

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

CIV 2009-404-6217

IN THE MATTER OF THE UNIT TITLES ACT 1972

BETWEEN BODY CORPORATE 203267
Applicant

AND THOMAS LESLIE
First Respondent

AND CHADWICK HOUSE LIMITED
Second Respondent

AND NICOLE PAMELA SMITH
Third Respondent

Hearing: 16 November 2009

Counsel: C E Harris for Applicant
No appearance by or on behalf of Respondents

Judgment: 16 November 2009

(ORAL) JUDGMENT OF HEATH J

Solicitors:
Jackson Russell, PO Box 3451, Auckland

Introduction

[1] Body Corporate 203267 seeks an order, under s 48 of the Unit Titles Act 1972. What is sought is approval of a scheme to enable damaged portions of the unit title development to be repaired. The development is situated at 30 John Jennings Drive, Albany.

Background facts

[2] The development consists of 18 principal units, within three separate blocks. Each block is a two storey townhouse style building containing between 5 and 7 units each. The blocks are separated by common property and driveway areas.

[3] The units were constructed between (approximately) January and December 2000. The exterior of each unit is clad with a combination of two types of fibre cement sheet cladding systems, namely Harditex and Hardiflex. A number of serious building defects have become apparent, leading to serious water ingress problems.

[4] Particular problems with the construction of the units were identified by building consultants in October 2008. Extensive repairs were required, including the removal of all fibre cement sheet cladding, removal of defective roof flashings, removal of all decayed timber framing and the addition of preservative to other external wall framing.

[5] Legal advice was sought as to whether there was any person against whom civil proceedings could be brought to assist individual proprietors in meeting the cost of remedying the defects. The costs are estimated to be in the vicinity of \$1.59 million. Advice obtained indicated there were no viable defendants with means to contribute towards the cost of the repairs. No claim against a territorial authority was possible because an independent private certifier was used.

The proposed scheme

[6] The Body Corporate decided to design a scheme to enable individual proprietors comprising the Body Corporate to repair the units. That was done.

[7] Following development of the scheme, a series of meetings were held among the proprietors to obtain their informed views on whether to proceed. Since 27 August 2008, there have been seven Extraordinary General Meetings held. At the last of those meetings, on 3 August 2009, the proposed scheme was approved, in accordance with the application presently before the Court.

[8] The scheme contains the following key elements:

- (a) **Appointment of Body Corporate as agent (clause 1):** The Body Corporate is irrevocably appointed the agent of each owner to act on behalf of the owner in connection with the repair project and the repairs to the owner's unit.
- (b) **Powers of Body Corporate (clause 2):** The Body Corporate is granted all necessary powers to undertake the repair project. Clause 2 sets out the general and specific powers granted to the Body Corporate. The Body Corporate is permitted to delegate its powers and authorities in the manner set out in the scheme.
- (c) **Ability to commence works to a block of Units when funds available (clause 2.3.10):** Unit Owners in a block of units may commence repairs to those units at any time after funds have been collected for the repairs to those units.
- (d) **Body Corporate duties (clause 3):** The scheme imposes a number of duties on the Body Corporate. The Body Corporate is permitted to discharge duties by employing professional advisers – provided it oversees those professional advisers.
- (e) **Additional works requested by owners (Clause 3.1.8):** Owners will be able to request certain additional works to be completed during the repair project. For example, owners may request double rather than single glazing. Any additional works will be paid in full in advance by owners.
- (f) **Existing repair works (clause 4):** In order to simplify the administration of the repair project and to reduce costs for the Body Corporate and owners, all work undertaken in connection with the damage to 30 John Jennings Drive is incorporated as part of the scheme.
- (g) **Levies (clause 5):** The Body Corporate will be authorised to levy and collect from each owner:

