IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-3256

	BETWEEN	BODY CORPORATE 373645 Plaintiff
	AND	OCEAN PACIFIC INVESTMENTS LTD Defendant

Hearing: 31 August 2009

Appearances: Mr S R Anderson for Plaintiffs
Mr D Hickson for Defendant

Judgment: 25 November 2009 at 11.30 a.m.

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on
***25.11.09 at 11.30 am**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors:
S R Anderson (Barrister), P O Box 932, Auckland - by email: stevelaw@hathi.co.nz
Castle Brown, PO Box 9670, Newmarket – by email: d.hickson@ihug.co.nz

The Application

[1] The plaintiff is a body corporate incorporated under the Unit Titles Act 1972 (the Act). The defendant company is the registered proprietor of 6 apartments (the units) in the unit plan administered by the plaintiff. On 3 April 2009, the plaintiff issued a statutory demand pursuant to s 287 of the Companies Act 1993 for $33,418.38 for outstanding body corporate levies. As that sum has not been paid, the plaintiff now seeks to have the defendant placed into liquidation. The defendant accepts that a claim for levies was made upon it (without wholly conceding these expenses were legitimate), but declined to pay for reasons that will be discussed below. It has filed a defence to the plaintiff's application.

Background

[2] The plaintiff, as a body corporate, has powers and duties ascribed to it under to the Act. Those that are relevant to this application are found in sections 12, 15 and 32:

> **12 Proprietors to constitute body corporate**
>
> (1) On the deposit of a unit plan the registered proprietor of the land to which the plan relates shall become a body corporate.
>
> (2) Thereafter the proprietor or proprietors for the time being of all the units comprised in the unit plan shall, by virtue of this Act, be the body corporate.
>
> (3) The body corporate shall have the designation "Body Corporate Number" (the registered number and Registry of the unit plan).
>
> (4) The body corporate shall have perpetual succession and a common seal.
>
> **15 Duties of body corporate**
>
> (1) The body corporate shall—
>
> (a) Subject to the provisions of this Act, carry out any duties imposed on it by the rules:
>
> [(b)Insure and keep insured all buildings and other improvements on the land to the replacement value thereof (including demolition costs and architect's fees) against fire, flood, explosion, wind, storm, hail, snow, aircraft and other aerial devices dropped therefrom,

impact, riot and civil commotion, malicious damage caused by burglars, and earthquake in excess of indemnity value:]

[…]

(e) Pay the premiums in respect of any policies of insurance effected by it:

[…]

(2) The body corporate shall also—

(a) Establish and maintain a fund for administrative expenses sufficient in the opinion of the body corporate for the control, management, and administration of the common property, and for the payment of any insurance premiums, rent, and repairs and the discharge of any other obligations of the body corporate:

(b) Determine from time to time the amounts to be raised for the purposes aforesaid:

(c) Raise amounts so determined by levying contributions on the proprietors in proportion to the unit entitlement of their respective units […]

32 Recovery of contributions

Any contribution levied in accordance with the provisions of paragraph (c) of subsection (2) of section 15 of this Act shall be due and payable in accordance with the terms of the relevant determination; and so much of the amount as from time to time becomes payable may be recovered as a debt by the body corporate in an action in any Court of competent jurisdiction from the person who was the proprietor of the unit at the time when the amount became payable or (subject to the provisions of section 36 of this Act) from the proprietor of the unit at the time when the proceedings are instituted.

[3] The default rules governing the powers and duties of bodies corporate are contained in Schedule 2 to the Act. Rule 11 provides:

11 Subject to any restriction imposed or direction given at a general meeting, the committee may—

(a) Meet for the conduct of business, adjourn, and otherwise regulate its meetings as it thinks fit:

Provided that it shall meet when any member of the committee gives to the other members not less than 7 days' notice of a meeting proposed by him, specifying the reason for calling the meeting:

(b) Employ for and on behalf of the body corporate such agents and servants as it thinks fit in connection with the control, management, and administration of the common property and the exercise and performance of the powers and duties of the body corporate:

(c) From time to time elect one of its members to act as convener of the committee:

(d) Delegate to one or more of its members such of its powers and duties as it thinks fit, and at any time revoke the delegation:

(e) Whenever it thinks fit, convene an extraordinary general meeting of the body corporate.

