IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2004-404-002395

	BETWEEN	BODY CORPORATE 164399 First Plaintiff
	AND	A TOLLEMACHE & ORS Second Plaintiffs
	AND	AUCKLAND CITY COUNCIL Defendant
	AND	PAXTON CONSTRUCTION MANAGEMENT LIMITED First Third Party
	AND	AKITA CONSTRUCTION LIMITED Second Third Party
	AND	WAYNE MITCHELL Third Third Party
	AND	GARY BARCLAY Fourth Third Party
	AND	PAUL BROWN Fifth Third Party

Hearing: 17 October 2008

Counsel: K Harkess for plaintiffs
G Grant for defendant

Judgment: 20 April 2009 at 10:00am

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 20 April 2009 at 10:00am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Grimshaw & Co, PO Box 6646, Auckland 1001 for plaintiffs
Heaney & Co, 105391, Auckland 1001 for defendant

[1] This application for discovery arises in a "leaky building" claim by the body corporate and individual unit owners of a multi-unit development. It raises an issue that may be peculiar to litigation brought by a body corporate.

[2] The defendant council has applied for an order that the plaintiffs provide particular discovery of several categories of documents. The plaintiffs initially opposed all aspects of the application but later provided a supplementary affidavit that resolved all but one aspect of the application.

[3] The issue that is left for the Court is whether the first plaintiff (the Body Corporate) should be ordered to discover documents believed to be held by the owners of two units who are not named as plaintiffs, but who have a shared interest in the common property which is the subject of the claim by the Body Corporate.

[4] There is no dispute over the fact that the documents being sought would be relevant to the claim in respect of the common property. The primary issue is whether the documents are within the control of a party to the proceeding, so as to make them discoverable. There are also issues as to whether the defendant has established the jurisdictional pre-requisite for an order, namely whether there are grounds for believing that the documents exist, and whether the Court should exercise its discretion to make an order.

Background

[5] The first plaintiff is the Body Corporate for a 22 unit residential development in Newton, Auckland known as Charlotte Mews. The second plaintiffs are the owners of 20 of the 22 units.

[6] The plaintiffs say that the units were constructed with defects which have resulted in leaks and damage to the property. They allege that the defendant council (which had responsibility for issuing the building consent and code compliance certificates for the development) was negligent in a number of respects when

carrying out those tasks. They are suing to recover the costs of repairing the defects and damage, and for general damages and consequential losses.

[7] As frequently occurs in these multi-unit and multi-party leaky building cases, discovery has been a progressive exercise. The plaintiffs filed a composite affidavit of documents in July 2004, and followed that with supplementary affidavits in October 2004, March 2006 and August 2007.

[8] The defendant remained dissatisfied with the extent of the plaintiffs' discovery. It filed the present application on 25 July 2008. It did not file a supporting affidavit. The plaintiffs filed notice of opposition, supported by an affidavit, contending that they had made all necessary discovery. The defendant filed an affidavit in reply.

[9] Shortly before the hearing the plaintiffs filed a further supplementary affidavit of documents, which seemed likely to resolve the defendant's requests in relation to all named plaintiffs. The only issue left for argument was whether a discovery order should be made in relation to documents held by the 2 unit owners who were not named as plaintiffs, being the owners of units 2E and 3C.

The application, and issues arising

[10] The defendant applied for an order for particular discovery pursuant to r 300 (now r 8.24 of the High Court Rules). The defendant sought an order in the standard terms of particular discovery, namely that the plaintiffs file and serve an affidavit stating whether certain categories of documents are or have been in the plaintiffs' control, and identifying any documents which had been but were no longer in the plaintiffs' control. The defendant sought the following documents in relation to units 2E and 3C:

a) The conveyancing files relating to the purchase of the units, including the sale and purchase agreements and any certificates under s 36 of the Unit Titles Act 1972;

b) All minutes, notices, correspondence and other documents between the owners of these units and the Body Corporate;

c) All documentation relating to the tenancy arrangements for the units.

[11] The application was made on the grounds that the documents had not been discovered to date, were relevant to the issues in the proceeding, and were necessary and appropriate to ensure that the defendant had available to it all information which might assist its defence of the plaintiffs' claims.

