IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.815/86

LOW PRIORITY

BETWEEN JOHN KENNETH JOHNSON, COLIN WILLIAM BRIGHT, GEORGE McCULLOUGH JOHNSTON, JOHN KENNETH JOHNSTON (Junior) and MARTIN GEORGE PETER KNAPP

Plaintiffs

1263

AND LANDMARK PROPERTIES LIMITED

First Defendant

AND CHASE CORPORATION LIMITED

Second Defendant

AND CHASE LANDMARK INVESTMENTS LIMITED

Third Defendant

AND COOPRO INVESTMENTS LIMITED

Fourth Defendant

CP. 962/86

BETWEEN C.R. WILSON

Plaintiff

AND LANDMARK PROPERTIES LIMITED

First Defendant

AND CHASE CORPORATION LIMITED

Second Defendant

AND CHASE LANDMARK INVESTMENTS LIMITED

Third Defendant

AND COOPRO INVESTMENTS LIMITED

Fourth Defendant

CP. 963/86

BETWEEN	K.H. PLANT (MANUFACTURING JEWELLERS) LIMITED	
		Plaintiff
AND	LANDMARK PROPERTIES LIMITED	
		First Defendant
AND	CHASE CORPORATION LIMITED	
		Second Defendant
AND	CHASE LANDMARK INVESTMENTS LIMITED	
		Third Defendant
AND	COOPRO INVESTMENTS LIMITED	
		Fourth Defendant

Hearing: 11, 12 August 1986

Counsel: C.W. Bright, in Person, Plaintiff in CP.815/86
P.T. Kiely for K.H. Plank (Manufacturing Jewellers) Limited and C.R. Wilson
Miss H.D. Winkelmann for 1st Defendant in all proceedings
R.J. Moody and Mr Turner for 2nd, 3rd and 4th Defendants in all proceedings

Judgment: 22 August 1986

JUDGMENT OF BARKER J

Before the Court are applications for interim injunction brought by 3 lessees of a building known to generations of Aucklanders as the 'Power Board' building. Situated in the heart of Queen St, this building, with its distinctive architectural style, is a standing reminder of a more

gracious age. It is something of a stately dowager amongst the high-rise edifices now to be found dominating the central business district. Some years ago, the Auckland Electric Power Board sold the building; it was subsequently purchased by the first defendant; the name of the building was changed to 'Landmark House'.

In March 1986, the first defendant ('Landmark') and the second defendant ('Chase') entered into a joint venture agreement for the development of the building; a joint venture company - the third defendant ('Chase Landmark') was formed. A wholly owned subsidiary of Chase Landmark, the fourth defendant ('Coopro'), became the owner of the building. However, a transfer to the fourth defendant has not yet been registered; none of the plaintiffs as lessees in the building has received any formal notice advising of change of ownership and requiring rent to be paid to the new owner. The plaintiffs continue to pay rent to Landmark. According to an affidavit from the first defendant's solicitor, the reason for the delay in registering the transfer was a desire on the part of the first defendant not to pay the stamp duty on the transfer until payment was strictly necessary.

The Building

When the Power Board owned the building, theere was an extensive foyer on the ground floor. A subsequent owner put shops into some of this space. The present entrance to the upper floors of the building from Queen St is down a passageway leading to two passenger lifts. This passageway had been created before the dates of the leases granted to the various plaintiffs by a previous owner, James Kirkpatrick Limited. The shops then located on the ground floor have now been acquired by the defendants. Some of the shops were behind the partition which formed the northern boundary of the passageway. The defendants wish to knock down the shops and reorganise the ground

floor differently; in particular, a new entrance from the corner of Durham and Queen Streets is envisaged. This desire by the defendants forms the basis for one of the injunctions sought by the plaintiffs, Johnston and Others ('Johnston Prichard').

The building has 8 floors. The first floor is tenanted; I was informed from the Bar that these tenants have recently concluded an agreement with the defendants to vacate. On the second floor, until recently, were located the offices of Landmark; about half the floor is occupied by the accountancy department of Johnston Prichard. Landmark has now moved to the 8th floor; the defendants cannot realistically undertake any redevelopment on this floor so long as Johnston Prichard remains.

Johnston Prichard occupy the whole of the third floor. On the fourth floor, Johnston Prichard have a lease of one room which they intend to use for word processors. On this floor are situated ladies' toilets used by Johnston Prichard staff, working on the second and third floors. There is also on this floor the office of a sharebroker, a Mr Hollies; he entered into a short-term tenancy in the knowledge of the redevelopment work. His affidavits reveal no complaints by him or his staff or clients about the defendants' activities. On this floor, the defendants have knocked down partitions and have removed both carpet from the passageway and fittings from the toilets.

