IN THE COURT OF APPEAL OF NEW ZEALAND

CA454/2012
[2013] NZCA 187

BETWEEN	D M ROBERTS LIMITED Appellant
AND	MARK SHANE MUDGWAY AND LEE ANNE MUDGWAY Respondents

Hearing:	20 February 2013
Court:	Stevens, French and Ronald Young JJ
Counsel:	K Cotter and W T Nabney for Appellant M J Fisher and P M Hardie for Respondents
Judgment:	30 May 2013 at 11.30 am

JUDGMENT OF THE COURT

A The appellant's application for leave to adduce further evidence is dismissed.

B The appeal is dismissed.

C The appellant must pay costs to the respondents on a band A basis with a 25 per cent uplift plus usual disbursements.

REASONS OF THE COURT

(Given by French J)

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Introduction

[1] D M Roberts Ltd (D M Roberts) refused to give its consent as lessor to the proposed assignment of a lease unless certain conditions were satisfied. The respondents Mr and Mrs Mudgway, who were seeking the consent, contended that the refusal was unreasonable. They issued summary judgment proceedings in the High Court. D M Roberts opposed the summary judgment application and also applied for a stay on the grounds that the dispute ought to go to arbitration in accordance with an arbitration clause in the lease.

[2] Both applications were heard by Associate Judge Doogue. The Associate Judge found that D M Roberts had no arguable defence to the summary judgment application. He granted various declarations sought by the Mudgways and declined D M Roberts' application for a stay.[1] In a later decision, the Associate Judge also awarded costs against D M Roberts.[2]

[3] D M Roberts now appeals both decisions. In addition, the company has filed an application for leave under r 45 of the Court of Appeal (Civil) Rules 2005 to adduce further evidence.

[4] The key issues raised by the appeal are:

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1 *Mudgway v D M Roberts* [2012] NZHC 1463.
2 *Mudgway v D M Roberts* [2012] NZHC 1981.

(a) Were the conditions that D M Roberts sought to impose simply a statement of existing rights and obligations under the lease, or did they constitute additional obligations?

(b) In determining whether a dispute existed for the purposes of art 8 to the First Schedule of the Arbitration Act 1996, did the Associate Judge err in applying an "arguable defence" test?

Factual background

[5] Mr D M Roberts was a very generous benefactor. His company, D M Roberts, owned a large rural property on Old Kaimai Road, Tauranga. In 1985, the company granted a 999 year lease over the land to trustees for the purpose of providing a recreational centre for students attending Tauranga Boys' College.

[6] A written memorandum of lease was duly signed on 18 March 1985, the lessees being the trustees of a trust which was to be incorporated and called the Tauranga Boys College Kaimai Recreation Trust. The annual rental was one dollar.

[7] For reasons that are not relevant to this proceeding, the trust was never formed. The college nevertheless erected buildings on the site and made use of the property for school camps and general outdoor education.

[8] At some stage in the late 1990s, the college and D M Roberts entered into discussions with a Mr Glenn Mudgway about the use of the property as a tourist lodge. Mr Mudgway owned an adjoining property. In 1998 Mr Glenn Mudgway and his brother Mr Mark Mudgway applied to the territorial authority for resource consent to enable D M Roberts' property to be used as a tourist lodge in addition to its existing use as an outdoor education facility. As detailed in the application, no additional buildings were proposed, the idea being that the existing facilities would only operate as a tourist lodge when not being used by the school. The application further stated that the proposed activity would provide for accommodation both for groups and individuals up to a maximum of 28 people as well as permanent residential accommodation for two staff. The two staff would remain on site even when the site was being used by the school.

[9] As noted in the High Court judgment, it seems likely that the reason the school was prepared to entertain the idea of a tourist lodge was to generate some revenue to defray costs.[3]

[10] The next thing that happened was that on 23 February 1999, the original lessees (the trustees of the trust that had never been formed) formally assigned their interest in the lease to the Tauranga Boys' College Board of Trustees (the College Board). The deed of assignment contained a number of modifications to the lease. These included cl 4, which read as follows:

> 4. The demised land shall only be used for any or all of the following purposes:
>
> (a) As an outdoor education facility;
>
> (b) As a facility for educating people in matters pertaining to forest and flora, animal and bird life and the enjoyment of the natural facilities available in the vicinity of the demised land;
>
> (c) The promotion of knowledge of and interest in the forest, land, streams, bush and geology and geography of the Kaimai Ranges and the area of the Western Bay of Plenty and other educational activities by means of camps, study, trips, lectures, publications and other forms of instruction;
>
> (d) The establishment and operation of a tourist lodge but only if such use is carried out in compliance with the conditions and requirements for the time being of the local authority having jurisdiction over the demised land.