[4] The committee was therefore empowered to engage a secretary to administer the affairs of the body corporate on its behalf.

Issues

[5] The following are the issues in this proceeding.

a) Is the defendant indebted to the plaintiff?

b) In particular, is the plaintiff body corporate authorised to claim payment of the levies? The sub-issues are:

i) Is the plaintiff's entitlement to recover the cost of insurance in some way contingent on the body corporate bringing the building up to code compliance standard or ensuring that the building use conforms with the uses permitted under the District Scheme?

ii) Did the body corporate actually insure the property?

iii) Is the plaintiff entitled to recover insurance payments which may have been made not by it, but by Auckland Property Management Limited (APML).

iv) Did the association between the secretary to the body corporate, APML, and Morley Associates, (who the defendant

is suing in other proceedings), mean that the present proceedings are being carried on for a collateral and improper purpose?

c) Is the defendant solvent?

Is the defendant indebted to the plaintiff?

[6] This issue turns on the plaintiff's entitlement to recover payments for insurance through a levy upon proprietors of the unit plan it administered. Discussion of that and related points, which will be determinative of the defendant's indebtedness, follows below.

Was the plaintiff's entitlement to recover the cost of insurance in some way contingent on the body corporate bringing the building up to Code Compliance standard; or ensuring that the building use conformed with the uses permitted under the District Scheme?

[7] Mr Hickson, for the defendant, realistically did not dispute that it was open to the body corporate to recover levies for items such as the cost of insurance from the unit owners. He said that such payments could only be recovered where they have been 'properly levied'. I understood Mr Hickson to suggest that, for reasons that have to do with how the apartment complex is being managed, the expenses claimed here were not properly levied.

[8] The argument for the defendant starts with the proposition that some of the apartments in the complex are being let as hotel rooms. The plaintiff does not deny this. The defendant states that by doing so, the plaintiff has breached the District Scheme.

[9] The assertion about the activities contravening the District Scheme is based upon the affidavit of a sales manager employed by the defendant. That person, Mr Fernandes, says he contacted the Auckland City Council to enquire about the matter. The enquiry that Mr Fernandez made was in the context that six building consents were necessary in order for the construction of the apartment complex to comply with the District Scheme. Apparently at least some of those consents were never finalised. In the course of his enquiries with the City Council, Mr Fernandez

received an email from a Mr Jones, a member of the Auckland City Council staff, dated 16 June 2008. The relevant paragraph of the email was as follows:

> I understand that the main obstacle to finalising the outstanding consents is that the current use of the building is not in line with the original intended use. This matter is currently under investigation. Once I have gathered and assessed the information surrounding the matter I will decide which what (sic) direction to go to resolve the issue.

[10] No evidence is produced by the defendant of what occurred subsequently. An assertion has since been made by Mr Fernandez in correspondence which was part of the evidence that the 'mixed use of the building' represents a 'lack of Auckland City Council compliance'. The response of the body corporate, through its agent Ms Mak, was to say that it had not received any:

> …previous advice that the building did not meet council requirements for hotel and residential use, and this matter will be discussed as soon as possible with the owners committee.

[11] The first issue is whether the use to which the premises are being put is one permitted under local body rules. The communication from Mr Jones at the Council is unclear. It speaks of the current use of the building not being 'in line with the original intended use'. This does not establish that it is reasonably arguable that the building is in fact being used for an impermissible purpose. Nor does it identify what that impermissible purpose might be. Mr Fernandez is, as I have noted, a member of the sales personnel of the defendant. He does not seem to have any relevant working background or qualifications which enable him to express independent views about compliance with the District Scheme.

[12] Further, even if there had been a breach of the District Scheme, it does not follow that this gives grounds for the defendant to resist payment of its share of the body corporate expenses. The case for the defendant seems to be that it has a reasonable argument that there has been non-compliance with the district scheme and that that in turn has lead to a delay in the issue of the code compliance certificates.