[12] The plaintiffs opposed the application on the grounds that they had provided discovery of all documents in their possession which were relevant to the matters in issue, and that the defendant had failed to establish any grounds for the Court to believe that the documents being sought were or had been in the plaintiffs' control. They also said that the defendant had put no evidence forward to establish that any such documents exist.

[13] The primary issue which the Court has to determine is whether these documents are in the control of a party to the proceeding. It is not in dispute that the documents being sought could be relevant, and that no such documents had been disclosed. If the Court finds that documents held by the owners of units 2E and 3C are within the control of a party, it must also determine the other pre-requisites to an order, namely whether there are grounds for the Court to believe that such documents exist and whether or not an order should be made.

Applicable principles

[14] The rule governing the making of an order for particular discovery has changed since the hearing of the application. The Judicature (High Court Rules) Amendment Act 2008 introduced new High Court Rules which came into force on 1 February 2009. Under the transitional provisions (s 9 of the Amendment Act) the application is to be determined under the new rules, as it had not been completed by the date the new rules came into force.

[15] The applicable rule is now r 8.24, which reads:

> **8.24 Order for particular discovery against party after proceeding commenced**
>
> If at any stage of the proceeding it appears to a Judge, from evidence or from the nature or circumstances of the case or from any document filed in the proceeding, that there are grounds for believing that a party has not discovered 1 or more documents or a group of documents that should have been discovered, the Judge may order that party—
>
> (a) to file an affidavit stating—
>
> (i) whether the documents are or have been in the party's control; and
>
> (ii) if they have been but are no longer in the party's control, the party's best knowledge and belief as to when the documents ceased to be in the party's control, and who now has control of them; and
>
> (b) to serve the affidavit on any other party.

[16] Under the existing rule (as distinct from the former r 300) the applicant must establish grounds for belief that the party has not discovered documents which should have been discovered, but is no longer required to establish that discovery is necessary at the time of the application.

[17] As the following rules demonstrate, general discovery obligations apply to "a party" to the proceeding.

a) A discovery order is defined under r 8.16(1) as an order requiring "each party" to give discovery:

> **8.16 Contents of discovery order**
>
> (1) … discovery order means an order, made under rule 8.17(1) or (3), that requires each party to a proceeding to discover the existence of documents to every other party.

b) Standard terms for a discovery order are established under r 8.18, and apply. Unless the standard terms are modified in accordance with r 8.16(3) or (4), r 8.18(2) requires "each party" to make an affidavit:

8.18 Default terms of discovery order

(2) Each party must make an affidavit of documents that lists the documents that—

(a) are or have been in that party's control; and

(b) relate to a matter in question in the proceeding.

c) The form of the affidavit and the scope of the documents to be discovered are prescribed by rr 8.20 and 8.21 (again, unless modified by Court order). R 8.20 sets out what the affidavit must contain, which includes a schedule of the documents to be discovered. Rule 8.21 stipulates the documents that are to be identified or listed in the schedule. They are all documents which are in the control of the party giving discovery or which were, but are no longer, in that party's control.

[18] Accordingly, leaving aside for present purposes the need to show relevance, the test for discoverability is whether a documents is or has been in a party's control and, if so, whether it is relevant. Control is defined in r 1.3:

1.3 Interpretation

….

control, in relation to a document, means—

(a) possession of the document; or

(b) a right to possess the document; or

(c) a right, otherwise than under these rules, to inspect or copy the document.

Are the documents within the control of a party?

[19] Counsel for the defendant submitted that an order could and should be made as the Body Corporate was suing for the total cost of repair to the common property in the development. She argued that this was a claim on behalf of all owners, regardless of whether they were named as plaintiffs. She referred to the decision of this Court in *Body Corporate 189855 v North Shore City Council & Or*s (HC AK

CIV 2005-404-005561 – 25 July 2008, Venning J) (the Byron Avenue case). In that case the Court held that the Body Corporate's claim for the cost of repairs to the common property was made as agent for the individual unit owners. She argued that as the Body Corporate had elected to sue for the whole of the cost of repair to the common property it was axiomatic that it was suing in respect of the shares of units 2E and 3C as well as the shares of the 20 named second plaintiffs. She argued that this brought the owners of units 2E and 3C within the definition of a party to the proceeding. She submitted that the defendant was entitled to discovery of all documents held by the owners of the units 2E and 3C that could be relevant to possible defences (such as a break in the chain of causation).