At the request of counsel, I took a view of the premises prior to embarking on the hearing proper on 11 August 1986; temporary plywood partitions had been erected to preserve the passageways on the fourth floor. Mr Moody informed me from the Bar that the defendants were prepared to restore both the carpet and the fittings in the toilets.

On the fifth floor are the premises leased by the plaintiff K.H. Plank (Manufacturing Jewellers) Limited

(Plank). There are also other tenants; at the moment, the defendants have no rights in respect of this floor, although details of the other tenancies were not given; in the premises leased by the plaintiff Plank are delicate machines; the work done by this plaintiff's employees is of a delicate nature involving the manufacture of jewelry and working with precious stones.

On the sixth floor, the defendants have obtained vacant possession; considerable structural change has been effected. Demolition work has caused upset to the various plaintiffs of various kinds and in varying degrees as detailed in the affidavits; on my inspection, the major work of reconstruction appeared to have been completed. I was assured by counsel for the defendants that only two weeks work remained before this floor would be completed to the standard desired by the defendants. It was the 'thumping' work occurring in the course of the demolition work on this floor which has disturbed particularly the plaintiff Plank with its jewelry business on the fifth floor and the plaintiff Wilson with his dental practice on the seventh floor. There were also complaints from Johnston Prichard employees of inability to work and concentrate because of the noise and the thumping. The demolition work also involved use of the lifts by the defendants' workmen to transport equipment.

The seventh floor is tenanted; the plaintiff Wilson has his dental surgery there. The defendants have no rights in respect of this floor although details of the tenancies, other than that of the plaintiff Wilson were not supplied. This plaintiff alleges difficulties in carrying on his profession as a dentist because of the noise and the thuds principally from the demolition work on the floor below. He claims - and one can well understand it - that these intrusions to the even calm of a dental surgery are stressful, both to himself and to his patients; in addition, this plaintiff complains of dust generated by the demolition operation.

The eighth floor, which I did not inspect, has apparently been refurbished and is occupied by the first defendant or a subsidiary. It was said that many of the misfortunes experienced by the various plaintiffs as recounted in the affidavits were caused by the refurbishment of this floor and by workmen using the lifts to go to the eighth floor. No details were given as to what ground for complaint was caused by whose workmen. However, counsel for the defendants stated that, if the plaintiffs have any claim for damages against any of the defendants cited, then such damages will be met by the third defendant which, as recorded earlier, is the joint venture company of the first and second defendants.

The plaintiffs, Johnston Prichard, were told by a Mr Clive Fuhr, a representative of the second defendant, that the defendants' ultimate intention was to provide shops on the first three floors, the fourth floor would be used as an entrance from a parking building in an adjoining property, and that the three upper floors would be used for high-quality air-conditioned office accommodation. They wished to instal escalators for the first four floors and provide only one lift to service the remaining floors.

The voluminous affidavits contain much totally unnecessary detail of offers and counter-offers made by the defendants to the various plaintiffs, particularly Johnston Prichard, in the hope that the plaintiffs would surrender their leases. These offers and counter-offers are completely irrelevant to the questions that have to be determined by the Court; I therefore do not propose to traverse them.

Nor do I propose to set out in any detail the complaints made by the various plaintiffs which seem now to have been either assuaged or which relate to work which has been completed and which will not be repeated. A prima facie case appears from the affidavits; in June 1986, Johnston Prichard suffered disturbance and loss of enjoyment of

their leased premises; one lift was out of action; there were power cuts, the removal of fittings from the lavatories and other inconveniences suffered by staff, partners and clients. They and the other plaintiffs may have claims for damages in relation to past inconvenience and breach of the covenant of quiet enjoyment. Determination of those claims will have to await the substantive hearing. I do point out, however, that the defendants may not be able to escape liability for any disruption to the plaintiffs caused by another tenant. In Kenny v Preen, (1962) 3 All ER 814, Pearson LJ at 819 referred to the covenant for quiet enjoyment as "protecting the tenant against interference with the tenant's quiet and peaceful possession and enjoyment of the premises by the landlord or persons claiming through or under the landlord" (emphasis added).

The third defendant went ahead with demolition on the fourth floor without consultation with Johnston Prichard who there a lease of one room which is currently unoccupied. Mr J.K. Johnston Jnr deposed that, on 10 July 1986, all passageway walls and offices (apart from the room leased by the plaintiffs) were demolished. There were piles of rubble; door frames and other salvaged material were stacked in the passageway.

