

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2008-404-001155

BETWEEN

BODY CORPORATE 322588
Applicant

AND

K MITCHELL INVESTMENTS LTD
First Respondent

Hearing: On the Papers

Judgment: 10 March 2009

JUDGMENT OF ASSOCIATE JUDGE ROBINSON

This judgment was delivered by me on 10 March 2009 at 12 pm,
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date.....

Solicitors: Grove Darlow & Partners, PO Box 2882, Auckland

[1] The applicant is applying to the Court for an order under s 48 Unit Titles Act 1972 settling and sanctioning a scheme of arrangement intended to be binding on the applicant and the respondents that ensures the repair and re-instatement of a damaged and deteriorating structure resulting from original design and construction failings which have caused the building to leak.

[2] The building managed by the applicant consists of 48 terraced houses within 11 The Avenue, Albany and known as "The Avenue". According to the applicant there are serious water ingress issues throughout the complex as a result of original design and construction failings. These have been identified by the North Shore City Council being the local authority at the time a code of compliance certificate was sought for the complex. The council has refused to grant a code of compliance and the developer or parties associated with the developer have applied to the Department of Building and Housing for a determination to direct the local authority to issue such code of compliance certificate.

[3] The applicant believes the presence of water ingress throughout the complex has and is continuing to lead to inevitable decay the full extent of which will not be known until the exterior wall cladding is removed. There is concern the decay will only escalate over time.

[4] None of the units are stand alone buildings and each are linked with one or two other units in their respective block. The nature of leaking building repairs is such that a complete recladding of the unit is required and this cannot practicably be carried out unless all units in a block are reclad. The applicant believes following an extraordinary general meeting held on 25 August 2008 that it will not be possible for the body corporate to obtain agreement of all owners to a co-ordinated remedial program to attend to the defects in construction. Consequently, the general meeting held on 25 August 2008 reached the view that it was necessary to obtain the Court's sanction to the remediation program under s 48 of the Unit Titles Act 1972.

[5] The applicant seeks this order authorising the application to be made in accordance with the procedure set forth under part 19 of the High Court rules. The Unit Titles Act is not listed amongst the enactments referred to in rule 19.2 to which

part 19 is to apply. However, under rule 19.5, the Court may in the interests of justice permit any proceeding not mentioned in rules 19.2 to 19.4 to be commenced by originating application. The restrictive and narrow interpretation of r 19.5 previously r 458d,(1),(e) adopted by McGechan J in *Jones v H W Broe Ltd* (1989) 5 PRNZ 206 has not been followed by Randerson J in *CIR v McIlraith* 19 February 2003 HC Hamilton M162/1/02. See *McGechan on Procedure* volume 1, commentary to High Court Rule 19.5 at page 2106 under heading HR 19.5.01. The Court has authorised an application under s 42 of the Unit Titles Act 1972 to proceed by way of originating application issued under part 19 of the High Court Rules and in a number of cases has sanctioned the procedure under part 19 in respect of applications for approval of schemes under s 48 of the Unit Titles Act 1972.

[6] Consequently, I am satisfied that it is in the interests of justice to grant leave to the applicant to bring these proceedings under part 19 of the High Court rules. I note that in the application for leave reference is made to bring proceedings under part 4A High Court rules. That of course refers to the High Court rules that have been repealed. Consequently, the application will be granted on the basis that leave is granted to the applicant to commence the proceedings under part 19 High Court rules. Costs will be reserved.

Associate Judge Robinson