EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT HUTT VALLEY

CIV-2013-096-000227
[2015] NZDC 22514

BETWEEN	HARRY MEMELINK AND PATRICK JOHN RENSHAW Appellants
AND	BODY CORPORATE 81012 Respondent

Hearing: 9 November 2015

Appearances: Appellant Harry Memelink in person
C Matsis for Respondent

Judgment: 18 March 2016

RESERVED JUDGMENT OF JUDGE C N TUOHY

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[1] This is the final judgment on this appeal from a Tenancy Tribunal order that the appellants pay a sum of $38,153.38 for unpaid levies, special levies, penalties and costs.

[2] In an interim judgment dated 14 April 2015, I found in favour of the respondent on all issues except one viz. were the levies unlawfully imposed if some of the unit owners who voted at relevant AGMs were in default of their obligations to the body corporate at the times they voted. On that issue, it was conceded by the respondent that if the appellants could establish that any particular levy was imposed as a result of the vote of unit owners who were not entitled to vote, it would not have been validly imposed and thus the body corporate could not maintain a claim for its recovery.

[3] The issue that remained, and which is the subject of this judgment, is whether the appellants have established that any of the unpaid levies were invalidly imposed for that reason.

[4] Subsequent to the issue of the interim judgment, I made a direction at an appeal conference dated 18 May 2015 in which I declined to order discovery on appeal which the appellants were seeking. I made a direction about evidence on the appeal as follows:

> If either party wishes to apply for leave to adduce additional evidence on appeal, that party must apply to do so not less than 21 days before the allocated hearing date. Any such application must be supported by sworn affidavit(s) setting out the special reasons relied upon and be accompanied by sworn affidavit(s) containing the further evidence.
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> No application will be entertained if it does not comply with the above requirement (including the time requirement).
>
> The appeal will otherwise proceed on the basis of the evidence before the Tribunal.

That direction was made with Rule 18.7 of the District Court Rules 2014 in mind.

[5] On 19 October 2015 (exactly 21 days prior to the hearing date), the appellants filed two affidavits sworn by Mr Memelink on that day, one of which is stated to be in support of (his) attached affidavit containing *"adduced additional evidence on appeal for which I am seeking the leave of this Court"*, the other of which is stated to be *"in support of my attached affidavit seeking leave to adduce additional evidence on this appeal"*. Both affidavits end with what is in effect an application to adduce the documentation annexed to the latter one (Exhibits "HM2" – "HM9" inclusive).

[6] Although Mr Matsis questioned both the form and timing, I am prepared to accept the former affidavit as supporting and including an application to adduce further evidence on appeal and the latter affidavit and its exhibits as the further evidence which the appellants seek to adduce. I am satisfied that the application does comply with my directions of 18 May 2015.

[7] Mr Matsis for the respondent filed a memorandum opposing the application on the grounds that there were no special reasons for hearing the evidence in terms of DCR 18.17(3). He submitted:

11. Few, if any, of the documents that the appellants seek to rely on relate to that issue, as they do not assist to establish the position of unit owners as at the time of the AGMs in issue.

12. A number of the documents that the appellants seek to rely on were clearly available to the appellants at the time of the Tribunal hearing, as those documents were either sent to, or addressed to, one or both of the appellants.

13. A number of the documents that the appellants seek to rely on were already in evidence in the Tribunal.

14. A number of the documents that the appellants seek to rely on contain hearsay statements in business records and do not meet the test for admissibility of business records in section 19 of the Evidence Act 2006.

15. A number of the documents that the appellants seek to rely on will require explanation by way of further oral evidence. Allowing such further oral evidence will complicate and possibly delay the appeal.

16. The respondent would be disadvantaged if some of the documents that the appellants seek to rely on were admitted at this late stage, as it is not able to cross examine the appellants on those documents nor call its own evidence in respect to those documents.

[8] In addition, Mr Matsis submitted that two other factors were relevant to the special reasons consideration, viz. the large number of documents sought to be adduced and the delay in filing the application in respect of documents in the possession of the appellants since October 2013.