[11] The deed also contained the usual provision that written consent of the lessor would be needed for an assignment, provided that the lessor would not unreasonably or arbitrarily withhold consent. It also stated that on any assignment the annual rental was to be increased to a figure more appropriate for a profit-making tenant.

[12] Another important clause was cl 11. It stated:

> 11. The Lessee will comply with all Statutes Ordinances, Regulations, Bylaws, Requisitions and Notices affecting or relating to the demised premises or the use thereof and with all requirements which may be made or notices or orders which may be given any authority whatsoever having jurisdiction or authority over or in respect of the

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3 *Mudgway v D M Roberts*, above n 1, at [11].

> demised premises and will indemnify and keep indemnified the Lessor from and against all actions, suits, claims, demands, fines, penalties and payments arising out of or relating to such Statutes Ordinances, Regulations, Bylaws, Requisitions and Notices and any alterations or additions of a structural nature to buildings, drains or standatory appliances on the demised land required by any duly constituted authority shall be the sole responsibility and liability of the Lessee and in particular the Lessee shall comply with the Camping Ground Regulations 1936 or any enactment in substitution thereof and shall make the regulatory provisions for fire fighting purposes.

[13] It is common ground that, correctly interpreted, cl 11 imposed upon the lessee (and hence any assignee) the obligation to comply with all conditions contained in the resource consent.

[14] On 3 May 1999 the College Board executed a sub-lease to the Mudgway brothers for four years. The sub-lease contained an option for the Mudgway brothers to take an assignment of the balance of the term of the lease.

[15] The option was duly exercised and on 16 June 2004 the lease was assigned by the College Board to the Mudgway brothers on payment of $40,000 to the College. The rental was increased from one dollar a year to $939. On 7 September 2004, Mr Glenn Mudgway assigned his interest in the lease to his brother Mark Mudgway and Mark's wife Mrs Lee Anne Mudgway. D M Roberts consented to both of the 2004 assignments.

[16] Mr and Mrs Mudgway (the Mudgways), who had resided on the property with their children since 2001, are the respondents in this appeal. They carried out various improvements on the property.

[17] In 2004 the Mudgways applied to the territorial authority to amend the terms of the resource consent to increase the number of persons who could be accommodated from 28 plus two staff to a maximum of 40 plus two staff. The amendments were granted.

[18] As time went by, Mr Roberts and his company became increasingly concerned that the original philanthropic object for which the property was settled

might no longer be realised and that private individuals might be able to treat the property as the equivalent of a lifestyle block.

[19] These fears intensified in 2011 when the Mudgways took steps to sell their interest in the property with a marketing campaign which emphasised the suitability of the premises for events such as team building, family reunions and birthdays.

[20] The Mudgways found a buyer and on 30 November 2011 they entered into a written agreement to sell their interest in the lease and the tourist lodge business to a Mr Regan Pryor for the sum of $600,000. On 14 December 2011, the Mudgways sought D M Roberts' consent to the assignment of the lease to Mr Pryor.

[21] By solicitor's letter dated 22 December 2011, D M Roberts advised that it was only prepared to consent to the assignment on certain conditions. The concluding paragraph of the solicitor's letter stated:

> Our client will not agree to the dwelling being used for residential accommodation and our client does not consent to the transfer to the new lessee without an acknowledgement from the new lessee that they will not be using the dwelling as residential accommodation.

[22] An exchange of correspondence ensued. The Mudgways objected to the wording of the required acknowledgement because they considered it would prevent the staff employed by the tourist lodge from being able to reside on the property with their children.

[23] On 23 February 2012, the Mudgways issued summary judgment proceedings against D M Roberts in the High Court. The statement of claim alleged that by making its consent conditional on the prospective assignee signing the acknowledgement set out in the letter of 22 December 2011, D M Roberts was unreasonably or arbitrarily withholding its consent, because under the terms of the lease, the demised land can be used for certain residential purposes relating to the operation of the tourist lodge. The statement of claim sought certain declarations and also an order for specific performance requiring D M Roberts to give its consent.

