IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1322/83

BETWEEN JOHN BERRIDGE SPENCER AND OTHERS

Plaintiffs

A N D GRAHAM JOHN SOLJAN

First Defendant

A N D TAKAPUNA CITY COUNCIL

Second Defendant

Hearing : 31st August 1984

Counsel : B.J. Joyce for Plaintiffs
First Defendant in person
M.L.S. Cooper for Second Defendant

Judgment : 31st August 1984

(ORAL) JUDGMENT OF BARKER, J.

In my judgment of 7th August 1984, I reserved leave to Mr Soljan to move the Court today for some amelioration of the order made against him on that day. I had then directed the issue of a writ of attachment against him, which writ was to lie in Court until 1st October 1984. The facts surrounding the issue of the writ of attachment were traversed by me at length on 23rd March 1984 in the subsequent judgment of the Court of Appeal and in my judgment of 7th August 1984.

Mr Soljan has now moved for an order discharging the interim injunction which, if granted, would have the consequence of discharging the writ of attachment. The basis of his application is that the affidavits now filed disclose that the

building alterations and additions which he proposes making to his flat property will not now contravene the provisions of the Takapuna City Operative District Scheme.

This situation is accepted by Mr Joyce for the plaintiffs and by Mr Cooper for the second defendant, the officers of which confirm by affidavit that the plans presented by Mr Soljan disclose no infringement of the Ordinances.

The sole question for determination today is the proper interpretation of the word "building" in Section 91 of the Town and Country Planning Act 1977 which reads:

> "91. Reconstruction etc. of non-conforming buildings - (1) Except as otherwise provided in the district scheme relating to the matters set out in clause 8(a) of the Second Schedule to this Act, where any existing building is not in conformity with a district scheme or any part or provision of it as in force for the time being, then the building may be reconstructed, altered, or added to if -
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> (a) The reconstruction, alteration, or addition does not increase the degree by which the building fails to conform to the scheme or any part or provision of it; and
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> (b) The reconstruction, alteration, or addition would not increase the current market value of the building by more than 60 percent.
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> (2) In assessing the current market value of a building for the purposes of subsection (1) (b) of this section, that value shall be taken as the value of the building in the condition it is or was in before the reconstruction, addition, or alteration in question took place less the value of any prior reconstruction, addition or alteration which was completed during the period of 5 years preceding the commencement of the reconstruction, alteration, or addition in question."

The affidavits in summary show that if the word "building" in Section 91 refers to the whole block of 5 flats of which Mr Soljan's is one, then the alterations which he proposes would not run counter to Section 91(1)(b)

in that the reconstruction, alteration or addition of the "building" would not increase the current market value of the "building" by more than 60 percent. On the other hand, if the word "building" means the one flat unit owned by Mr Soljan, then it is acknowledged by all that his proposals for reconstruction, alteration or addition would increase the current market value of that flat by more than 60 percent. The valuers differ as to percentage but it is immaterial to record details of their valuations because the two alternative situations clearly emerge from their affidavits.

Mr Soljan, appearing for himself, simply submitted that the word "building" in Section 91 means exactly what it says, and that the "building" in this case constitutes the block of 5 units which are joined together and appear to the outsider to be one building.

Mr Joyce submitted that because Mr Soljan's unit is separately rated and has a separate leasehold certificate of title issued for it, it should be regarded as one building. I here pause to record that what Mr Soljan actually owns is an undivided 1/5th share in the fee simple of the land on which the block of flats stands, together with a lease for 999 years over what is described as "Flat 4 on DP 66846". The scheme of co-ownership under which this set of home units is operated is under the cross lease system. Apparently, the owners have not decided to avail themselves of the regime of the Unit Titles Act 1972 although there is provision in that Act for a change from the cross lease system to the unit title system; see Geddes v. Devon Park Town Houses Limited (1977) 1 N.Z.L.R. 53.

Alternatively, Mr Joyce submitted that because Mr Soljan had only a 1/5th interest in the land, then he would be entitled to increase the market value of the building by no more than 1/5th of 60 percent of the value of the building.

In my view, I must interpret the word "building" in Section 91 in the context of an Act designed to regulate the amenities of a district and which endeavours to balance, on

the one hand, the right of citizens to do what they wish with their own land against the right of the community to interest itself in the uses to which land in a particular local government area is utilised. The Act is concerned with the use of land and the type and alocation of buildings.