Johnston Prichard obtained an ex parte interim injunction from Thorp J on 11 July 1986 which effectively brought work on the fourth floor to a halt. Henry J, on 16 July, 1986 ordered that the Johnston Prichard injunction be argued as if on an application on notice for interim injunction. By consent, the injunction applications of the other two plaintiffs (which were filed later) were heard at the same time.

One feature of the narrative which must be mentioned is the attitude of the first defendant to the plaintiffs' complaints. Not surprisingly, since they had been given

no notice of change of landlord, all the plaintiffs wrote and/or spoke to the first defendant, complaining about what they saw as breaches of the covenant of quiet enjoyment. Their complaints were answered on behalf of the first defendant by Mr O.M. Newland in what can only be described as an offhand way with little attempt to be conciliatory. For example, when Johnston Prichard complained about the lift being out of action, Mr Newland wrote on 12 June 1986, saying that the lift was likely to remain out of action because of its age and the difficulty of obtaining parts. The reply stated that the maintenance firm was 'scouring museums to find replacement pieces'. The lifts were nevertheless later restored to running order and are still operational. There was only a blanket denial by Mr Newland to this and other detailed complaints.

Of greater concern to the Court was the reply by the first defendant to the letter of complaint written by solicitors acting for the plaintiff Plank. It appears that this plaintiff leased other premises owned by the first defendant and for which Plank wanted a renewal of lease. The first defendant's reply included the following statement:

> "Should your client attempt Court action then we reserve the right to take whatever action we deem necessary now and in the future with regard to his lease (either in Landmark House or Queen Street) to compensate ourselves."

I viewed this statement in a very bad light; it seemed on its face to intimidate Mr Plank from taking action. The Court sought submissions from Miss Winkelman on behalf of the first defendant. She filed an affidavit from Mr Newland who stated that he wrote that letter to the solicitors with no intention to intimidate Mr Plank. He had found Mr Plank's solicitors' letter difficult to reconcile with what he considered had been amicable previous negotiations in which he had offered assistance

to Mr Plank. After considering Miss Winkelman's submissions, I do not consider that this letter, whilst unfortunate in its terms, can constitute a contempt of Court. See Webster v Bakewell Rural District Council, (1916) 1 Ch. 300 and Attorney-General v Times Newspapers Ltd, (1973) 3 All ER 54, 76.

The first defendant's treatment of the plaintiff Wilson appears hardly less tactful. The reply to his solicitors' letter complaining about the difficulties, could hardly be said to be a measured reponse to the concerns of a professional man. Mr J.K. Johnston (Junior) deposed to a conversation with Mr Newland on 10 July 1986 where, inter alia, Mr Newland told Mr Johnston and other members of his firm, that they had no right to try and stop the work that was going on in the building and that they should have accepted the offers to surrender the lease. He then said that "if they rushed off to the High Court they might get an injunction or something that might stop them for a month but they would not win in the end"; that the defendants would regard that sort of action as a "declaration of war" and that "things would get very nasty"; they would find that, when they arrived there would be "chains across the doors" and that they "would be locked out". As indicated, Mr Newland made no detailed refutation of these allegations but offered a blanket denial in his affidavit. I have referred to these matters as matters of background; in their light, one can readily appreciate the concerns of the various plaintiffs and their ongoing suspicion after receiving such treatment from the representative of their landlord.

Mr Moody acknowledged that many of these exchanges between the plaintiffs and Mr Newland had been 'unfortunate'; they had put the tenants 'off-side' with the landlords. He stated that the new landlord and the developer (i.e. the second and third defendants) wished to have a constructive relationship with the tenants; these defendants regretted much of what had gone before.

The Court must look to the future to see whether relief should be continued by way of injunction. As Mr Moody acknowledged, Johnston Prichard were thoroughly justified in obtaining their interim injunction ex parte in view of the actions of the first defendant.

As against counsel's assertion that the entry of the second and third defendants betokens a new era of reasonableness for the plaintiffs, I merely point out that it was not the first defendant, but the second defendant or its workmen, which commenced work on the fourth floor without discussion with Johnston Prichard.

The Leases

The Johnston Prichard lease was entered into on 20 July 1982 with a previous owner, James Kirkpatrick Limited. These plaintiffs have three leases, all in identical terms, each dealing with premises on each of the three floors. The lease is a printed form, but with typewritten additions; it refers to "All that the premises described in the schedule hereto (hereinafter called the said premises) together with the use in common with the lessor and other lessees in the building and other persons lawfully in the building of the entrance, passageways, corridors, stairs, leading to the premises and the passenger lifts".