[24] D M Roberts filed a notice of opposition. In an affidavit sworn on 15 March 2012, Mr Roberts deposed that he thought the matter had been settled. So as to make his position "crystal clear", he had instructed his solicitors to draft an assignment of lease containing the acknowledgement that he required for his consent. A draft copy of the assignment which he said that he was prepared to sign was attached to the affidavit. The draft was a standard deed of assignment of lease but with an added fifth schedule. The proposed fifth schedule states:

> The Assignee agrees with the Assignor to perform all the provisions of the Resource Consent dated 8 November 2004 and any variations thereto from the date of the Assignment.
>
> Any residential dwelling on the property is subsidiary to the Lodge and may only be used as a residential dwelling for a maximum of 2 persons (and dependent children) in conjunction with the function and the management of the Lodge.

[25] The Mudgways considered this revised wording was still unacceptable and continued with their proceedings.

[26] In the meantime however, the proposed assignee, Mr Pryor, had tired of waiting and on 9 May 2012 withdrew from the sale. This resulted in the Mudgways amending their statement of claim at the hearing on 22 May 2012 by deleting the plea for specific performance and rephrasing the text of the declarations being sought.

The decision of the High Court

[27] In his decision, Associate Judge Doogue traversed the principles governing consent to assignment of leases and held that the conditions that a lessor seeks to attach to its consent must not impose a greater detriment on the assignee than can be justified by the terms of the lease. In the context of this case, that meant D M Roberts was not entitled to impose any greater restrictions on the use currently permitted under the existing lease.

[28] The Associate Judge went on to say that when considering what was permitted by the lease, it was necessary to have regard to the resource consent because of the lessee's obligation under the lease to comply with the consent. The

two documents, the resource consent and the lease, had to be read in conjunction with each other. In the Associate Judge's view, when read together the two documents prevented people from residing on the property for purposes which had no connection to the operation of the business of the tourist lodge. However, they did authorise staff working at the complex to live there on a permanent basis. It followed that a blanket prohibition on residential accommodation such as was sought by the letter of 22 December 2011 would be contrary to the terms of the lease. In seeking to attach such conditions, D M Roberts was attempting to exercise a right that it did not have under the lease and was therefore acting unreasonably.

[29] The Associate Judge took the same view of the conditions contained in the second paragraph of the proposed fifth schedule.

[30] Having found that the company was acting unreasonably in withholding its consent, the Associate Judge then considered whether any useful purpose would be served in granting declarations, having regard to the fact the sale to Mr Pryor was no longer going ahead. He found that because the Mudgways intended to try to sell their interest again, the correct interpretation of the lease was of more than academic interest.

[31] The Associate Judge said he had come to the overall conclusion that D M Roberts had no arguable defence to the application for summary judgment seeking declarations. Moreover, the form of declarations sought correctly reflected the parties' contractual intentions.

[32] Finally, there remained the issue of the stay application. That had been brought in reliance on art 8(1) of the First Schedule of the Arbitration Act 1996 which provides:

> **Arbitration agreement and substantive claim before court –**
>
> (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in

> fact any dispute between the parties with regard to the matters agreed to be referred.

[33] Counsel for D M Roberts submitted that in light of art 8, the only basis on which the Mudgways could prevent a stay was if there was no dispute between the parties. However, the existence of a dispute was self-evident and therefore the stay should be granted. It was further submitted that insofar as the Court of the Appeal decision in *Royal Oak Mall Ltd v Savory Holdings Ltd* suggested that the company was required to go further and show that it had an arguable defence, that decision had been decided under different legislation and had been overtaken by the enactment of the 1996 Arbitration Act.[4]

[34] Those arguments were rejected by the Associate Judge. Following *Pathak v Tourism Transport Ltd*, he found that any changes in the legislation were not such as to require a different approach and therefore it was necessary for D M Roberts to demonstrate there was a real question to be tried.[5] This it was unable to do in light of the Judge's interpretation of the lease.