[13] However, there are a number of omissions in the chain of reasoning that the defendant would need to establish. Quite apart from the question of whether the

building is in fact being operated in an impermissible way, there is no evidence indicating what degree of responsibility, if any, the body corporate has for this state of affairs. Presumably any decision to let the apartments as hotel rooms was one for the owners of the apartments, including the defendant, to make. I would regard it is unlikely that the body corporate made such a decision without the consent of the owners. I do not know, for there is no evidence on the point, whether the plaintiff, as the body corporate, was at least required to co-operate in what is alleged to be a use of the units which does not comply with the district scheme. For the purposes of this judgment I do not assume that it has. I do not accept, therefore, that the defendant has an arguable claim that:

a) The body corporate has brought about the state of affairs where the letting of units in the development contravenes the district scheme and;

b) That the carrying on of the alleged impermissible use has, in anyway, caused delay in issuing the code compliance certificates.

[14] Next, it is not established that a delay in providing code compliance certificates has caused loss to the defendant. The defendant's claim seems to be mixed up with a further element and that is the apparent sub-standard construction in the building. The primary part responsible for any such defects is likely to be the developer and the builder together with other classes of defendant who are typically cited as parties in weathertight building litigation. It cannot have been the responsibility of the body corporate that the building was designed or constructed with inherent defects.

[15] The reference to code compliance certificates in the defendant's evidence masks a real problem with the defendant's arguments. The defendant's real complaint is not that code compliance certificates have not been issued, but that the building has not been constructed to the appropriate standard for certification. On the face of the very limited evidence before me, it is not reasonably arguable that even if the plaintiff had not permitted the asserted wrongful use of the property, that

would have permitted the local authority to issue code compliance certificates in respect of the building.

Has the plaintiff in fact actually arranged insurance?

[16] I was not entirely clear if the defendant accepted that the plaintiff had in fact taken out insurance. Out of caution I shall deal with that issue now.

[17] In the plaintiff's statement of claim, it is alleged that as at 3 April 2009 the defendant company owed the plaintiff the sum of $33,418.38 in outstanding body corporate levies. The plaintiff's counsel, Mr Anderson, told me that these levies have arisen as a result of the body corporate incurring the costs of insuring the body corporate's interest in the apartment building.

[18] The ledger, which evidences the state of account between the defendant and the plaintiff, does not particularise in complete detail what the subject matter of the various levies was. Some of the charges in the ledger are particularised, such as electricity charges. At the hearing before me, though, it was the plaintiff's submission that the bulk, if not all, of the amount owing was related to insurance charges for insurance which the body corporate had arranged.

[19] The only reference that appears to be made to the question of the insurance in the affidavit material filed by the defendant is to be found in Mr Fernandes' affidavit of 14 July 2009 where he deposes:

> 8. The body corporate, by its agent Ms Mak, has also refused to disclose to me the name of the insurer for the Portland Towers.

[20] I note that despite provision having been made in the timetable orders for the plaintiff to file affidavits in reply, it has not chosen to do so. Mr Fernandes' assertion about the insurance company has gone unanswered. Nor did the plaintiff attempt to clarify (by reply affidavit) what the body corporate levies arose from.

[21] I interpolate that if the employee of the property management company has declined to provide the name of their insurer to a party who it is seeking to charge

with part of the cost of the insurance, then it is unlikely that withholding that information can be justified.

[22] While it is unfortunate that Ms Mak has declined to provide the name of the insurance company, the real issue that needs to be considered is whether that omission or refusal defeats the right of the body corporate to recover insurance costs that it has paid. In my opinion, the non-disclosure of the name of the insurance company would not justify such an omission on the part of the defendant.

