

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

CIV-2009-404-007599

BETWEEN BODY CORPORATE 200200
 Plaintiff

AND NICKLAUS JOHN BARNETT
 Defendant

Hearing: 27 November 2009

Appearances: T J G Allan for the Plaintiff
 No Appearance of or for the Defendant

Judgment: 7 December 2009

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 7 December 2009 at 11.30 am, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: Grove Darlow and Partners P O Box 2882 Shortland Street Auckland
1140 for the Plaintiff

Copy To: N J Barnett (Defendant) Unit 92 2 Armoy Drive East Tamaki
Manukau 2016

[1] The plaintiff is the body corporate of 153 townhouses at Armoy Drive, Howick, Manukau City, (the complex), that are subject to the Unit Titles Act 1972. The complex suffers from leaky building syndrome, and requires almost a complete recladding, as well as other repairs. Litigation was commenced against various persons, as a result of the complex suffering from leaky building syndrome. This has since settled. Funds then became available to pay towards the repair of the complex. The body corporate obtained an order of the Court, pursuant to s 48 of the Unit Titles Act, approving a scheme for the repair of the townhouses, including the recladding of a substantial part of the complex. Now that the body corporate has obtained the Court's approval of its scheme for the repair of the complex, it wants to proceed with the planned repairs. Contracts have been entered into to achieve this end and, under the contracts, plans are in place for the repair work to commence on or about 11 January 2010. While the contract works are in action, the residents of the townhouses will not be able to inhabit them.

[2] All but one of the residents is agreeable to vacating the townhouses to enable the works, planned to commence on 11 January 2010, to proceed on or about that date. The non-cooperative resident is the defendant, Mr Barnett, who is the proprietor of unit 92, 2 Armoy Drive, Botany Downs, Auckland, (unit 92). He has advised the body corporate that he will resist any attempt to remove him from unit 92; he says that he will seek the help of the New Zealand Police, and apply for trespass orders to prevent the body corporate from taking any steps to remove him from the unit. Mr Barnett has also indicated he may not be able to pay a body corporate levy due on 10 January 2010.

[3] Given the circumstances facing the body corporate, it has applied to this Court for an interim injunction requiring Mr Barnett to vacate unit 92, so that works can commence on or about 11 January 2010. The interim injunction sought is unusual in that it is in the nature of an interim mandatory injunction, which, if granted, will have the effect of a final injunction. Such orders are rarely sought, and I am aware of no cases where such orders have been made. Nonetheless, I consider that there is jurisdiction to make such orders: see *Telecom New Zealand Ltd v Clear Communications Ltd* (1997) 6 NZBLC 102,325 at 102,335.

[4] Despite the stance Mr Barnett has conveyed to the body corporate on the question of him vacating unit 92 for repair work to commence, he has taken no steps to oppose the making of the orders sought. He has been served twice with the application and the supporting documents. On both occasions he accepted service. When he was first served, the affidavit of service did not reliably identify the person served at unit 92 as being Mr Barnett. When he was re-served, he again accepted the documents and provided his driver's licence for copying, so that the process server could ascertain and prove that the person served on both occasions was in fact Mr Barnett. Since Mr Barnett has chosen not to oppose the making of orders, all that is necessary is for me to satisfy myself that the body corporate has established a case for the orders being made.

[5] The purpose of interim relief is to protect the rights of the plaintiff before trial, in circumstances where damages will not be an adequate remedy for the plaintiff, should he or she obtain a favourable judgment at trial. Hence, the Court weighs the plaintiff's need for such protection against the defendant's need for protection against injury from intrusive legal orders for which damages will not adequately compensate. The grant of interim relief is discretionary. In general, Courts consider whether the plaintiff has established that there is a serious question to be tried and where the balance of convenience lies. However, these questions do not constrain the Court from standing back to determine where the overall justice of the case lies: see *Telecom New Zealand Ltd v Clear Communications Ltd* at 102,335:

But at the end of the exercise it is important to stand back from the individual criteria and ask where the overall justice of the case resides: *Klissers Farmhouse Bakeries Ltd v Harvest bakeries Ltd* [1985] 2 NZLR 140 (CA). The question is whether it has been affirmatively shown that the risk of injustice to an ultimately successful, but temporarily unassisted, plaintiff is greater than the risk of injustice to a temporarily restrained, but ultimately successful, defendant.

[6] In the present case, the proprietors of the townhouses which form the complex have been involved in substantial litigation to resolve the leaky building problems from which these townhouses suffer. There is no doubt that the buildings in the present state suffer from substantial defects, which require extensive repair work if they are to be remedied. The litigation has been finally resolved by a settlement which has provided some funds from which the needed repairs can be

funded. This Court has approved a scheme pursuant to s 48 of the Unit Titles Act for the repairs. Consequently, the magnitude of the repair work to be undertaken has already been approved by this Court. The s 48 order provided that:

- a) The body corporate was required to carry out the repair process.
- b) The body corporate was entitled to raise levies from proprietors for the cost of repairs.
- c) The body corporate was entitled to enter such contracts as it deemed appropriate in terms of the repairs.
- d) The timing of the contract and the raising of levies was at the body corporate's discretion.
- e) The costs of repairs would be paid for by proprietors in accordance with the unit entitlement. Those proprietors involved in the leaky building proceeding receive their share in the funds also by unit entitlement.
- f) The body corporate has given all owners notice that they are required to give vacant possession of their units by 10 January 2010.