[9] The appellants filed a memorandum in answer to the respondent's stating that the special reasons relied on are:

i. That the evidence is pertinent and necessary to show whether the levies were imposed by vote of ineligible voters, being the sole remaining issue identified in your Honour's interim judgment dated 14 April 2015, as your Honour answered in the affirmative in paragraph 36 of your Honour's interim judgment.

ii. That all documents required to give a full and clear outline of this evidence were not previously available to accessible by the appellant at the time of the original hearing or thereafter due to the appellant's access to numerous BC81012 records having been obstructed by the BC81012 management and administration until October 2013.

iii. That although some of the documents were previously available to the appellant, the relevance of those documents was not fully understood without the availability and context placed on that evidence by the supporting new evidence since found.

[10] In reply to other specific points raised on behalf of the respondents, the appellants submitted:

- any hearsay statements will meet the test for admissibility in s 19 of the Evidence Act;

- the documents would assist in giving a more cohesive explanation of the facts to the Court *"along with oral evidence"*;

- the respondent has had the further evidence for the time required by the Court and there is no reason why the respondent would not be in a position to cross-examine or call its own evidence;

- the documents have been available to the respondent much longer than they have been to the appellants and the quantity of them is dictated by the requirement to prove the point at issue.

Discussion

[11] The submissions from both sides seem to assume that if the further evidence is permitted, there would be an opportunity for oral evidence and cross-examination of witnesses on appeal. If the parties are under that assumption, they should be disabused of it.

[12] It is clear from DCR 18.17 that in the normal course an appeal from a tribunal to the District Court should be dealt with on the evidence adduced in the tribunal. It is not an opportunity for a de novo hearing. The adducing of further evidence is an exception not the rule. That is clear from the direction to the Court contained in DCR 18.17(3) that leave to do so may be granted only if special reasons are established. Even if leave is granted, the further evidence must be given by affidavit unless the Court otherwise directs.

[13] In the particular circumstances of this case, including the time since the appeal was filed and its subsequent contorted progress, if further evidence is to be

permitted, it would be confined to Mr Memelink's affidavit of 19 October 2015 which is really no more than a vehicle for adducing in evidence the documents exhibited to it, none of which were made by him.

[14] Accordingly, I approach the application for leave to adduce further evidence on appeal on the basis that it is confined, in substance, to the documents exhibited to his affidavit and that, if leave is granted, the Court would have to consider the documents on their face without benefit of oral evidence relating to them.

[15] The onus is on the appellants to establish special reasons. Here what is primarily put forward is that the evidence was not available to the appellants at the time of the Tenancy Tribunal hearing and that it is pertinent and necessary to show that the levies were imposed by vote of ineligible voters.

[16] Both parties agree that some of the exhibited documents were available to the appellants at the time of the Tribunal hearing, but some were not. The ones that were not were made available to the appellants in a Dropbox dump in October 2013, a few months after the Tribunal hearing. Unfortunately, it is not clear from either affidavit, or from the submissions which documents were not available to the appellants at the time of the Tribunal hearing.

[17] I have perused the various documents. The relevance of some is not immediately apparent. However, some of them, particularly the Minutes of Annual General Meetings up to and including the 2012 AGM and some levy reconciliations of uncertain provenance and correspondence, strongly suggest that unit holders who were in default in levy payments did vote at AGMs where annual levies were imposed. (Perhaps surprisingly, the appellants themselves seem to have fallen into that category of unit holder).

[18] That may explain the somewhat obscure acknowledgement in paragraph 18 of the respondent's submissions:

> 18. The Respondent accepts that a number of the documents that the appellants seek to rely on raise issues that the respondent may need to inquire into further. The respondent is able to explore those issues

> outside of this court process. The respondent does not believe that this appeal is necessarily the appropriate forum to do that.