[35] The Associate Judge then granted the following declarations:[6]

> (a) "Under the terms of the Memorandum of Lease two staff members of the tourist lodge being operated on the demised land are entitled to reside there with their children";
>
> (b) "The defendant unreasonably and/or arbitrarily [withheld] its consent to a proposed assignment of the lease by the plaintiffs to R H Pryor or Nominee contrary to clause 5 of the Memorandum of Lease by making its consent conditional on:
>
> (i) the proposed assignee signing the acknowledgement sought in Sharp Tudhope's letter to Jones Howden dated 22 December 2011"; and/or
>
> (ii) the assignor and the proposed assignee agreeing to the variations to the lease set forth in the Fifth Schedule to a proposed Deed of Assignment of Lease (at exhibit "T" to the affidavit of D M Roberts sworn 15 March 2012.)

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4 *Royal Oak Mall Ltd v Savory Holdings Ltd* CA106/89, 2 November 1989.
5 *Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681 (HC).
6 At [60], referring to [34].

(c) "The plaintiffs [were] entitled to assign their interest in the lease to R H Pryor or Nominee and such assignment, on terms that the assignee would sign a Deed of Covenant confirming that it would abide by the terms of the lease and of any resource consent relating to the property, would not have constituted a breach of the lease".

Grounds of appeal

[36] On appeal, counsel for D M Roberts did not take issue with the Associate Judge's interpretation of the lease. In particular, counsel agreed that the lease permits residential accommodation for persons who are employees of the tourist lodge and their children. It was also accepted that the test of whether the company had acted reasonably was whether the conditions it sought to impose were consistent with the lease. If they amounted to an attempt to extract what was described as a collateral gain, then that was unreasonable.

[37] Counsel further conceded that the conditions contained in the proposed fifth schedule were "problematic" because they purported to limit the number of residential staff to a maximum of two, thereby precluding the possibility of the lessee exercising its undoubted right to apply to the territorial authority for a further amendment to the consent. The fifth schedule could therefore be viewed as attempting to extract a collateral gain.

[38] All these concessions were in our view rightly made.

[39] Despite making these concessions and accepting that the Associate Judge had applied the correct test of reasonableness, counsel submitted that the Associate Judge's conclusions were nevertheless wrong for the following reasons:

(a) It was only the reasonableness of the 22 December 2011 conditions that mattered, because that was the basis of the statement of claim. The fifth schedule only came into existence later.

(b) Correctly construed, the letter of 22 December 2011 did not purport to impose a blanket restriction on all residential accommodation. When read as a whole, the letter clearly contemplated staff accommodation.

The letter was simply seeking a reaffirmation of existing rights and obligations and was therefore reasonable.

(c) The Associate Judge erred in determining the stay application by reference to the "no arguable defence" test. All that D M Roberts was required to prove was that there was a bona fide dispute in existence.

[40] Before turning to the substantive merits of the appeal, it is necessary for us first to consider the application for leave to adduce further evidence.

Application for leave to adduce further evidence

[41] The further evidence which D M Roberts seeks to adduce is an affidavit by Mr Roberts. The affidavit details various alleged breaches of the lease by the Mudgways and exhibits a series of photographs. The matters raised relate to the use of car parks, a boundary fence, access rights and the addition of two bedrooms to the staff quarters.

[42] In our view, the application must fail for the most fundamental of reasons, namely that the proposed new evidence is simply not relevant to the issues on appeal. None of the evidence relates to matters on which D M Roberts made its consent conditional and, as counsel accepted, the appeal stands and falls on the reasonableness of those conditions. Further, counsel expressly eschewed any reliance on an argument that breaches of the lease by the Mudgways could as a matter of law render reasonable what would otherwise be an unreasonable withholding of consent.

[43] The "new" evidence does of course explain why Mr Roberts was motivated to seek conditions. But, in so far as that is relevant, it is an inference already available on the evidence that was before the Associate Judge.

[44] The application for leave to adduce further evidence is dismissed. Our assessment of the substantive merits of the appeal is therefore based on the evidence that was adduced in the High Court.

The summary judgment application

[45] We turn first to consider the 22 December 2011 letter and the evidence surrounding it.

[46] The full text of the letter reads as follows:

> …
>
> We refer you to the **attached** application for consent to the establishment of the tourist accommodation which clearly states that it provides for accommodation for **two staff**.
>
> The addition of the 2 bedrooms by your client was in breach of clause 4 of the lease and occurred without our clients' knowledge. Clause 4 of the lease states "the demised land **shall only be used for**" the purposes set out at (a) to (d) inclusive. This does not include use as residential accommodation.
>
> Our client agrees the dwelling on the property is a permitted activity but this is contrary to the terms of the resource consent and the lease which take precedence.
>
> Our client will not agree to the dwelling being used for residential accommodation and our client does not consent to the transfer to the new lessee without an acknowledgement from the new lessee that they will not be using the dwelling as residential accommodation.