[7] The body corporate's evidence in support of the application for the interim relief establishes that the repair work cannot be undertaken while residents of the townhouses remain in residence. This is particularly so in relation to units 77 to 93, which include Mr Barnett's unit. Those units are the most severely affected by water ingress. All services to those units are planned to be disconnected on 11 January 2010, and the units will be fenced off for security, health and safety reasons. Apart from Mr Barnett, every other resident of the complex plans to vacate his or her unit by 11 January 2010 so that repair work can commence on that day. Since this is a time during which many persons take their annual holiday and it is a time generally associated with fair weather, the choice of this date for the repair to commence is understandable.

[8] The undertaking of the repair work in January 2010 follows decisions by the body corporate, both as a result of general and extraordinary general meetings, as well as decisions exercised pursuant to the powers given in the s 48 order. These decisions override any decisions to the contrary made by proprietors of individual units. Such loss of individual autonomy of land owners is essential for the sensible operation and maintenance of multiple owned residential accommodation and is, therefore, consistent with the purpose of the Unit Titles Act.

[9] The body corporate acting on behalf of the proprietors of the units has entered into a building works contract with Canam Construction Ltd (Canam). The contract date for the works to commence is 11 January 2010. Canam will have entered into contracts with the various trade subcontractors who perform substantial repairs to leaky buildings. Any delay to the start of the repair works will have a detrimental impact on the body corporate's obligations under the contract, with costs implications for the body corporate.

[10] It can be readily seen that if all the planning and preparation associated with the repair works is brought to a halt by the actions of one unit holder's refusal to vacate his unit, then this will cause immense trouble, inconvenience, cost and, therefore, injury to everyone else associated with and having an interest in the completion of the repair work.

[11] The evidence filed by the body corporate in support of the application for interim relief shows that it has made a number of attempts to explain to Mr Barnett the need for unit 92 to be vacated. The body corporate has sent him communications warning him that his failure to agree to vacate the unit by 11 January 2010 would result in legal proceedings, including an application for an interim injunction of the type now being sought against him. This is not a case where any interim injunction made against Mr Barnett would come as a surprise to him. He has had ample warnings of the body corporate taking legal proceedings against him.

[12] If Mr Barnett is obliged to vacate unit 92 while the repair work is in progress, he will incur accommodation costs and costs associated with moving to a new temporary residence. He will also no doubt suffer some inconvenience. However,

the injury he will suffer if obliged to leave unit 92 is far less than the injury the other 152 unit holders and the body corporate will suffer if their plans for the repair work do not proceed on the appointed date under the contract with Canam.

[13] The repair work has to be done. If it does not proceed in January 2010, it will have to proceed later. If the work did not proceed in January but at a later stage, Mr Barnett would most probably have to vacate his unit then. Delaying the exercise in January is only going to lead to it occurring later on. Mr Barnett's failure to participate in the application has meant that any realistic alternative to what the body corporate is seeking is not before the Court.

[14] The body corporate has presented its case on the basis that all residents must vacate their units while the repair work is in progress. There is nothing in the evidence to suggest that in respect of unit 92, repair work on that unit and neighbouring units could be accomplished without the need for Mr Barnett to vacate his unit. The evidence of the body corporate, which shows that nothing short of the residents of units 77 to 93 vacating the complex for the repair work to be carried out, appears to me to be both reliable and credible. It makes sense for the complex to be reduced to the status of a building site while repair work as extensive as what is planned is being undertaken. If this is to occur, it will make the complex unsafe for persons not connected with the repair work to remain on site.

[15] I am satisfied that the body corporate has established a serious question to be tried in its statement of claim. Having obtained the Court's sanction to a s 48 scheme, it should be free to implement the scheme. The evidence suggests that the period of time for which the units must remain vacant is likely to be somewhere between 12 and 20 weeks. In terms of the balance of convenience, I consider that any inconvenience Mr Barnett will suffer if he has to vacate unit 92 for the period required to complete the works is far outweighed by the inconvenience that will flow from the planned repair works being unable to be commenced on time. The financial costs of delaying the planned repair works are unlikely to be recovered from Mr Barnett. He has already indicated he may have difficulty in paying the next body corporate levy when it falls due. On the other hand, should Mr Barnett choose to defend the substantive claim against him and succeed in doing so, the inconvenience

he is likely to suffer through the grant of interim relief can be compensated for by a damages award against the body corporate. It has filed an undertaking as to damages. The financial information contained in the affidavit evidence filed in support of the application for interim relief satisfies me that the body corporate could meet any damages award of this nature that a Court might make against it.

[16] The grant of interim relief as sought will also have the effect of granting the body corporate the permanent relief which it seeks in its statement of claim. An order of this nature is novel. Nonetheless, given the circumstances, this is one of the rare occasions when a mandatory interim order having the effect of a final order should be granted. The body corporate is entitled and is, therefore, granted the orders as sought in its application.

[17] In its memorandum in support of the application, the body corporate sought costs on a solicitor/client basis. However, nothing is said in the application for interim relief regarding costs. An order for costs should have been sought in the application. I am not prepared to make a costs order against Mr Barnett, particularly at an amount calculated on solicitor/client costs, without a costs order being sought by application on notice. If the body corporate wants to pursue the question of costs against Mr Barnett, it will have to make an application on notice.

Result

[18] The orders sought in the application for interim relief are granted.

[19] Leave is reserved to the body corporate to apply for costs.

Duffy J