[19] I do consider some of the material which the appellants seek to adduce is pertinent to the issue which this appeal has narrowed down to. While it is not entirely clear, it may well be that some of that material was not available to the appellants at the date of the Tribunal hearing. However, admission of the evidence itself is insufficient to enable the Court to adjudicate with any degree of confidence on the issue.

[20] Having come to those conclusions, the question arises as to how the appeal can be justly disposed of. The interests of justice include both parties' interest in having an adjudication in which all relevant evidence is before the Court or tribunal making the decision. The respondent has a particular interest in obtaining finality so it can properly discharge its responsibilities.

[21] In the course of my consideration of this appeal, I have read the decision of Kelly DCJ dated 26 May 2014 in which she rescinded the stay of execution of the Tribunal order which the appellants had earlier obtained. With respect I fully agree with that decision. For the reasons so cogently expressed by Kelly DCJ, if the appellants are to be given the opportunity of continuing to pursue their appeal, it is just that they should pay the respondent the amount which the Tribunal has ordered them to pay.

[22] I have no direct information as to whether they have. However, I note that Exhibit *"HM9"* to Mr Memelink's affidavit included the Minutes of the 2015 AGM of the respondent which Mr Memelink attended. Those Minutes contained the following entry:

> Following a statement from Harry he was eligible to vote the Chair explained that his levies hadn't been paid up to date so he will not be eligible to vote. This was queried by Harry advising he has paid his current levy yesterday along with an amount of $100,000 ordered by the Court paid into a solicitors trust account and he considered there can be no question about his eligibility to vote. The Chair further explained the funding paid into Trust were not available to the Body Corporate until Harry's appeal had been determined by the court and those funds released into our bank account. Until that happened, Harry is not eligible to vote. The meeting then continued.

[23] I gather from that entry that despite the rescission of the order staying execution of the Tribunal's order, the appellants have not paid to the respondent the amount ordered by the Tribunal.

[24] On appeal the Court has the powers set out in s 118 of the Residential Tenancies Act[1] which provides:

> **118 Powers of District Court Judge on appeal**
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> (1) On the hearing of an appeal under section 117, a District Court Judge may –
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> (a) quash the order of the Tribunal and order a rehearing of the claim by the Tribunal on such terms as the Judge thinks fit; or
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> (b) quash the order, and substitute it for any other order or orders that the Tribunal could have made in respect of the original proceedings; or
>
> (c) dismiss the appeal.
>
> (2) In ordering a rehearing under subsection (1)(a), the District Court Judge may give to the Tribunal such directions as the Judge thinks fit as to the conduct of the rehearing.
>
> (3) The procedure at an appeal under this section shall be such as the Judge may determine.

[25] I consider this appeal should be disposed of by ordering a rehearing of the claim for unpaid levies by the Tribunal on the following terms:

(a) The order of the Tribunal is quashed on the condition that the appellants pay to the respondent unconditionally the sum ordered by the Tribunal, $38,153.38 (unless it has already been so paid).

(b) The rehearing is to be strictly confined to two issues:

(i) whether any person voted at a meeting of Body Corporate 81012 on a resolution which imposed any of the levies which are the subject of the claim when that person was prohibited

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[1] See s 176 Unit Titles Act 2010

from so voting by s 96(3) of the Unit Titles Act 2010 or Rule 28 of Schedule 2 Unit Titles Act 1972;

(ii) if so, whether that had the effect that the levy was not lawfully imposed and thus not payable by the appellants.

[26] For the avoidance of doubt, my intention is that unless and until the sum ordered by the Tribunal is paid unconditionally to the respondent, the order quashing the Tribunal's order and directing a rehearing has no effect, i.e. the Tribunal's order stands. It is also my intention that if the respondent is successful on both issues which are to be the subject of a rehearing, then the Tribunal's original order will be reinstated, i.e. no other defences may be raised in the Tribunal as they have all been dealt with in the course of the appeal.

[27] Finally, I wish to apologise to the parties for the time it has taken to deliver this judgment which has been the result of pressure of other work and the Christmas break.

C N Tuohy
District Court Judge