IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-007873

BETWEEN	BODY CORPORATE 206697 Appellant
AND	KATHRYN CHEN Respondent

Hearing: 14 August 2008

Appearances: J T Burley for Appellant
D K Wilson for Respondent

Judgment: 5 January 2009

JUDGMENT OF KEANE J

This judgment was delivered by Justice Keane on 5 January 2009 at 3 pm
pursuant to Rule540(4) of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Solicitors:

Callaghan & Co., Auckland
P Wong & B Bong Law Office, Pakuranga, Auckland

[1] On 15 November 2007 Kathryn Chen obtained judgment in the District Court, Auckland, against Body Corporate 206697 for $49,754, the rent accrued under a deed of lease as to which the Body Corporate was 'prime obligor'.

[2] On June 2005 Ms Chen had purchased an apartment in the complex the Body Corporate exists to serve, then occupied by the building manager, as she believed under a lease running until April 2011 that gave her a rental income of $24,000 each year. Within six months, however, in January 2006, the building manager vacated. His agreement with the Body Corporate entitling him to live there had ceased on 1 September 2005. He remained building manager but lived elsewhere.

[3] The Body Corporate asserted that this brought the lease, if there was one, to an end. More fundamentally, it contended, the lease was invalid or it never became, itself, bound as prime obligor. Ms Chen elected not to accept that. She did not take possession herself, or otherwise end the lease if it were still on foot. She rested on her rights as lessor. She turned for the rent as it accrued to the Body Corporate as guarantor, obtaining eventually judgment for $49,754.

[4] In the District Court the Body Corporate denied it had ever become bound as prime obligor. It denied indeed the validity of the lease. It contended that until January 2006, when the building manager quit, certainly after 1 September 2005 when his original contract ceased, he had enjoyed at most a monthly tenancy. In January 2006 any tenure then ceased. The Judge rejected these propositions and on this appeal the Body Corporate seeks to show that she did so wrongly on four bases.

[5] First, the Body Corporate contends, the Judge concluded incorrectly that when Ms Chen acquired the property she assumed the benefit of any lease. The deed of lease was not sufficiently identified in the agreement for sale and purchase dated 18 May 2005.

[6] Secondly, the Body Corporate contends, the Judge was incorrect to hold that it did subscribe to the deed of lease as prime obligor and that it was capable of doing so. It did not subscribe under seal as it should have. Eden Village Limited subscribed on its behalf after it had ceased to have the capacity as sole proprietor to

do so. As prime obligor it necessarily assumed an interest in land but that was beyond its power and prohibited.

[7] Thirdly, the Body Corporate contends, the Judge was incorrect to conclude that the deed remained on foot even at the hearing. She ought to have concluded that if the lease ever did subsist it expired when the reason for it ceased. The lease had been taken to house the building manager. He had vacated. There had been no formal re-assignment. It ceased on 1 September 2005.

[8] Fourthly, the Body Corporate contends, the Judge was incorrect to hold that Ms Chen was under no duty to mitigate. The apparent ability of lessors to stand upon their right to rent, and pursue it in debt, instead of accepting that there has been a default amounting to repudiation and seeking damages, is becoming increasingly constrained.

Threshold on appeal

[9] The right of appeal conferred by s 72 of the District Courts Act 1947 is general. It extends to 'the whole or any part of any decision': subs (2). This Court's powers on an appeal, under s 76, are correspondingly wide. This Court can make any decision it thinks should have been made (subs (1(a)); or may direct the District Court to rehear the case, or any aspect of it or indeed to enter judgment (subs (1)(b)).

[10] As the Supreme Court confirmed recently, however, in *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141, first generally at 147, para [5], and then particularly at 150, para [13], on an appeal under s 72 an appellant still carries the onus. As Elias CJ said for the Court in the first of those passages:

> … the appellant bears an onus of satisfying the appeal court that it should differ from the decision under appeal. It is only if the appellate court considers that the appealed decision is wrong that it is justified in interfering with it.

[11] At the same time, Elias CJ emphasised, at 147 para [5], this Court, like any court on appeal, must make up its own mind. It is not to defer to the Court appealed from, except where that Court enjoys some definite advantage. For, as Elias CJ said,

‘on general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case’.

Purchase with benefit of lease

[12] Mrs Chen, the Judge was entitled to conclude, purchased with the benefit of the lease. She was entitled to reject the Body Corporate’s argument that the lease was not adequately identified in the agreement for sale and purchase, dated 18 May 2005; and that under cl 3.1 Ms Chen took vacant possession.

[13] Clause 3.1 of the agreement, the standard agreement approved by the Real Estate Institute of New Zealand and the Auckland District Law Society, says this:

> Unless particulars of a tenancy are included in this agreement the property is sold with vacant possession and the vendor shall so yield the property on the possession date.