- (i) the cost of repairs to the owner's unit;
 - (ii) the cost of repairs to the common property (and costs not specifically attributable to units) on a unit entitlement basis; and
 - (iii) the full cost of any additional works requested by the owner.
- (h) **Default in payment of levy (clauses 5.3 and 8):** The Body Corporate will be able to sue owners for unpaid levies and recover interest and the Body Corporate's costs;
- (i) **Refund of levies / additional levies (clauses 5 and 11.2):** If there are surplus levies at the end of the repairs to a block and/or the repair project, the Body Corporate will refund the surplus to owners who have overpaid. Unit Owners who have underpaid will be levied for the amount underpaid.
- (j) **Use of levies (clause 6):** Levies will only be used for the repair project and to cover temporary shortfalls in general levies pending payment or collection of those levies.
- (k) **Reporting (clause 7):** The Body Corporate will keep owners apprised of progress of the repairs by reporting to owners at least every three months during the repair project and promptly after completion of the project.
- (l) **Shortfall levies (clause 9):** If one or more owners has defaulted in payment of a levy, the Body Corporate may levy others owners in order to meet the shortfall pending payment.
- (m) **Indemnity (clause 12):** Owners indemnify the Body Corporate and Committee members from liability where they exercise powers under the scheme.
- (n) **Scheme bind transferees (clause 13):** The scheme binds owners at the date of the scheme and future owners during the operation of the scheme.
- (o) **Dispute resolution (clause 16):** The scheme provides a process for resolving disputes. A materiality threshold is applied to avoid disputes over immaterial matters.

[9] The s 48 jurisdiction was considered by me, in *Fraser v Body Corporate S63621* (High Court, Tauranga, CIV 2008-470-772, 10 September 2009). The facts were quite different, so I refer only to those passages of the judgment which provide guidance on the extent and nature of the discretion to approve a scheme.

[10] Section 48(1) enables the Court to make "such orders as it considers expedient or necessary for giving effect to the scheme". The Court has a wide

discretion to do justice among all proprietors, in a manner that will best resolve the particular problems that have led to the application. Deliberately, the discretion has been expressed in wide terms, so that the vast array of circumstances that could not have occurred to the drafters of s 48 may be considered on an application.

[11] I am satisfied that this is a case in which the scheme should be approved. The scheme was developed carefully, after proper expert advice. It was the subject of full consultation with owners, all of whom had the opportunity to attend Extraordinary General Meetings to discuss the content. It was approved, in the form put to the Court today, at the last of the meetings held on 3 August 2009.

[12] As a matter of discretion, I hold that the scheme in the form annexed to the application dated 18 September 2009 should be approved.

Substituted service

[13] Only one of the individual proprietors has not been served with the application, the first respondent, Mr Leslie. Mr Leslie no longer occupies his unit. The tenant was not prepared to give any information as to his whereabouts.

[14] On 13 November 2009, documents were forwarded to Mr Leslie at an email address, through which the Body Corporate secretary had previously communicated with him. Copies of the Court documents were also affixed to the front door of his unit. The registered mortgagee of Mr Leslie's unit has been served with all relevant documents.

[15] I am satisfied that in terms of r 6.8(b) of the High Court Rules I should order that the process adopted on 13 November 2009 is sufficient for the documents to be treated as served on Mr Leslie as at that date. However, I propose to qualify the order I will make, to provide an opportunity for Mr Leslie to apply to set aside or vary any orders made within the limited period; to avoid the possibility of injustice caused by the late service of the application and accompanying documents.

Orders

[16] For those reasons, I make the following orders:

- a) I approve the scheme annexed to the originating application of 18 September 2009. That scheme will be binding on all successors and assigns. I envisage that the existence of the scheme will be disclosed in any certificate sought by a purchaser, under s 36 of the Unit Titles Act 1972.
- b) Leave is reserved to the applicant and all respondents to apply to vary, modify or discharge the scheme.
- c) The reasonable solicitor/client costs and disbursements shall be payable by the Body Corporate, from levies made against individual registered proprietors for that purpose.
- d) The order approving the scheme is stayed for 14 days from service of the sealed order on Mr Leslie by substituted service. Substituted service shall be effected through forwarding the relevant order to Mr Leslie at the email address disclosed in the affidavit of Ms Dixon sworn on 13 November 2009, paragraph 5 and by affixing the order to Unit 1A, being Mr Leslie's unit. If no application were made within that 14 days period, the stay will be lifted and the order may be implemented. Otherwise, the stay will enure, pending further order of the Court.

[17] The sealed order may be served on individual proprietors at their residential addresses known to the Body Corporate. The mortgagees, insurers and the District Land Registrar may be served by post.

[18] Leave to apply is reserved, should any unexpected matters arise that require further direction from the Court.

[19] I compliment counsel and the solicitors for the applicant on the quality of the documentation provided to the Court.

P R Heath J