[47] We accept that there are passages in the letter which acknowledge the right of staff to reside on site. However, the concluding paragraph of the letter sets out the actual wording of the acknowledgement to be signed. The wording is in categorical and absolute terms. As worded, it was not an acknowledgement which it was reasonable to require as a condition of consent to the assignment. In our view, it was also not reasonable to require an assignee to sign an acknowledgement in those terms on the basis that it was impliedly qualified by the contents of another document, namely the letter.

[48] If however an absolute prohibition was never intended and it was simply a matter of the draft acknowledgement lacking precision, we would have expected commonsense to prevail and the lawyers acting for the parties to have been able to resolve the matter amongst themselves without the need for court action. According to counsel for D M Roberts, the reason that this did not happen was the fault of the Mudgways and their solicitors. In support of that argument, Mr Cotter drew our

attention to a letter advising that Mr Pryor was prepared to sign an acknowledgement that "the dwelling will be used as residential accommodation only for staff associated with the lodge operation and not as a private resident". Mr Cotter said an acknowledgement in those terms was acceptable to his client and had been at the time.

[49] However, an objective reading of all the correspondence suggests otherwise.

[50] The response of D M Roberts' solicitors was not to say that they accepted Mr Pryor's wording, but rather "to confirm our client company consents to the transfer on the basis set out in our fax... dated 22 December 2011".

[51] The evidence further shows that while it was later accepted that staff could reside on site, D M Roberts insisted in a letter written by Mr Roberts' son that the children of staff were excluded from residing on site. The acknowledgement which the assignee Mr Pryor was prepared to sign would have permitted children to reside and therefore it cannot be said that an acknowledgement in those terms was acceptable to D M Roberts. The issue of child residents appears to have become the stumbling block necessitating the filing of proceedings.

[52] As regards the fifth schedule, we do not accept that the Associate Judge erred in considering the reasonableness of the conditions it sought to impose. The fifth schedule was annexed to an affidavit of Mr Roberts, in which he expressly stated it was the acknowledgement that he "required for [his] consent to [the] assignment". In those circumstances, it is in our view absurd to suggest that the Associate Judge was obliged to focus only on the 22 December 2011 letter.

[53] As already mentioned, the fifth schedule read:

> The Assignee agrees with the Assignor to perform all the provisions of the Resource Consent dated 8 November 2004 and any variations thereto from the date of the Assignment.
>
> Any residential dwelling on the property is subsidiary to the Lodge and may only be used a residential dwelling for maximum of 2 persons (and dependent children) in conjunction with the function and the management of the Lodge.

[54] We agree with the Judge that insisting on the fifth schedule as a pre-condition to consent was also unreasonable. The number of staff residents was not a lease issue and the fifth schedule was purporting to set in stone the current number, thereby preventing future change through any further resource consent applications. Unlike the Associate Judge, we consider the first paragraph of the fifth schedule to also be objectionable because it was purporting to tie the assignee to the particular resource consent of 8 November 2004 in the context of a lease for 999 years.

The application for a stay

[55] By consent, D M Roberts' application for a stay was heard by the Associate Judge at the same time as the application for summary judgment.

[56] On appeal, Mr Fisher for the Mudgways argued that by consenting to that process, D M Roberts had waived its right to argue on appeal that the Judge had erred in applying the same test (no arguable defence) to both applications.

[57] Mr Cotter however advised us that all D M Roberts had consented to was a joint hearing. It did not consent to the Associate Judge applying the same test (no arguable defence) to both applications. In his submission, the Associate Judge should have applied a narrower test to the stay application, namely whether there was a genuine dispute, it being irrelevant whether the points being taken by D M Roberts were worthless or not.

[58] After reading a pre-hearing memorandum filed by D M Roberts' then counsel in the High Court, we considered it distinctly arguable that D M Roberts had indeed agreed to the "no arguable defence" test being applied to both applications. That was because the memorandum makes a specific reference to the "correct" procedure as established by the Court of Appeal in *Royal Oak Mall Ltd v Savory Holdings Ltd*. In *Royal Oak* the Court of Appeal held that the same test applies to both.

