IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-006605

	BETWEEN	GULF HARBOUR MARINE VILLAGE RESIDENTS' ASSOCIATION INCORPORATED Applicant
	AND	GULF HARBOUR MARLIN LIMITED Defendant

Hearing: 15 October 2009

Appearances: J K McRae and A F Buchanan for Applicant
M D Arthur and R M Irvine for Respondent

Judgment: 21 October 2009 at 11:00 am

RESERVED JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 21 October 2009 at 11:00 am
pursuant to r 11.5 of the High Court Rules

Registrar / Deputy Registrar
Date……

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Introduction

[1] Gulf Harbour Marlin Limited (Marlin) is the owner and developer of land in the town centre area of Gulf Harbour. Its proposed development is opposed by Gulf Harbour Marine Village Residents' Association (the Association). In 2008 the Environment Court delivered an interim decision approving Marlin's proposal, subject to certain conditions. The Association has appealed against the Environment Court's decision but Marlin asserts that it has the status of Controlling Member of the Association, with the ability to force the Association to abandon its appeal. Marlin's status as the Controlling Member has recently been confirmed by an arbitral award delivered 18 September 2009. The Association has appealed against the award but Marlin intends to exercise its voting power as the Controlling Member to effect an abandonment of the appeal at the Association's next annual general meeting, scheduled for Wednesday, 22 October 2009. The Association has applied for an interim injunction restraining Marlin, from taking this step.

[2] The Association says that the form of Marlin's development is of vital interest to its members and if Marlin exercises its voting power as it intends the Association will lose its statutory remedy in respect of the Environment Court's decision and its appeal against the arbitral award will be rendered nugatory. In opposition, Marlin contends that the Association does not have the power under its constitution to bring and maintain the appeal against the decision of the Environment Court so that the abandonment of the appeal would not actually affect its legal rights. Further, it says that it will suffer significant financial loss if its development is delayed by the appeal against the award and, although the Association has given an undertaking as to damages, it has no power under its constitution to levy members to meet an award of damages.

[3] Marlin acknowledges that there is a serious question to be tried in the appeal against the award. In this application the issues are, therefore, where the balance of convenience lies, whether prejudice to Marlin can adequately be met through the

Association's undertaking as to damages and whether the Association has the power to levy members for damages.

Balance of convenience

[4] Although the Association's appeal against the Environment Court's decision was filed in April 2008, Marlin has never before asserted that the Association had no power to bring the appeal. It was, I was told, a point that developed for the first time during the arbitration and has only arisen for determination now.

[5] The Gulf Harbour development was formed in the mid-1990s by the original developer, Gulf Harbour Development Limited (GH Development) . In his award, the arbitrator, the Hon Barry Paterson QC, helpfully traces the history of the development, citing from a 1995 brochure, which described the development as a:

> …totally integrated lifestyle development of the highest quality…envisaged to be a bustling marina and seaport village with its Town Centre being set back with an intimate harbour setting…The Town Centre will be bustling and vibrant, but designed in such a way so as not to compromise the peaceful environment desired by owners and residents within the marine village.

[6] The Association was formed in 1994 and adopted its constitution in 1996 (the constitution having been amended in some respects since then). In his award Mr Paterson observed that the Association, through its constitution and various rules, was obviously intended to be the mechanism by which GH Developments' master plan was implemented and controlled. Neither counsel expressed any disquiet about that observation and consideration of the constitution supports that view.

[7] The Association's argument that it has the power to bring the appeal centres on cl 3, which records the objects of the Association. Clauses 3.1(d) and (j) provide that:

> The Association is formed to promote the following objects for the benefit of Members:
>
> (d) to provide for the enforcement and regulation of the Owners' Scheme;
>
> …
>
> (j) to undertake any other activity or work relating to the Gulf Harbour Marine Village, and ancillary or incidental to the above objects, as the association may from time to time resolve by Special Resolution.

[8] Identifying the parameters of cl 3.1(d) and (j) obviously requires identification of the "Owners' Scheme". However, that is not as easy as it appears. The phrase "Owners' Scheme" is defined as:

> …the scheme for the regulation and control of those matters affecting the use and enjoyment of all Dwellings and Commercial Units developed as part of the Gulf Harbour Marine Village, in accordance with the provisions of s 10.