From the point of view of persons administering the Act, and all persons in the vicinity concerned with this building, it matters not whether this were a block of 5 flats owned by one individual or whether, as here, a block of 5 flats with individual titles issued in respect of each of the 5 units.

Whether an individual flat owner is able to do what Mr Soljan is doing with the consent of the other owners is a matter of contract between him and the other owners. His right to do so, so far as they are concerned, is regulated by the registered lease document which governs relationships amongst the 5 flat owners. If this scheme had been under the Unit Titles Act, then there would have been some constitution established which would have regulated dealings amongst co-owners. However, whatever the situation with co-owners, "building" means one building and not 5; this is the proper interpretation of the word "building" in Section 91.

There are no authorities on the point. Mr Cooper helpfully pointed to indications which favoured the view that I have taken. He first referred to Section 91(2) which relates back to a period of only 5 years preceding the commencement of the alteration and reconstruction. He submitted that this provided a partial answer to the further submission of Mr Joyce that one owner could "steal a march" on his fellow owners by using up the 60 percent; Mr Cooper submitted that the limitation of only 5 years backwards ameliorated this particular practical difficulty. I agree. As I have said earlier, any anomalies created amongst owners can be met by the constitution of the governing body for the flats as a whole.

Secondly, Mr Cooper referred to an unreported decision of the Planning Tribunal in the case of Jobbins v. Otahuhu

Borough Council, a decision of the No. 4 Division presided over by Judge Sheppard at Auckland on 27th January 1981.

That case proceeded on an agreed set of facts. It concerned three attached home units at Otahuhu; in one of these, a solicitor had practised as a sole practitioner, employing no qualified staff or legal executives. He practised in the middle unit while the other two units had remained in residential use. Another solicitor wished to practise in a similar way in the front unit, the middle and rear flats then being occupied for residential purposes. She wished to utilise the "existing use" rights of the middle flat in the front flat.

The Tribunal held that, subject to the restrictions in scale of practice, existing use rights under Section 90 of the Act applied to the building as a whole; the new solicitor was entitled to avail herself of these existing use rights and practise in a unit which had not been used previously as a solicitor's office.

The precedent value of this decision is somewhat undermined by the recording by the Tribunal of the common ground between the parties that there was nothing in the section which would apply the existing use rights to a particular part of the building so as to preclude another part being availed of for that purpose. For that reason, the precedent value is somewhat limited; nevertheless, I think the Tribunal clearly took the right approach in that case.

I am clearly of the view that the word "building" in Section 91, in the circumstances of this case, refers to the whole block of 5 flats; therefore, provided his development proceeds along the lines of the plans which Mr Soljan has submitted to both the plaintiffs and the second defendant, there is no legal impediment to his erecting such an alteration.

The injunction made on 22nd December 1983 required Mr Soljan to restore the property to the state it was on that

day. He pointed out at the last hearing, quite rightly, that there was little point in restoring the building to that stage if he then could lawfully build the building he now proposes. He has, on the record - and this has been confirmed by Mr Cooper - withdrawn his previous application to the Council for permission to legitimate his previous proposals.

Therefore, I see no reason - and none was advanced by counsel - for continuing the injunction. I therefore dissolve the injunction against Mr Soljan; this means that the application for writ of attachment must be dismissed.

I do so on the basis, which Mr Soljan clearly understands, that his building development must proceed in general accordance with the plans which he has submitted to the other parties; it must of course conform in all respects with the provisions of the Operative District Scheme and with Section 91 of the Act as interpreted by me.

I record that Mr Soljan clearly understands these stipulations; in those circumstances, there seems no point whatever in holding over his head the writ of attachment. Of course, should there be any further infringement, then the plaintiff or the second defendant will doubtless apply to the Court again; I rather think that after his present experiences, Mr Soljan will be at great pains to ensure that his further development does not infringe.

The question of costs is reserved pending the substantive hearing.

Mr Soljan advises that the $2,500 costs awarded to Mr Spencer in March 1984 has now been paid to his solicitors; he will now direct them to pay that money to the plaintiffs' solicitors.

R.D. Barker J.

SOLICITORS:

Clendon, Wilkin, Feeney & Joyce, Auckland, for Plaintiffs.
Butler, White & Hanna, Auckland, for Second Defendant.