in the relevant proceedings. Nor do we consider that the arrangements Mr Cummins has brought about between himself and Manchester make it necessary or desirable that he be added as a party, in addition to Manchester.

[8] The Court considered it would be unjust to permit a person claiming under Manchester to defer the payment obligation while pursuing their cross-claims. In all, the Court considered that the application and the appeal were an abuse of the Court’s processes given the repeated Court rulings that Manchester and those claiming under it must pay the sums owing to the Body Corporate. The Court of Appeal subsequently dismissed an application for recall of that judgment.¹⁴

The proposed appeal

[9] The applicant says he meets the, low, threshold for joinder. He wishes to argue that the Court of Appeal was wrong because the Body Corporate will not be unfairly prejudiced by joinder; he is not obliged to take legal title before the set-off is resolved; and joinder will not bring the administration of justice into disrepute. In addition, he says that under s 47 of the Trustee Act 1956 the rights in the proceedings vested in him when he became a trustee or were otherwise assigned to him.¹⁵ He also relies on s 48(4) of the Unit Titles Act 1972 which gives a right to be heard on scheme applications to persons having or claiming any estate or interest in any unit. Finally, the applicant challenges the decision to award indemnity costs against him.

¹² CA joinder decision, above n 2, at [59].

¹³ At [59].

¹⁴ *Cummins v Body Corporate 172108* [2022] NZCA 153.

¹⁵ That section deals with the vesting of trust property in new trustees.

[10] We accept the respondent's submission that the criteria for leave to appeal are not met in relation to the proposed appeal.¹⁶ In terms of the approach to joinder and abuse of process, the applicant does not challenge the legal principles applicable. Rather, resolution of the proposed appeal would ultimately require the Court to revisit the concurrent factual findings of the Courts below which are specific to this case. No question of general or public importance or of general commercial significance arises from these matters.¹⁷

[11] In any event, we are satisfied that the arguments the applicant wishes to raise, including those based on s 47 of the Trustee Act¹⁸ and s 48(4) of the Unit Titles Act, have insufficient prospects of success to warrant a further appeal. We add in relation to the argument concerning s 48(4) of the Unit Titles Act that there is merit in the respondent's submission that, assuming the provision applied, it would be unjust to allow unconditional joinder as that would defeat the Courts' earlier rulings.

[12] At the time the application for joinder was before the Court of Appeal, it appeared the Trust would not take an active part in the proceedings. We understand from the respondent that is no longer the case. The liquidator is taking an active role. In all the circumstances, nothing raised by the applicant gives rise to the appearance of a miscarriage of justice in the Court of Appeal's assessment of the case.¹⁹

[13] The application for leave to appeal was filed out of time. The delay is explained and the respondents do not oppose an extension of time. We accordingly grant 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.

¹⁶ Senior Courts Act 2016, s 74(2).

¹⁷ Section 74(2)(a) and (c).

¹⁸ The High Court dismissed the argument based on s 47 on the basis that s 47 did not apply to land subject to trust if, as here, the land comes under the Land Transfer Act 2017: HC joinder decision, above n 4, at [13]. But, in any event, the trust deeds made it clear the trust property remained with Manchester absent transfer of title.

¹⁹ Senior Courts Act, s 74(2)(b). See also *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.

[15] The applicant must pay the respondent costs of \$2,500.

Solicitors:

Core Legal Ltd, Masterton for Applicant

Grove Darlow & Partners, Auckland for Respondent