[9] Although cl 10 purports to govern "Owners' Encumbrances and Owners' Scheme" cl 10.2 merely records that:

> …the Members acknowledge that the association is a member of the owners' scheme intended to benefit all of the Benefiting Lots, which provides for all Owners in the Association, to be entitled to enforce the Owners' Scheme so that all Owners and Occupiers of Dwellings shall be bound by the stipulations and restrictions set out in the Village Rules.

[10] There is no separate document before me identified as the "Owners' Scheme". Mr MacRae, for the Association, advised that what constituted the "Owners' Scheme" was explored inconclusively during the arbitration. One interpretation is that the "Owners' Scheme" simply refers to the collection of rules contained in both the constitution and schedules. Mr MacRae told me that during the arbitration evidence was given about other possible documents that might be relevant to such a scheme but that, ultimately, the evidence was inconclusive as to precisely what the "Owners' Scheme" referred to. For present purposes I intend to proceed on the basis that the phrase at least includes the constitution and its schedules. Whether it comprises other documents is something I cannot answer on the evidence before me.

[11] Returning, then, to the Association's argument, cl 10.2 specifically refers to the association enforcing the Owners' Scheme

> …so that all Owners and Occupiers of Dwellings shall be bound by the stipulations and restrictions set out in the Village Rules.

[12] "Village rules" are, in turn, defined. The relevant part of the definition provides that "Village Rules" means:

> …the rules promulgated from time to time by the Association regulating and controlling certain matters relating to the use and enjoyment and state of repair, decoration and landscaping of and provision of services to, all Dwellings and Commercial Units within the Gulf Harbour Marine Village…

[13] These rules include both the "Village Rules" at Schedule 4 and the Town Centre Rules at Schedule 5. Of some significance in this case is Town Centre Rule 1 which provides that:

> No Commercial Member shall use or permit to be used any Commercial Unit within the Town Centre for any purpose other than as a commercial or retail of goods and/or services use (which use shall include but not be limited to travel accommodation and motel facilities) or such us as may be permitted by the relevant local body planning requirements, without the prior written consent of the Association and in no case shall any Commercial Unit be used for a purpose not permitted under the relevant local body planning requirements.

[14] One of the Association's grounds for opposing the development was that 190 residential apartments were proposed to be included which the Association maintained was not permitted by r 1 of the Town Centre Rules. Therefore, the Association says that its appeal against the Environment Court decision was a step taken pursuant to cl 3.1 to enforce the Owners' Scheme.

[15] Mr Arthur, for Marlin, argued that, whilst cl 3.1(d) does permit the association to enforce and regulate the owners' scheme, which includes the "Village Rules", those rules do not apply to Marlin's proposed development. This is because the Owners' Scheme only applies to "Developed Land" (as defined) and only to "Members". He submitted that not only is the Town Centre land not "Developed Land", Marlin is not a Member. I find it difficult to accept this latter submission in light of Marlin's position under arbitral award. At paragraph 23 of the award Mr Paterson records Marlin's position as being that it was both the Developer and

Controlling Member for the purposes of the constitution and the award upheld that claim.

[16] Nor do I think that the status of the land as "developed" is relevant. The purpose of r 1 of the Town Centre Rules is to preclude non-commercial uses and uses not permitted under the local body planning requirements. It is agreed that this rule forms part of the "Owners' Scheme". In order to enforce the "Owners' Scheme" it must have been envisaged that the Association would be empowered to take practical steps to advance this object including, where necessary, acting in anticipation of any breach. It cannot possibly have been envisaged that the Association would be required to do nothing in the face of an impending breach and only permitted to act once the breach was completed (which might not occur until substantial building work had been completed). Subject to the effect of cl 5.3 I consider that the Association is empowered to appeal against a proposal that would, if permitted to proceed, breach the owners' scheme.