[14] The most natural interpretation of cl 3.1 is that a purchaser is entitled to vacant possession, unless any tenancy is disclosed and incorporated in the agreement. The Body Corporate seeks to give cl 3.1 the converse meaning that, absent particulars of a tenancy in the agreement, a purchaser is obliged to take vacant possession. Whether cl 3.1 bears that second meaning I do not need to consider. The Judge was entitled to find that the deed of lease was incorporated plainly enough.

[15] Brief details of any tenancy are allowed for on the first page of the agreement. Under the heading ‘Tenancies (if any)’ five topics call for entries. Against the first ‘name of tenant’ is the entry ‘On site Building Manager’. No entries are made against ‘bond’, or ‘term’ or ‘right of renewal’. But these are unlikely to be as essential when a purchaser expressly takes with the benefit of a tenancy. Against ‘rent’ is the entry ‘see clause 14.0’ and that supplied any lack. Clause 14.0 was not confined to rent. It called for Ms Chen’s solicitor to approve the lease. It said this:

> This agreement is conditional upon the purchaser’s solicitor’s approval of the rental lease document within three working days from the date of this agreement.

[16] Clause 14.0 was struck from the agreement. Ms Chen, when questioned about this, could not finally say why. She first said that the vendor had required that. She later accepted that she did not know how it came about. The fact remains that the lease continued to figure explicitly in the agreement and Ms Chen was not offered and did not assume vacant possession. The building manager remained the occupant until the Body Corporate brought that to an end.

Execution under seal

[17] The second issue is whether the Body Corporate ever subscribed formally to the deed of lease as prime obligor. The lessor and lessee each executed the lease by simple subscription under s 180 of the Companies Act 1993 and as to that at the hearing there was no issue. The issue was as to whether the Body Corporate should have executed the deed under seal.

[18] The manner in which the Body Corporate ostensibly subscribed was this:

> SIGNED by Eden Village Limited as sole registered proprietor BODY CORPORATE NO as guarantor in the presence of:

Against that two directors of Eden Village Limited were to and did subscribe, their signatures witnessed by an Auckland solicitor. As to that as well there was no issue. Issue was taken as to the absence of the Body Corporate's own seal.

[19] If Eden Village Limited had the capacity to subscribe on its behalf, an issue in itself, the Body Corporate contends, that had to be under the Body Corporate's own seal. It had been in existence since 10 April 2001. But, as the Judge found and as I consider, it has been unable to point to any rule imposed by statute, or of its own, that unequivocally says so.

[20] Section 12(4) of the Unit Titles Act 1972 says that a body corporate 'shall have perpetual succession and a common seal'. It nowhere states that a body corporate only has capacity to bind itself by seal. Section 4(2) of the Property Law Act 1952 then applied and it did say, prescribing the formalities of a deed, that 'Except where the party to be bound by deed is a corporation, sealing is not

necessary.' But it does not seem to me to have made that an absolute necessity. Section 5, which dealt with deeds by corporations, allowed for sealing and for subscribing without seal by attorney.

[21] As the Judge found, moreover, there was only one of the Body Corporate's own rules with direct bearing , Rule 33, and it said this:

> The common seal of the Body Corporate shall not be used without the authority of the secretary or the committee of the Body Corporate previously given. Whenever the seal is affixed to any instrument, that instrument shall be attested to by at least 2 members of the committee or where an administrator has been appointed or there is only one proprietor, by the administrator or that proprietor.

What this rule stopped short of saying was when the seal was to be used and with what the consequence if it was not.

[22] The only other rules that conceivably had a bearing were these. Rules 34 and 35 governed special resolutions. But they were not an immediate point if Eden Village Limited was sole proprietor. The only other rule that might have applied, as a matter of inference, was Rule 36 that enabled the secretary to give certificates under seal without further authority and to subscribe as a witness. By contrast Rule 33 was less prescriptive.

[23] If then, as the Judge also found, Eden Village Limited did subscribe on the Body Corporate's behalf with capacity as sole proprietor, as Rule 33 allowed, it was enough that it did so, subscribing itself as s 180 of the Companies Act 1993 required. There was no need independently to affix the Body Corporate's seal.

Subscriber – sole proprietor

[24] The third issue is whether when the deed of lease was executed Eden Village Limited was still, or had ceased to be, sole proprietor. If the deed was executed on 24 April 2001 it remained sole proprietor. As to that there was no issue. The issue was whether it remained sole proprietor if the deed was executed on 2 May 2001 the date the Body Corporate contended for.

[25] The Judge found that the lease was, as it said on its face, dated 24 April 2001. She declined to receive evidence after the hearing that the Body Corporate contended showed it had been executed on 2 May 2001 but backdated because Eden Village Limited had ceased to be sole proprietor. She held that this was not fresh evidence. The Body Corporate had it before trial and could have found it had it been diligent. It did not go to the essential issue. These conclusions were, I consider, fully open to her.