[23] But as I understood it, Mr Hickson further submitted that the failure to disclose the name of the insurance company casts doubt on whether in fact there was in truth any debt owing for insurance which the body corporate could recover from the owners, including the defendant. I do not accept that submission. Mr Storey, in his affidavit of 14 July 2009 annexes the statements, which show the position of the defendant's account with the plaintiff. He does not suggest that those accounts are incorrect. His affidavit, rather than denying the propriety of the body corporate levies, appears to justify the non-payment of the levies on the grounds of the disputes arising from the code compliance certificates, the building defects and alleged non-compliance with the district scheme - all being issues raised by Mr Fernandes in his affidavit also sworn 14 July 2009. The absence of a forthright denial that the body corporate levies are justified, coupled with the further consideration that the plaintiff has provided sworn verification of its statement of claim is enough to persuade me that there is no dispute of substance concerning the existence of the debt. That being so, unless there is some defence available to the defendant such as equitable set-off or abuse of process, the Court must conclude that the defendant is indebted to the plaintiff as the plaintiff claims.

Is the plaintiff entitled to recover insurance payments which may have been made not by it, but by Auckland Property Management Limited (APML)

[24] Mr Storey a director of the defendant deposed as follows:

> 4. The current proceedings are based on non-payment by Ocean Pacific of body corporate fees rendered by Auckland Property Management to Ocean Pacific for six Portland Tower Apartments owned by Ocean Pacific. The reason the body corporate fees have not been

> paid is due to a dispute between Ocean Pacific, Morley & Associates and the developer of Portland Tower, Portland Trustee Company Limited ('PTC').

[25] In the passage just quoted, Mr Storey appears to assert that the body corporate fees have not been levied by the plaintiff but by APML, the Morley's company. Given that APML is the secretary only of the plaintiff, the statement which Mr Storey makes is only partly correct. The fees might have been "rendered" by APML but in doing so it, it was plainly acting as an agent of the plaintiff.

[26] The next sub-issue "crosses-over" with the matters to be discussed in the next section of this judgment. It will become apparent in the following section of the judgment that there is a dispute between the defendant and the plaintiff's agent. In case it is suggested that this excuses the non-payment, I observe that the fact that the defendant has a dispute with the plaintiff's agent does not absolve it from paying debts properly owed to that agent's principal.

Did the association between the secretary to the body corporate, APML, and Morley and Associates Ltd who the defendant is suing in other proceedings, mean that the present proceedings are being carried on for a collateral and improper purposes?

[27] The next complaint which the applicant makes concerns the alleged connection between Morley & Associates Limited and the body corporate, Auckland Property Management Limited (APML). Mr Hickson's submission was as follows:

> (b) Auckland Property Management is wholly owned by Morley & Associates Limited. Mr Howard Morley is the sole director of Auckland Property Management Limited and he and his wife, Joan Morley, are the sole directors and shareholders of Morley & Associates Limited.

[28] The defendant goes on to assert that Morley & Associates Limited, in the course of its business as registered valuer, prepared a valuation of apartments in the Portland Tower development. Before it purchased its units in the Portland Tower development, the defendant says, it was supplied with a copy of that valuation. I understand that the defendant further claims that it was induced to buy those apartments at a price above market value and that the Morley & Associates Limited

valuation was carried out negligently. As a result, the defendant claims it suffered loss.

[29] The defendant apparently claims that arising from the commonality of proprietorship in APML, the secretary of the body corporate, and the valuation practice which valued the Portland Tower Apartments, the defendant has grounds for asserting that even if insurance levies are otherwise properly chargeable to the defendant, it is able to set-off against that claim its own cross-claim arising out of the purchase of the Portland Tower Apartments.

[30] The general submission was based upon the premise that Mr Morley (who is apparently the guiding hand and mind of Morley & Associates Limited) and Mrs Morley (who is the other shareholder of APML) are hostile to the defendant because the defendant has brought negligence proceedings against Morley & Associates Limited. Therefore, the argument runs, their participation in the ownership and management of APML which is the secretary to the body corporate, means that they are misusing that position to promote the present liquidation proceedings breach by the plaintiff against the defendant. The Court is asked to assume these matters, there being no proof that this is the objective of the Morleys and their company.

[31] I am not prepared to draw the inference that the defendant invites me to. Further, even if the Morleys personally were motivated to act in the way suggested, neither they nor either of their companies is the plaintiff in this proceeding. The plaintiff is a different legal entity. There is no evidence to show that the Morleys or their companies dominate it. There is a bona fide explanation why the plaintiff is bringing the liquidation proceeding: it wishes to enforce a debt. It appears to me that that is the reason why the proceedings have been brought and not the more sinister purposes that the defendant would attribute to the Morleys. Therefore, the proceedings are not, as Mr Hickson, submitted an abuse of process.