[17] However, cl 5.3 on its face, raises a clear bar against the right to appeal:

> Each Member acknowledges and confirms, as an independent acknowledgement and confirmation intended to be enforceable by the Developer, that the Member shall not object or take steps to object to any of the Developer's applications for consents and approvals required by the Developer or necessary to facilitate the Developer's development plans, whether in relation to the Gulf Harbour Marine Village or any other part of the development forming part of Gulf Harbour at the Whangaparaoa Peninsula nor shall any Member permit anyone claiming an interest through or on behalf of at the instruction of such Member so object or take any such steps to object.

[18] The parties do not agree as to the purpose of this provision. On one view it might be regarded as ancillary to cl 17.2 which confers on the Controlling Member an additional vote at any general meeting (other than where a special resolution is required). The purpose behind these provisions was considered during the arbitration, with Mr Paterson accepting evidence given by Marlin's solicitor to the effect that the purpose was for the protection of the developer against purchasers opposing its plans to complete the project, with that protection becoming more vital in the final stages of the development when the new developer might have different aspirations from those of the Association's members. Alternatively cl 5.3 might be

regarded as a means of ensuring that members do not create unnecessary difficulties through individual actions by requiring them to act only through the Association.

[19] It seems to me that the former purpose is the more likely. However, even accepting that purpose, if the clause acted as a complete bar to any proposed development, it could have the effect of defeating aspects of the "Owners' Scheme" such as r 1 of the Town Centre Rules, which cannot have been intended. I do not accept that cl 5.3 does create a complete bar; the right to resist plans that are themselves in contravention of the "Owners' Scheme" must be preserved. This can be done by construing cl 5.3 as applying only where the developments do not contravene the "Owners' Scheme" i.e. only consents and approvals that do not contravene the "Owners' Scheme" can be "required" by the developer or "necessary" for its development.

[20] Clearly, if Marlin is permitted to exercise its Controlling Members' rights at the next meeting the appeal will be abandoned and what appear to me to be legitimate rights being exercised by the Association in respect of both appeals would be lost. This is a matter that must weigh heavily against Marlin in assessing the balance of convenience.

Prejudice / undertaking as to damages

[21] Marlin asserts that it is within weeks of obtaining resource consent to begin its building work, that it has negotiations well under way with prospective tenants and that if it is precluded from commencing work until after the appeal against the Environment Court decision is determined it will incur substantial costs in the form of interest incurred on loans obtained to fund the development, costs paid to construction contractors, additional rates, costs incurred under lease agreements and costs incurred in the event of tenants refusing to sign leases because of the delay together with lost profits on the development venture.

[22] Mr Hudson, Marlin's project director, has deposed that, as an indication of the amounts involved, Marlin incurred about $1.1m in interest on loan funding for the development between April and September 2009. The implication is that losses

resulting from delay will be in the order of hundreds of thousands of dollars if not millions of dollars. Marlin maintains that it is at real risk of not being compensated for such losses because, it says, the Association has no power to levy members to meet an award of costs or damages.

[23] Under cl 5.2 each member accepts an obligation to pay the Base Levy which is defined at cl 9.1 as being the member's share of General Association Expenses. General Association Expenses is, in turn, defined as:

> …the total sum of all rates, taxes, costs and expenses of the Association assessed or assessable, paid or payable, or otherwise incurred in respect of the Common Facilities or the Owners' Scheme…and shall include, but not be limited to…(i) all costs of and associated with implementing and enforcing the Owners' Scheme including (without limitation) all costs of maintaining the landscaping of Dwellings.

[24] Given my conclusion as to the basis on which the Association is entitled to maintain its appeal against the Environment Court decision I consider that the costs connected with such an appeal fall within General Association Expenses. The position is not, however, as clear in relation to damages. The levies and charges permitted to be raised under cl 9 are clearly directed towards costs and expenses of various kinds. Even on the broadest view a claim for damages would not fall within any of the categories.

[25] Mr MacRae submitted that cl 3.1(j) extends to an undertaking in damages given in proceedings arising from an arbitration and that in this case the undertaking has been given to preserve the efficacy of the right of appeal from the arbitration. There can be no doubt, because there is specific provision in cl 18.12, that the association was empowered to enter into the arbitration. Under that clause the arbitration was to be conducted in accordance with the statutory provisions relating to arbitrations and in this case the parties agreed that any party might appeal on a question of law arising from the award. That being the case, it can hardly be suggested that the association is not empowered to levy in respect of costs.