[26] The so-called new evidence was not new. It had been in the hands of the Body Corporate before the hearing but mis-filed. I have however considered it and it is not compelling. It is in whole or main part email traffic indicative of more. It is hearsay and incomplete. It carries the prospect of a whole new order of inquiry. By itself it cannot contradict the date that appears on the two extant versions of the deed, the one materially the same as the other, each dated 24 April 2001.

[27] The result has to be that the Judge was correct to hold that Eden Village Limited did have the capacity to subscribe on behalf of the Body Corporate, committing it as prime obligor. Subject to the remaining point taken about whether the Body Corporate went beyond its power she had no need to consider, as the Body Corporate contends on this appeal she was obliged to, the issue of consideration. The deed bound without more.

Prohibited interest

[28] As a prime obligor, the Body Corporate contends, it must necessarily have acquired an interest in land or a chattel real and that is prohibited by s 9(1) and the proviso to s 37(5) of the Unit Titles Act 1972.

[29] I do not see s 9(1) assists particularly. All it says is that the common property is to be held by the proprietors of all units as tenants in common in proportion to their unit entitlement; and s 12(2) deems the proprietors for the time being to be the Body Corporate. Section 37(5) is I accept more explicit. It does prohibit rules that would ‘enable the body corporate to acquire or hold any interest in land or any chattel real.’ I have greater difficulty with the next proposition.

[30] Under cl 13 of the deed, as the Body Corporate says, it was more than a surety, it was a 'prime obligor'. Under cl 13(2) it assumed 'the primary financial obligation … not contingent upon default by the lessee'. Clause 13(2) went on indeed to say, 'the guarantor shall satisfy such obligations before the lessee attempts to do so …'. But that does not mean that it obtained any correlative interest. Nothing in the deed suggests that. It took on the burden without the benefit. It is not to be equated to an unregistered lessee with a caveatable interest.

Termination date

[31] The only issue can then be whether the Judge erred in concluding the deed of lease did not come to an end on 1 September 2005 when the building management agreement did. Clause 9.1 of the deed of lease, as the Body Corporate says, said this:

> It is the intention of the parties that this lease is for the benefit of the Building Manager and the Premises can only be used by the Building Manager. In the event that the building management agreement is terminated, then this lease shall also be terminated.

[32] The short answer to that, however, is that cl 9.1 did not stop there. The Body Corporate's own obligations did not terminate. Clause 9.1 went on to say:

> In the event that that the Building Management Agreement is terminated then this Lease shall also be terminated and pending appointment of a new building manager the Body Corporate shall meet the obligations of the lessee.

[33] The Judge was entitled to conclude the Body Corporate's liability remained even at the date of the hearing and to give judgment against it for the rent accrued, as if the lease had not terminated, subject only to the very last point the Body Corporate takes on this appeal.

Remedy – rent or damages

[34] The Judge held Mrs Chen was entitled to the rent she claimed. She did not have to accept the Body Corporate's abandonment as repudiation. She had not herself re-entered. She was under no duty to mitigate. The rent had continued to

accrue. In this too, the Body Corporate contends finally, the Judge was wrong. There were exceptional circumstances fettering Ms Chen's freedom of choice.

[35] The Body Corporate attempted to assist Ms Chen to re-let. She chose not to on the advice of her solicitor and for no other reason. She also rejected an offer to re-house the manager in her unit under a new leaseThough a lessor may not be under a duty to accept abandonment as repudiation, flexibility is called for. In equity all she should have been award was damages: *Seon Development Limited v Roger* (1993) 2 NZ Conv.C 191,664. She should have been held to a duty to mitigate: *Butler & Sweeney v R F & S A Bluck Ltd* [1996] 1 NZLR 675, 683.

[36] To this Ms Chen responds, as she did before, as registered proprietor, as lessor, she was entitled to rely on the liability the lease imposed on the Body Corporate even after the lease itself had ceased, and seek the sum that has accrued. She was not obliged to accept the Body Corporate's abandonment as a fait accompli and cancel. She was entitled to the fixed sum awarded: *Miller v Mattin* (CA 159/88, 24 July 1990); *Metcalfe v Waterbedroom (Dominion Road) Ltd* (HC AK, CP 2703/88, 20 November 1990), Hillyer J; *Seon Developments Ltd v Roger* (1993) 2 NZ ConvC 191, 664 (CA).

[37] As to this final question I need only say this. The Judge made no error of law. The decision she made was within her discretion. It is not for me on this appeal to revisit her decision. But on the evidence as whole I agree with it. In revising the terms on which the building manager was employed, so that he ceased to be housed in Ms Chen's unit, the Body Corporate rewrote the rules for its own benefit. Ms Chen should not have had to carry the cost. Had the Body Corporate faced up to this earlier its liability would have been less.

[38] The appeal will be dismissed. The sum Ms Chen is entitled under the judgment under appeal will need to be recalculated. Ms Chen is entitled to costs as I should have thought in scale 2B. Any related memoranda, if costs cannot be agreed, are to be filed by the end of January 2009.

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P J Keane J