The lease permits the premises to be used for the purposes of the offices of barrister, solicitors and notaries public or such other use as shall be consented to by the lessor in writing. Clause 9 reads:

> "Nothing herein contained shall by implication of law or otherwise operate to confer on the Lessee any easement of right or privilege whatsoever over or against any adjoining or other property belonging to the Lessor which may restrict or prejudicially affect the future rebuilding, alteration or development of such adjoining or other property."

The final clause of relevance is an added one, Clause 37, which reads:

> "The Lessor shall keep and maintain the exterior walls of the building and the roof and the entrance passageways and corridors stairs and passenger lifts and the conveniences in good order and condition PROVIDED HOWEVER that the Lessor shall not be liable for any loss suffered by want of repairs unless the Lessor shall have failed within a reasonable time after having received reasaonable notice to have remedied the same."

The leases of the other plaintiffs are basically in the same printed form; however, they contain no counterpart to Clause 37, nor in the reference to 'premises' in these other leases is there any addition referring to entrance, passageways etc. In Clause 9, the following words are found at the conclusion of the clause; they were deleted from the Johnston Prichard lease: i.e. "Nor shall the tenant be entitled to compensation for any damage or disturbance caused by or caused through any such rebuilding, alteration or development". The Johnston Prichard term expired on 10 June 1986; there is a right of renewal for a further four years which has been exercised. The other leases expire in 1989 for Plank and 1991 for Wilson.

The Injunction

The injunctions issued by Thorp J were amended by Henry J. They are issued against the first and second defendants only at present because the plaintiffs were unaware of the third and fourth defendants' involvement at the time of the hearing before Henry J.

1. The first and second defendants and any subsidiary company are restrained from any acts or omissions resulting in:

(a) Any further demolition of passageway, walls and/or damage to the said walls, the stairways and the floors of the passageways including the carpet laid thereon on the second, third or fourth floors and/or in or about the entrance area of the building known as Landmark House situated 187 Queen St, Auckland.

(b) Any one or both of the two passenger service lifts in the said building known as Landmark House ceasing to function between the ground and all floors up to and including the fourth floor.

The injunctions now sought by the plaintiffs in summary are aimed at:

(a) Further demolition work;
(b) The use of the lifts for construction purposes;
(c) Any breach of the covenant for quiet enjoyment;
(d) Any change in the entranceway from Queen Street.

The Defendants' Position

Lengthy affidavits were filed by Mr Fuhr on behalf of the second, third and fourth defendants. The desire of these defendants is said to achieve a reasonable relationship with the plaintiffs. Mr Moody, counsel for these defendants, submitted that nothing can be done on floors 1 to 4 until the defendants' problems with the plaintiffs have been resolved; floors 5 and 7 were still tenanted and there was only 2 weeks' work to be done on floor 6.

There is no evidence that further demolition work is to take place on the sixth floor; only partitioning and decorating is likely; whether or not what has been done in the past on this floor has breached the plaintiffs' rights of quiet enjoyment, the fact of just 2 weeks' work

remaining on this floor cannot justify the issue of an injunction. The worst has happened on this floor; damages would be an adequate remedy for all plaintiffs in respect of the defendants' activities on the sixth floor, both past and future.

I think it proper to reserve liberty to the plaintiffs Plank and Wilson to apply in respect of the sixth floor (or any other floor) should need arise; I therefore adjourn their applications for interim injunction in case any further work by the defendants gives them cause for concern. This order is made on the clear understanding that there is only 2 weeks work to be done on the sixth floor. If a greater time is taken by the defendants, the plaintiffs may return to the Court at short notice.

I think that Johnston Prichard are justified in maintaining their concern regarding the fourth floor. What was done by the defendants was in clear breach of the plaintiffs' licence in respect of the passageways and toilets. I think a limited injunction ought to remain in respect of the Johnston Prichard floors with liberty reserved to the defendants to seek to vary or set aside.

If the defendants indicate exactly what work they wish to undertake on the fourth floor and if their desires can be achieved with minimum interference with the plaintiffs' right of quiet enjoyment of any part of their premises, then a variation might receive favourable consideration. For example, I should regard favourably a proposal which confined work to weekends or to outside business hours, provided inconvenience to the plaintiffs was kept to a minimum.

There is a serious question to be tried. I cannot see damages as an adequate remedy. A plaintiff is entitled to an interim injunction where his legal right has been infringed and there is some threat of further material

infringement; Meux's Brewery Co v City of London Electric Lighting Co. (1895) 1 Ch. 287.