[26] I also accept Mr MacRae's submission that the giving of an undertaking as to damages is within the broad range of "activity…ancillary or incidental" to the objects of the Association (in this case the enforcement of the "Owner's Scheme").

The Association acknowledges that the undertaking was given without a Special Resolution as required by cl 3.1(j) but proposes to rectify that by having any injunction conditional upon the undertaking being ratified by Special Resolution at the annual general meeting.

[27] I should also note that I am not convinced that there will be loss to Marlin at level approaching that described by Mr Hudson. The Environment Court gave its interim decision granting consent to Marlin's proposal subject to conditions in March 2008. However, 18 months later, Marlin has yet to comply with the conditions and obtain its consent from the Environment Court. According to Mr Goodman, the chairman of the Association, the appeal against the Environment Court's interim decision has been adjourned more than once to enable Marlin to file amended plans and conditions of consent in the Environment Court but it has not yet done so. Although Mr Hudson, for Marlin, deposes that Marlin is hopeful of obtaining its resource consent by November 2009, he has not produced any document to support that proposition, notwithstanding obvious criticism by the Association for its delay. Mr Arthur responsibly acknowledged that it would not be until Marlin actually obtained its resource consent from the Environment Court that it could point to any identifiable losses flowing from the association's conduct.

[28] The parties jointly seek a priority fixture for the hearing of the appeal against the award. If that appeal is heard promptly Marlin's status as Controlling Member will be finally resolved and the parties will know whether the appeal against the Environment Court's can proceed. If the appeal is unsuccessful, Marlin will be in a position to force the abandonment of the appeal against the Environment Court decision. The Appeals List Judge has indicated that a one-day fixture can be allocated in February or March 2010. Given Marlin's progress to date it seems unlikely that resource consent will be available until then in any event. This would mean that it is unlikely that there will be much delay between Marlin obtaining its resource consent and determination of the appeal.

Decision

[29] If Marlin is not restrained from exercising its Controlling Member voting rights at the next annual general meeting the Association will effectively lose its rights in respect of both its appeal against the arbitral award and its appeal against the Environment Court's interim decision. If Marlin is restrained from exercising its voting rights as Controlling Member there is a risk that it will sustain losses, which may be substantial, as a result of its development being delayed. However, Marlin itself acknowledges that there will be no losses resulting from the Association's conduct until it has its final resource consent. Although it now asserts that it will probably have that consent very soon, it has not provided any evidence to support that assertion and the assertion is not consistent with progress to date.

[30] The appeal against the award can be given a priority fixture in February or March 2010. I consider that the risk to Marlin of losses being sustained between now and determination of the Association's appeal against award is sufficiently low that the balance of convenience favours the Association. Further, injunctive relief will only continue beyond the annual general meeting if there is a Special Resolution ratifying the undertaking as to damages.

[31] There will, therefore, be an interlocutory injunction restraining Marlin from exercising Controlling Member voting powers under the constitution of the Association at any general meeting or committee meeting prior to determination of the Association's appeal in CIV-2009-404-006605, subject to the following conditions:

a) As the first item of general business at its annual general meeting on 21 October 2009 the applicant must put to its members a Special Resolution seeking ratification of the Association's undertaking as to damages dated 7 October 2009;

b) If the Association's undertaking as to damages is not ratified by a Special Resolution of its members at its annual general meeting on 21

October 2009 this order shall immediately lapse and be of no further effect;

c) If a Special Resolution is passed:

i) The applicant shall take all necessary steps to expeditiously prosecute its appeal;

ii) The applicant shall convene a general meeting or committee meeting as soon as practicably possible after the determination of its appeal in CIV-2009-404-006605 and the first item of general business before the meeting shall be a resolution seeking the ratification of the Association's appeal in CIV-2008-404-002119.

[32] There is to be a one-day fixture in February 2010 allocated for the appeal against the award.

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P Courtney J