[32] In summary, this alleged defence is unarguable. Auckland Property Management Limited is not to be equated with the body corporate anymore than any other contractor who provides services to the body corporate ought to be. There is

no need to consider the other serious deficiencies in the defendant's argument arising under this head.

Is the defendant solvent?

[33] Mr Hickson submitted that the defendant was solvent. He drew to my attention an affidavit filed by Mr Drum, a chartered accountant who stated that he had responsibility for preparing the annual accounts and tax returns of the defendant. That affidavit had annexed to it a statement of financial position as at 30 June 2009. Mr Hickson said that that statement of position showed part liabilities of approximately $36,000 compared with current assets of $48,000 approximately.

[34] The real question to be answered is whether the company can pay its debts as they fall due. One of the items that has been treated in the statement of financial position as a current asset is an item headed 'pre-paid legal costs' which total approximately $44,000. No notes are provided which throw any light on what this item comprises. Mr Hickson was unable to clarify what the item was. The item is an important one in the context of these proceedings. Upon it rests the defendant's contention that the defendant is able to pay its current liabilities.

[35] In the absence of explanation, I assume that the item represents funds that have been paid to a law firm or to a third party on its behalf, to be held for the benefit of that firm. Further, it seems to me to be a reasonable inference that the funds are held on terms that are available to meet future charges to be levied by the law firm. It may further be supposed that the law firm will make such charges and will expect to be able to resort to the fund for their satisfaction. I assume that the point of having such a fund is that the law firm does not have to line up with the other general creditors of the company to await payment. That is, the arrangement is likely to be a measure designed to ensure that notwithstanding that the company has limited liquidity, the law firm can rely upon the fund to assure payment of legal costs. For that reason, the items cannot be regarded as providing any assurance that the company has the necessary ability to meet its current creditors generally. If the item of pre-paid legal costs is put to one side, there is in fact a deficiency of total current assets.

[36] Mr Hickson also drew my attention to another part of the evidence which Mr Storey filed and which makes reference to the fact that he and another director of the company, a Mr Gibson, have entered into a litigation funding agreement pursuant to which they undertook to pay 'to the company' (the defendant) instalments of money commencing with the sum of $50,000 on 15th August 2009. This was, Mr Hickson said, a further assurance that the company would have the necessary funds to meet its liabilities generally. But Mr Hickson properly disclosed to me that in fact the payment of $50,000 had not been made on 15 August 2009, as the agreement required. It is therefore of no assistance to the company in trying to establish its solvency.

[37] The position, therefore, is that the usual presumption of insolvency which arises following expiry of an unsatisfied statutory demand means that in the absence of satisfactory evidence to the contrary, the company is presumed to be insolvent. There is no such satisfactory evidence in this case, and therefore I conclude that, contrary to the defendant's submission, the company is in fact insolvent.

Other discretionary considerations

[38] In general terms, I next enquire whether the continuation of the proceedings is in some way an abuse of process because of considerations of unfairness or the bringing to bear of undue pressure on the defendant. I am unable to conclude that there are any such factors present. The body corporate is a vehicle that exists to transact business on behalf of the owners generally. The owners generally have an obligation to contribute to the expenses that the body corporate must meet on their behalf. The defendant has failed to meet its obligations to make its rateable contribution. It is insolvent. In these circumstances the plaintiff has made out its entitlement to a liquidation order.

[39] Mr Hickson, however, requested that if I found that an order should be made it should lie in Court for 14 days in order to give the company time to meet the debt.

Orders

[40] The Registrar is to arrange for this matter to be called in my liquidation list on **4 December 2009 at 11.45 a.m**. If the plaintiff wishes to obtain an order for appointment of liquidators pursuant to this judgment on that date, it should make available to the Court a current certificate of debt pursuant to Rule 31.21 of the High Court Rules. I will deal with any costs issues as well on **4 December 2009.**

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J.P. Doogue
Associate Judge