The various cases referred to by counsel indicate, in general terms, that the right of the tenant to quiet enjoyment of a demised property is treated seriously by the Courts. Attempts by landlords to harrass tenants have been treated severely by the Courts. However, the reasonable wish of a landlord to refurbish a large building cannot be thwarted entirely; mere temporary inconvenience to a tenant of part of the building is not enough to justify an injunction. There is, in every case, the need to balance the right of the tenant to quiet enjoyment against the landlord's right to do what he wishes with the remainder of his property.

I note in passing that Clause 9 of the various leases cannot refer to other parts of the same building. It must refer to the adjoining 'property' as distinct from 'premises'. The clause refers to properties other than the one in which the demised premises exist; it may often happen that a landlord owns several buildings adjacent or adjoining. I think that I should interpret the lease, in case of any doubt, against the landlord because of the contra proferentem rule; this is a standard form; a more positive term was needed in order to defeat the clear right of a tenant to claim damages for loss of quiet enjoyment.

I consider also that the plantiffs have made out a 'serious question to be tried' in respect of interim injunctions aimed at (a) preserving the entranceway in its present state and (b) keeping the lifts running.

I do not consider that damages is an adequate remedy in respect of these two matters without a detailed statement by the defendants as to exactly what is intended to be done and exactly what inconvenience will be caused to the

plaintiffs. The cases, on balance of convenience, make it clear that one should look at the status quo; i.e. the situation obtaining both when the original lease was granted by James Kirkpatrick Limited to the plaintiffs and at the date of issue of the proceedings. See Garden Cottage Foods Ltd v Milk Marketing Board, (1984) AC 130.

I consider that an injunction should be granted to the plaintiffs in respect of the accessway from Queen Street; the defendants may be at liberty to apply to rescind this part of the injunction on filing such detailed information as would enable the Court to assess better whether damages would be an adequate remedy.

The position with regard to the lifts should not be so inflexible. One should have thought that some reasonable accommodation could have been reached between the parties. Mr Moody suggested that one lift could be used solely for tenants and persons having business with them; the builders should use one lift and its hours of use should be restricted to exclude normal business hours.

I do not think that the plaintiffs can maintain their stance that the defendants should not use their own lift in a building where there is no goods service lift and where the defendants may be legitimately entitled to conduct the refurbishing of the other floors. There have been problems with regard to the cleanliness of the lifts and to the obstruction of the lifts by workmen.

I therefore think it reasonable (a) to restrict the defendants to the use of one lift and (b) that that use of the one lift by the defendants be restricted to before 8.30 a.m. and after 5.30 p.m. Mondays to Fridays except where there is a real emergency or where the lift is not being used for the transportation of heavy material. The lift should be cleaned out by the defendants after any use by them during office hours which use causes the lift to

become dirty. No doubt the plaintiffs will see that this condition is enforced and will record any breaches.

I have omitted many matters of detail which were recorded in the affidavits in an endeavour to have this judgment released within a reasonable time; this was, after all, only an interim injunction application; it should not have been necessary for the Court to have to traverse so much factual material which is better reserved for the substantive hearing.

The orders that I make are as follows:

(a) The applications for interim injunction by the plaintiffs Plank and Wilson are adjourned sine die on condition that there is only 2 more weeks' work on the sixth floor. Liberty to apply is reserved to bring these applications on at short notice.

(b) An injunction at the suit of Johnston Prichard is to issue against all defendants in the usual form in respect of the second, third and fourth floors. Such injunction is to contain liberty to apply to vary or set aside if the defendants (or any of them) articulate any proposal for demolition or rebuilding and suggest reasonable times for carrying out the work. If any proposal appears not to interfere with any plaintiff's reasonable expectation of quiet enjoyment during normal business hours, then it will receive favourable consideration from the Court.

(c) An injunction is to issue at the suit of Johnston Prichard in respect of the entranceway, preserving it as it is pending a similar articulation of detail referred to in para (b).

(d) An Injunction is to issue in respect of the lifts as indicated.

(e) Liberty to apply is reserved for all parties.

(f) These orders are made in substitution for previous interim injunctions which are to be dissolved seven days after delivery of this judgment.

(g) The defendants may file undertakings under seal within 7 days in lieu of injunctions.

(h) Costs reserved.

Counsel may submit a draft order for approval in case of any difficulty.

R.D. Barker J.

SOLICITORS:

The Plaintiffs, Johnston Prichard Fee & Partners, Auckland, in Person in CP.815/86

Wilson Henry, Auckland, for Plaintiffs in CP.962/86 and CP.963/86.

Nicholson Gribbin & Co, Auckland, for 1st Defendant.

Molloy Moody & Greville, Auckland, for 2nd, 3rd and 4th Defendants.