IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 94/2023
[2023] NZSC 157

BETWEEN	SHIRAZ HOLIDAY LIMITED Applicant
AND	BODY CORPORATE 406198 First Respondent
	PROPERTY OPPORTUNITIES LIMITED Second Respondent
	BIANCO LIMITED (IN LIQUIDATION) Third Respondent
	AVONDALE PROPERTIES LIMITED (IN LIQUIDATION) Fourth Respondent

Court:	Glazebrook, Ellen France and Kós JJ
Counsel:	T J Rainey for Applicant D R Bigio KC, I J Stephenson and H W Struthers for First Respondent C J Pendleton for Second Respondent
Judgment:	5 December 2023

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the first respondent costs of $2,500.

REASONS

Introduction

[1] The applicant, Shiraz Holiday Ltd (Shiraz), is the building manager of a unit title development in Auckland pursuant to a Management Agreement entered into between the first respondent, Body Corporate 406198 (Body Corporate), and Shiraz's predecessor. Under the Management Agreement Shiraz has exclusive rights to provide letting services on behalf of the unit owners.

[2] The Body Corporate issued proceedings in the High Court challenging the validity of the Management Agreement. As the Court of Appeal said, the essence of the Body Corporate's concern is that the Management Agreement has the effect of improperly requiring unit owners to cross-subsidise Shiraz's operation of a hotel and short-term accommodation in the development.[1]

[3] In the High Court, the Body Corporate succeeded in part.[2] In particular, Campbell J found that the provisions in the Management Agreement giving Shiraz exclusive rights to provide letting services and hotel management services were ultra vires the Unit Titles Act 1972. The Judge did not, however, agree with the Body Corporate that the Management Agreement as a whole or cl 5.6.6 (dealing with the obligation to make a rental contribution) were ultra vires. The High Court considered the ultra vires letting provisions could be severed from the rest of the Management Agreement.

[4] On appeal, the Body Corporate again was successful in part. Importantly, for present purposes, the Court of Appeal found that cl 5.6.6 was ultra vires. The Court of Appeal took the view the cl 5.6.6 compensation was "directly referable to the ultra vires exclusive letting service" and could not be "sensibly decoupled" from the corresponding ultra vires clauses.[3] The Court of Appeal agreed with the High Court that the Management Agreement was otherwise lawful.

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1 *Body Corporate 406198 v Property Opportunities Ltd* [2023] NZCA 302 (Katz, Whata and Davison JJ) [CA judgment] at [4].

2 *Body Corporate 406198 v Property Opportunities Ltd* [2022] NZHC 418 (Campbell J) [HC judgment].

3 CA judgment, above n 1, at [58].

[5] Shiraz has filed an application for leave to appeal the finding cl 5.6.6 was ultra vires. The Body Corporate opposes the application for leave to appeal. The second respondent is not taking any steps in the proceeding and abides the decision of the Court.

Background

[6] The background, including the relevant documentation, is discussed in some detail in the judgment of the Court of Appeal.[4] In terms of this material, we need only note the terms of cl 5.6.6 which are as follows:

> The Body Corporate will throughout the term of this management agreement pay (in addition to the management fee) to the Manager a contribution equivalent to the rent payable under the lease for the Management Unit and Reception.

[7] In determining this provision could not be severed from the other ultra vires provisions, the Court of Appeal reasoned that, where the Body Corporate had invalidly bound itself to an exclusive letting regime, cl 5.6.6, which "was directed to providing compensation for the rental cost of the unit used for this exclusive letting regime, … must also be invalid".[5] The Court said this:

> [63] … the clear purpose of cl 5.6.6 is to compensate the Manager for rental costs associated with the ultra vires exclusive letting services. A clause requiring the Body Corporate to pay for an ultra vires purpose must also be ultra vires and void ab initio. The fact that Duties and Services may also have been performed out of the Management Unit does not validate payments clearly made for an ultra vires purpose.
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> [64] We acknowledge the point made by Campbell J that the Body Corporate was at liberty to engage a manager on terms it thought appropriate. But a body corporate can only bind itself to do something that is referable to its lawful powers and duties. By purporting to bind itself to an exclusive letting service, and to pay the rental cost associated with that service, it acted ultra vires its powers and duties. A compensatory method premised on that exclusivity is necessarily also ultra vires from inception.

The proposed appeal

[8] Shiraz says, first, that the proposed appeal raises questions of general or public importance or of general commercial significance about the applicability of the ultra

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4 At [7]–[42].
5 At [6].

vires doctrine to the Unit Titles regime where both the Unit Titles Act 1972 and the Unit Titles Act 2010 recognise the need for a flexible and responsive regime for the governance of unit title developments.[6] In this context, Shiraz also wishes to argue that the Court of Appeal's approach gives rise to commercial uncertainty because the fact the payment provided for under cl 5.6.6 could be linked to an ultra vires provision was held sufficient to make cl 5.6.6 ultra vires as well.

[9] Second, Shiraz submits that a miscarriage of justice will arise if the appeal is not heard.[7] In developing the submissions on this point Shiraz raises a pleading point and challenges the conclusion of the Court of Appeal that the payment provided for in cl 5.6.6 was compensation for the letting service. Shiraz advances various reasons why the payment agreed to be made under cl 5.6.6 is separate. For instance, Shiraz says that under cl 5.3 the manager had to occupy the management unit to provide the Duties and Services. "Duties" and "Services" do not include the letting service. Shiraz also relies on the failure to consider the reliance interests of Shiraz which took an assignment of the Management Agreement.

[10] We are not satisfied that the proposed appeal would raise any questions of general or public importance or of general commercial significance. As the Body Corporate submits, Shiraz accepted the applicability of the ultra vires doctrine and that some provisions of the Management Agreement were ultra vires.[8] The proceedings to date have, instead, focused on the construction of a bespoke agreement and which the High Court found was governed by the 1972 Act. The challenge is a not one of principle but is, rather, fact specific.

[11] The arguments that Shiraz wishes to make would essentially reprise the arguments made in the Court of Appeal. We see those arguments as having insufficient prospects of success to warrant a further appeal. There is accordingly no appearance of a miscarriage of justice as that term is used in the civil context.[9]

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6 Senior Courts Act 2016, s 74(2)(a) and (c).
7 Section 74(2)(b).
8 HC judgment, above n 2, at [59]; and CA judgment, above n 1, at [55].
9 *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

Result

[12] The application for leave to appeal is dismissed.

[13] The applicant must pay the first respondent costs of $2,500.

Solicitors:
Pidgeon Judd Law Ltd, Auckland for Applicant
Lane Neave, Auckland for First Respondent
Turner Hopkins Solicitors, Auckland for Second Respondent