[20] Counsel for the plaintiffs did not contest the potential relevance of the documents being sought, but argued that the Body Corporate was constituted by statute (the Unit Titles Act 1972) and had no power under the Act to require the unit owners to provide these documents, or make them available for inspection and copying. In those circumstances she submitted that the documents could not be said to be within the control of the Body Corporate.

[21] The first question to answer is whether the owners of units 2E and 3C are parties to the litigation for the purpose of discovery. The starting point is the definitions of "party" and "plaintiff" in the High Court Rules:

> **1.3 Interpretation**
>
> ….
>
> **party** means any person who is a plaintiff or a defendant or a person added to a proceeding
>
> **plaintiff** means the person by whom or on whose behalf a proceeding is brought.

[22] The nature of the claim is also relevant. In their prayer for relief the plaintiffs seek judgment for losses pleaded in paragraph 27 of the amended statement of claim. These losses include the sum of $704,849.20 which the Body Corporate has incurred or will incur in undertaking repairs to the property (principally, if not entirely, to the common property). The sum which the Body Corporate claims for repairs ($704,849.20) exceeds the total of the individual claims for repair costs

($629,143.12) made by the second plaintiffs in an alternative claim based on their share of the repair costs according to their respective unit entitlements.

[23] The legal nature of a body corporate established under the Unit Titles Act is also relevant:

a) The body corporate is established as the administrative vehicle for the unit development. The proprietors for the time being of all the units in the unit plan comprise the body corporate: s 12(1) and (2) of the Act.

b) The common property is owned by the proprietors of all of the units in the development as tenants in common in shares proportional to the unit entitlement in respect of their respective units: s 9(1) Unit Titles Act 1972 (the Act).

c) The body corporate has a duty to keep the common property in a state of good repair (s 15(1)(f)). To enable it to carry out this duty it has the power to levy proprietors for contribution towards the costs in proportion to respective unit entitlements (s 15(2)(c)).

d) The body corporate is also given power to sue (in its corporate name) for damage caused to the common property (s 13(1) and (2)). Its standing to sue has been confirmed in recent decisions of this Court: *Body Corporate 188529 v North Shore City Council* (HC AK CIV 2004-404-3230, 30 April 2008, Heath J) (the Sunset Terrace case) and *Body Corporate 189855 v North Shore City Council* (HC AK 2005-4040-5561, 25 July 2008, Venning J). In the latter, Venning J said that the body corporate sues "effectively acting as agent of the owners of the common property" (see below).

[24] The Body Corporate has exercised its power to sue in the present case for the total cost of repair to the common property (including the cost of repair to the shares of the common property held by units 2E and 3C). It had the option to exclude the

amount attributable to the common property entitlement of these two units. It did not, and does not, do so. It may be inferred that the Body Corporate (through its committee or in general meeting) decided to sue on behalf of all owners of the common property, notwithstanding that the owners of units 2E and 3C have elected not to bring separate claims in respect of their units.

[25] The nature of a body corporate's claim in respect of common property was addressed specifically in the Byron Avenue case (at paras [66] –[69]):

> [66] There is no need to read into s 13 a requirement that all owners of the common property must join in the claim as a pre-requisite to a claim by the Body Corporate in relation to the common property. The Body Corporate is made up of the individual unit owners from time to time: s 12, but it acts by majority decision. It has a duty to maintain and repair common property. The Body Corporate can bring a claim in relation to the entire common property even if not all the individual owners pursue separate claims in relation to their own units.
>
> [67] However, as the claim is effectively on behalf of the individual unit holders' interest in the common property and the duty is owed to them then, to the extent the Council (or other defendant) may have a defence to a claim by the individual owners, the claim against it in relation to the common property must be reduced accordingly in proportion. As the Body Corporate is effectively acting as agent of the owners of the common property in pursuing a claim for damage to the common property, its claim in relation to the damage cannot be better than that of the particular unit owners from time to time and must be subject to the same defences.
>
> [68] While the Body Corporate has perpetual succession it is different to a body corporate such as a company. The Body Corporate's powers and duties are prescribed by the Unit Titles Act and the rules (which must not be ultra vires). Importantly, the Body Corporate cannot trade: s 16. That confirms its special nature and distinguishes it from other body corporate structures.
>
> [69] I conclude that rather than owing a duty to the Body Corporate as such, the Council owed the individual unit owners of the common property a duty of care in relation to the common property and that under s 13 the Body Corporate may pursue a claim (effectively on behalf of such owners) against the Council in respect of the damage to the common property, but that such claim can be proportionately rebated to the extent that the defendant may have a defence to the individual owner's claims. Again, that is a matter I return to later in this judgment.

