

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

CIV-2009-404-006570

UNDER Part 19 of the High Court Rules
IN THE MATTER OF Section 40 of the Unit Titles Act 1972
BETWEEN MARGARETHE CHRISTINE NORMAN,
ALEXANDER JAMES BURRELL,
ROBERT CHARLES LEONI, DAVID
JOHN LINCOLN PITTMAN, AND
PHILIP CHANDLER
Applicants
AND BODY CORPORATE 193764
Respondent

Hearing: 14 October 2009

Appearances: T J G Allan for Applicants
R G S Hay for Respondent

Judgment: 23 October 2009 at 3:30pm

JUDGMENT OF HUGH WILLIAMS J

*This judgment was delivered by
The Hon. Justice Hugh Williams
on*

23 October 2009 at 3:30pm
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

**A Application by building proprietors for appointment of an
Administrator.**

B Administrator appointed.

[1] This was an application by proprietors of units in the building now known as Grand Central Station and formerly known as the Railway Campus for the appointment of an administrator.

[2] It came before Hugh Williams J on 14 October 2009 in the Duty Judge list and orders were made giving the applicants leave to commence the proceeding by originating application and appointing a Mr McCullagh as administrator of the respondent Body Corporate until further order of the Court. Conferred on Mr McCullagh were a list of powers appearing in the schedule to the application to which, in one respect, it will be necessary to return.

[3] The application was sparked by a near-desperate situation in relation to Auckland's former Railway Station. The Body Corporate which owns it is essentially insolvent and, although it has funds which are able to go part way towards meeting the costs of the widespread refurbishment which is currently underway, it does not have sufficient funds to meet the whole of the estimated repair costs and certain of the proprietors of the units in the Body Corporate are resisting the Body Corporate's attempts to raise further funds by way of levy.

[4] The basis on which those proprietors are refusing to meet any further levies is that there is a serious incongruity between the rule of the Body Corporate, the Unit Plan and the Unit Titles Act 1972, which will be difficult and complex to resolve.

[5] The former Railway Station comprises 355 units, 230 of which are residential units, two are commercial, 85 are car parks within the building, and 38 are car parks around the exterior. Part of the problem arises because large areas of the building are accessory units on the Unit Title Plan, and are thus privately owned when their usage means they should be common property.

[6] The former Railway Station was developed into a large number of units with the intention that the University of Auckland would have complete management and control (with the exception of the car parking area) after it was redeveloped by Covington Developments Limited in the late 1990s. The intention was that the structure would be residential accommodation for University students.

[7] Covington lodged a new set of rules for the Body Corporate on 26 February 1999 with Land Information New Zealand, but a Body Corporate unit plan was lodged on 12 August 1999, thus making the changed rules ineffectual and resulting in the Body Corporate's rules being those operating by default under the Second Schedule of the Unit Titles Act. Under the rules Covington registered, the Body Corporate had to maintain the exterior walls, windows and roof with each owner maintaining their respective units.

[8] In addition, the resource consent provided that the 97 car parking spaces within the building should only be used as ancillary to the student accommodation but Covington created those units as principal units and sold them independently of the residential units. Thus the car parking spaces passed out of the control of the University.

[9] For a period, these incongruities did not create problems but in 2000, the University assigned to the Body Corporate the task of settling with creditors and deducting costs from the proprietors' gross income and the Body Corporate raised levies proportionate to the unit entitlement to meet that cost. The owners of the car parking spaces paid levies direct to the Body Corporate, but by statute the Body Corporate can only raise levies for its functions in relation to common property, not private property.

[10] To effect that arrangement, the University incorporated Uni-Accommodation Limited, which it owned and controlled, but the company is now in liquidation.

[11] The combined effect of a Management Agreement with Covington and leases of every unit was that the proprietors surrendered control, management and running of the Railway Campus to the University. Excepted from that arrangement were the interior car parking units which were leased. The exterior car parking spaces were not leased other than by their individual proprietors.

[12] The building – most of which has Heritage listing – has been recognised since 2006 as a “leaky building” and requires substantial remedial work, including replacing almost the entire roof, the exterior cladding, and replacing the windows in

the new structure. Students could not live there while the work was and is being carried out.

[13] At a general meeting of the Body Corporate held on 21 July 2008, a resolution was passed to raise \$6.1 million *pro rata* to unit entitlement (other than the exterior car parking spaces) payable in four equal instalments commencing on 30 November 2008. The contract was awarded to Legacy Construction Limited who started the works in September 2008. They are currently scheduled for completion in February 2010 though they may be completed earlier.

[14] The Secretary of the Body Corporate did not apply to the High Court for the scheme to be sanctioned under s 48 of the Act. This occasioned no problems until late this year because the proprietors accepted they would pay for the remedial work by unit entitlement, and most did. However, by March 2009, two proprietors refused to pay on the basis the Body Corporate had no mandate either by statute or otherwise for the repair of private property, that is to say, most of Grand Central. They have since been joined by others who take a similar view.

[15] Further problems eventuated when Uni-Accommodation Limited cancelled the Management Agreement with the Body Corporate on 3 November 2008 and gave proprietors notice to surrender their leases, though proprietors whose units were not in the area being worked on had rented their units privately in breach of the leases with Uni-Accommodation Limited. That compounded the proprietors existing difficulties arising through lack of income from the leases to students.

[16] Because it is practically impossible to obtain the agreement of the minimum 80% of proprietors under s 42 of the Act, the committee of owners who brought this application decided that the most practical – though not straightforward – option is to change to a unit plan under s 46 of the Act. This requires to be actioned urgently as the Body Corporate only has about two months funds left to pay its contractor and, as noted, is unable to raise further levies or enforce the collection of unpaid levies, particularly when, un-let and with the building in its present state, the units are virtually worthless.

[17] It was for that reason that an administrator was appointed on 14 October 2009. His powers were considerable but one addition was intended to circumvent the requirement in s 40(3) of the Act to make decisions otherwise requiring a unanimous resolution. But that was amended during the hearing so that Mr McCullagh only had “liberty to apply” for that additional power.

[18] Orders were made suppressing search of the file and publication for seven days from the date of the order to enable Mr McCullagh to undertake the necessary consultation with financiers and Legacy Construction.

[19] Included in the application to the Court was an application that a Judge be appointed to preside over all future applications that arise in connection with the Body Corporate’s affairs, given the complexity of the issues – only outlined above – and the desirability of having someone moderately familiar with the issues to carry the matter forward.

[20] A copy of this judgment is directed to be sent to Lang J as Auckland Civil List Judge for the assignment of a Judge, whether Hugh Williams J or someone else.

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HUGH WILLIAMS J

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Lang J, Civil List Judge, High Court Auckland