[59] However, it is clear that the Associate Judge did not interpret the memorandum in that way. The issue about the correct test for the stay application appears to have been the subject of a full argument at the hearing and is fully considered in the Associate Judge's decision. There is also no reference in the High

Court judgment or the parties' written submissions to an argument about D M Roberts having consented to the summary judgment test.

[60] In those circumstances, we do not consider that D M Roberts should be precluded from taking the point on appeal.

[61] As it transpired, the same issue regarding the interpretation of art 8 was raised in another proceeding, *Zurich Australian Insurance Ltd t/a Zurich New Zealand Ltd v Cognition Education Ltd*.[7] We therefore heard arguments on the art 8 point from counsel involved in that proceeding at the same time as D M Roberts' appeal was heard.

[62] For the reasons given in our decision in *Zurich Australian Insurance*, we have concluded that in determining whether there is a dispute for the purposes of art 8(1), the Court should apply the summary judgment test of no arguable defence. It follows that in this case Associate Judge Doogue applied the correct test and, in our view, reached the right outcome on the facts.

Appeal against costs

[63] At the conclusion of his judgment, Associate Judge Doogue directed the parties to confer on costs and endeavour to reach agreement. The parties were unable to agree on costs and subsequently required the Associate Judge to determine the matter. The key issue was whether costs should be affected by the fact that at the hearing the Mudgways sought declarations which were in different terms to those sought in the original statement of claim. The Associate Judge found that the substance of the claim as pleaded and argued was still the same. D M Roberts was the party that had failed with respect to the proceedings and accordingly should pay full costs calculated on a 2B basis. The Associate Judge so ordered.

[64] On appeal D M Roberts argued that the Associate Judge erred in awarding full costs and that the costs award should be amended having regard to r 7.77(8) of the High Court Rules.

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[7] *Zurich Australian Insurance Ltd t/a Zurich New Zealand Ltd v Cognition Education Ltd* [2013] NZCA 180.

[65] Rule 7.77(8) states that:

> (8) If an amended pleading has been filed under this rule, the party filing the amended pleading must bear all the costs of and occasioned by the original pleading and any application for amendment, unless the court otherwise orders.

[66] An appeal against a costs award is an appeal against the exercise of a discretion. It is therefore incumbent on D M Roberts to satisfy us that the Associate Judge applied a wrong principle, took into account an irrelevant matter, ignored a relevant matter or was plainly wrong. We are not so satisfied. The Associate Judge clearly took into account the amendment and its possible implications as regards costs, but was satisfied that the amendment did not affect the substance of the claim. That was a view that was clearly open to him and one with which we agree. Further, as Mr Fisher points out, the reason the amendment was necessary in the first place was because of events directly occasioned by D M Roberts' own conduct.

[67] There are no grounds for appellate intervention.

Costs on this appeal

[68] Mr Fisher submitted that in the event D M Roberts failed in this appeal, it should pay increased costs under r 53E of the Court of Appeal (Civil) Rules because it had advanced unmeritorious arguments and taken unreasonable steps. He sought costs at twice the scale in respect of the application for leave to adduce further evidence and an uplift of one and a half times in respect of the substantive appeal itself.

[69] We agree that the application to adduce further evidence was completely lacking in merit and should never have been brought. Also lacking merit were the arguments relating to the fifth schedule and the 22 December 2011 letter. On the other hand, the argument concerning the interpretation of art 8 was an important issue and one worthy of consideration.

[70] Weighing up those matters, we consider the most just solution is to order the appellant to pay the respondents' costs for a standard appeal on a band A basis with a 25 per cent uplift plus usual disbursements.

Outcome

[71] Like the Associate Judge, we have some sympathy with Mr Roberts. His generosity to the community was admirable and his concerns are understandable. However, as also noted by the Associate Judge, ultimately the Court's decision must be based on the contractual obligations entered into by Mr Roberts' company. His public spirited attempts at benefaction cannot defeat the Mudgways' legal rights under the lease.

[72] The outcome of the appeal is as follows:

(a) The appellant's application for leave to adduce further evidence is dismissed.

(b) The appeal is dismissed.

(c) The appellant must pay costs to the respondents on a band A basis with a 25 per cent uplift plus usual disbursements.

Solicitors:
Simpson Aspen Law, Tauranga for Appellant
Jones Howden, Matamata for Respondents