[26] It follows from the above that the claim by the Body Corporate for the cost of repair to the common property is the sum of the claims of the individual unit owners as the owners of the common property. This claim is brought by the Body Corporate as their agent: the Byron Avenue case at para [67].

[27] Further, this common property claim is susceptible to the same defences as may be raised in respect of claims for damage to individual units (for example, a break in the chain of causation). There is no reason to exclude the application of those defences to the common property claim simply because a unit owner has not brought a separate claim in respect of that unit.

[28] Counsel for the plaintiffs argued that it would be contrary to public policy to treat a unit owner as a party (with attendant responsibilities and risks) where the owner had elected not to bring a separate claim in respect of damage to that unit. She referred to the provision in r 4.56(3) that no person can be made a plaintiff without that person's consent. I do not accept that these points apply in this case. The common property claim can only be brought by decision of the owners acting as the Body Corporate. The Act and rules made pursuant to it provide for such decisions to be made by a majority (either of the owners in general meeting or of the committee through which the Body Corporate acts). By agreeing to purchase their units, unit owners impliedly agree to abide by this process, and decisions of the Body Corporate. Assuming that this process has been followed, the owners of units 2E and 3C can thereby be said to have agreed impliedly to the issue of the common property claim.

[29] Counsel for the plaintiffs also argued that treating non-plaintiff parties as plaintiffs for the purpose of discovery could raise issues as to costs (whether they thereby became jointly and severally liable notwithstanding their decision not to bring a claim in their own names). I do not regard this as a determining factor. If the unit owners could potentially receive a benefit from the litigation, I see no reason that they should not have a potential cost obligation also. Any unfairness that might arise can be taken into account in the exercise of the court's discretion (r 46).

[30] I can accept that the positions of the owners of units 2E and 3C might have warranted different treatment if they had instructed the Body Corporate not to recover their shares of the cost of repairs to the common property (for which they are liable regardless of whether they seek recovery). In that event, there would be no basis for the Body Corporate to include their shares of the repair costs in its claim. However, there is no evidence that these owners have taken this step.

[31] I accept the submission of counsel for the defendant that the Body Corporate has brought the claim for the cost of repair to common property on behalf of the owners of all the units in the development, including the owners of units 2E and 3C:

a) Under the Unit Titles Act, the owners of the individual units also acquire shares to the common property of the development as tenants in common in proportion to their unit entitlements;

b) The Body Corporate has sued for the total cost of repair to the common property (not just for the shares of the 20 unit owners named as second plaintiffs);

c) The Body Corporate has accordingly brought this part of the claim also on behalf of the owners of unit 2E and 3C for their proportionate shares.

[32] The consequence of this finding is that the owners of units 2E and 3C come within the definition of a party to the proceeding, and hence have discovery obligations. As observed by the Court in the Byron Avenue case (at para [369]), the onus is on the defendant to produce evidence to support a defence to the body corporate's claim in respect of common property. It should be entitled to discovery of any documents, which may assist a defence in respect of any aspect of that claim. The knowledge and circumstances of each owner of the common property are relevant inquiries, and hence matters for discovery.

[33] The defendant seeks an order that the Body Corporate, rather than the owners of units 2E and 3C, provide this discovery. This brings me to the plaintiffs' argument that documents held by the owners of units 2E and 3C are not within the control of the Body Corporate. Counsel for the plaintiffs submitted that the documents were not within the definition of control in r 1.3 because the Body Corporate does not have power over them in terms of the test laid down by Lord Diplock in *Lonrho v Shell Petroleum Co Ltd* [1980] 1 WLR 627, 635 (and applied in *Johansen v American International Underwrites (NZ) Ltd* (1997) 11 PRNZ 22 and

Trustees Executors and Agency Co of NZ Ltd v Price Waterhouse (HC CHCH CP14/98, 19 April 1999, Master Venning):

> "[T]he expression 'power' must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else."

[34] I accept that the Unit Titles Act does not contain an express power for the Body Corporate to require one of its members to produce documents. However, it does have power to sue for damage to common property (s 13) and such powers as are reasonably necessary to enable it to carry out duties imposed on it by the Act or by its rules (s 16). A power to call for documents with which to meet discovery obligations is clearly ancillary to the power to sue (particularly when it is acting as agent for the owner when doing so). It must also be reasonably necessary to enable it to carry out its duties to repair the common property, and to control, administer and manage the common property (s 15(f) and (h)). It is unrealistic to treat the Body Corporate as separate from its constituent unit owners.

[35] This approach is also consistent with the approach taken in representative actions, and in other cases where a named party is suing for the benefit of others. In *Devcich v Cowley Stanich & Co* (1997) 11 PRNZ 22 the Court was asked to consider the extent of discovery to be given by the plaintiff (representing a number of investors with claims against an auditor). The Court directed that all identified investors were to provide a verified list of documents. In *Trustees Executors and Agency Co of NZ Ltd v Price Waterhouse* the Court ruled that a trustee suing for the benefit of stockholders was deemed to have relevant documents of stockholders within its power.

[36] This approach also answers the practical concern raised by counsel for the plaintiffs as to what would follow if the unit owners did not provide the documents. In that event, the Body Corporate would be justified in withdrawing the claim for that owner's share of the common property repair costs, failing which the defendant would be entitled to have that part of the claim struck out. This will have the logical effect that the Body Corporate will be able to maintain a claim in respect of common

property only to the extent that it has the support of individual unit owners. As I have already said, the unit owners' underlying liability for repair costs will not be affected.

Other jurisdictional ground – whether documents exist

[37] The plaintiffs argued that the Court lacked jurisdiction to make an order as the defendant had produced no evidence to establish that the documents being sought exist (the only affidavit filed by the defendant did not refer to documents held by the owners of units 2E and 3C).

[38] There is nothing in this argument. The Court can have regard not only to evidence put before it but also to the nature and circumstances of the case. The 20 unit owners who are named second plaintiffs have discovered documents of the kind being sought. It stands to reason that the owners of units 2E and 3C will have documents relating to their purchase of the units, correspondence with the Body Corporate, and in relation to tenancy arrangements (if tenanted). This is not a case of whether the Court has been given grounds to question the conclusiveness of an affidavit of documents. These owners have not provided an affidavit and the affidavits filed by the Body Corporate list only documents from the other owners.

Exercise of discretion

[39] Counsel for the defendant submitted that the defendant was entitled to have discovery of any documents which might assist its defence. In the ordinary course a requirement for fairness and openness in discovery will justify an order. However, counsel for the defendant submitted that an order was not warranted because the documents were available elsewhere, and it would be fairer to require the defendant to seek them by way of non-party discovery.

[40] I am satisfied that an order is appropriate. The defendant is entitled to proper discovery. It should only have to access documents elsewhere if they are not available through the other party's discovery in accordance with the rules of discovery. That applies even if the documents are also available from a public

register (such as the Land Titles Register) or from a non-party. In any event, the conveyancing files may well contain relevant documents other than those to be found in the registered title documents and the owners ought to disclose whether they have any correspondence with the Body Corporate not already disclosed and any tenancy arrangements. Non-party discovery is not applicable in this case given my finding that the owners of units 2E and 3C have discovery obligations. This also answers the plaintiffs' point that it is unfair to require the Body Corporate to meet the costs of the discovery (a back-door justification for requiring the defendant to pursue non-party discovery). I see no reason not to treat the costs of this discovery other than in the usual manner for discovery as between parties.

Decision

[41] The defendant is entitled to an order in terms of paragraph 1 of the defendant's application, requiring the Body Corporate to file and serve an affidavit addressing the documents listed in schedule A to the application in respect of units 2E and 3C. The affidavit is to be filed and served within 14 days, but with leave to the plaintiffs to seek extension if it proves impossible to comply within that time.

[42] I see no reason to depart from the usual course of ordering costs to follow the event, on a 2B basis. However, as counsel did not address me on costs, I make no order at this point. If counsel are unable to agree on costs, memoranda are to be filed within 21 days.

Associate Judge Abbott