IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-005222

BETWEEN	JOHN EVANS DORBU Plaintiff
AND	DAVID COOKE First Defendant
AND	PIERRE LE NOEL Second Defendant
AND	BARRY HEGMAN Third Defendant
AND	CROCKERS STRATA MANAGEMENT LIMITED Fourth Defendant

Hearing: 18 March 2009

Appearances: S Judd for Plaintiff
J Cox for the First, Second and Third defendants
R Hay for the Fourth Defendant

Judgment: 30 April 2009 at 11 am

JUDGMENT OF ASSOCIATE JUDGE ROBINSON

This judgment was delivered by me on 30 April 2009 at 11 am,
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date…….

Solicitors: Murdoch Price, PO Box 23-620, Auckland
Morgan Coakle, PO box 114, Auckland
Rennie Cox, PO Box 6647, Auckland

[1] The plaintiff, Mr John Dorbu, is the owner of unit 5A and accessory units 8-9, 18 and 57 situated on level 7 in a block of units at 126 Vincent Street, Auckland which he acquired in August 2007. David Cooke, the first defendant, is the director of the company which owns the unit at level 7 of the building at 126 Vincent Street, and Pierre Le Noel, the second defendant, is the director of the company which owns the unit on level 16 of this building. The third defendant, Barry Hedgman, is the building manager who is responsible for co-ordination of building maintenance. The fourth defendant, Crockers Strata Management Ltd, is the Secretary of (Body Corporate 134199) in respect of the building at 126 Vincent Street.

[2] Under the rules of the Body Corporate, the secretary's roles and functions are to:

a) keep proper books of account

b) keep full, true and complete accounts of the affairs and transactions of the Body Corporate; and

c) carry out such other functions as may from time to time be delegated to the secretary by the Body Corporate.

[3] From time to time at its annual meeting the Body Corporate with the assistance of the Secretary, assesses the levies to be paid by the individual unit holders to cover outgoings and other expenses of the building. Between March 2008 and July 2008, the fourth defendant, as secretary of the Body Corporate, issued invoices addressed to the plaintiff claiming a total of $18,008.72 which the defendants maintain is the amount of the plaintiff's contribution to the outgoings and other expenses of the building assessed in accordance with the resolution of the Body Corporate.

[4] The plaintiff has not paid the levy. On 23 May 2008, the plaintiff requested a break down of an invoice he received from the fourth defendant dated 13 May 2008 claiming $3,656.25. In reply on 3 June 2008, the fourth defendant provided the

plaintiff with an invoice from Argus Fire Protection claiming a total of $8,912.25 being a claim for the carrying out of remedial items as per Fire Protection Inspection Service report.

[5] According to the records of the Body Corporate, at a meeting held on 26 June 2008 those present resolved as follows:

> Level 3 & Level 7 have still made no effort to pay any of their outstanding bills. It was decided that on Monday 7 July (Barry has changed dates) their access to the lifts will be stopped, and the residents issued with keys for the bottom door so that they can have access to the stairs. Barry is going to get a new lock installed on this door, and have everyone's locks checked to ensure the safety of each floor. He is also getting the alarm taken off the bottom door to prevent callouts.

Included in those listed as present at that meeting, were the first, second and third defendants. Darren Powell who represented the fourth defendant, was also listed as being at this meeting.

[6] As the plaintiff had tenants residing in his property on the 7th floor of the building, the third defendant delivered letters to those tenants dated 4 July 2008 in which he stated:

> Dear Sir/Madam
>
> RE: Alterations to Access Arrangement for Entry to Level 7
>
> Please find attached a letter from the buildings administrators, (Crockers Strata Management) dated 27 June 2008 and sent to the owner of level 7, J.E.Y. Dorbu.
>
> Mr Dorbu, landlord has at this date not responded to the Crockers request.
>
> The Body Corp is left with no other choice in regard to the long standing debt Mr Dorbu has incurred and will take measures within its powers to rectify this matter.
>
> Accordingly, all access cards to level 7 will be deleted at 8.30 am on Monday, the 7th of July.
>
> Access to level 7 will then be by way of entry through the car park level fire door.
>
> I am providing keys for this door which will allow entry from outside.
>
> The stairway doors at the 7th level should remain unlocked.

> Please close the fire doors once admittance has been achieved, thus reinstating building security.

[7] From the 7 July 2008, the plaintiff and his tenants were prevented from having access by lift to level 7 of the building. As a result, the plaintiff and his tenants have to use the stairwell and thus walk up 7 levels to reach their unit. The plaintiff's tenants decided to bring this problem to the attention of the public through a programme known as "Fair Go" which broadcast through TVNZ Channel One.

[8] On 28 July 2008, Mr Cox, the solicitor who acts for the Body Corporate, wrote to those involved with the production of the Fair Go programme and advised as follows:

> The current owner of Level 7, Mr Dorbu, took possession of the floor on 10 August 2007. Since that time, there have been ongoing problems in recovery of Body Corporate fees from him. As at July 2008 there are currently arrears totalling over $18,258.97. There have only been two payments made by Mr Dorbu towards his Body Corporate fees since August last year. There is no valid dispute concerning the balance due to the Body Corporate for Level 7.
>
> The payment of Body Corporate fees by the floor owners is essential to the continued operation of the building, and the maintenance of all services. The Body Corporate manager over the past 11 months has consistently chased Mr Dorbu for payment of Body Corporate fees, but since the last payment which was received in mid February 2008, there has been minimal co-operation provided by him, and, most importantly, no payment made towards the ongoing arrears.
>
> The Body Corporate faces the cost of replacing the roof membrane this year, and must necessarily levy all members in respect of that unbudgeted cost (which is estimated at over $100,000.00) on top of the other ongoing running costs of the building.
>
> The Body Corporate has no overdraft facility available, and must collect its fees from all members to maintain a cashflow to stay afloat and enable the building services to keep operating.
>
> Consequently, at the monthly Body Corporate members' meeting held in June, it was unanimously decided that the Body Corporate was left with no option but to restrict lift access to Level 7. The decision was not taken lightly by the members, but faced with the owner of Level 7 refusing to address the arrears situation (when rent is presumably being collected from each of his tenants), the Body Corporate had no option but to exercise its legal rights. Advance warning was given to both Mr Dorbu, and the residents in Level 7. The Body Corporate arranged for a new lock and keys to be cut for all tenants on Level 7 so they were not locked out of the floor.

> The Body Corporate is hopeful that the matter can be concluded as soon as possible, but the only person who can resolve the problem at this point is Mr Dorbu, the owner of Level 7.

The Fair Go programme was broadcast throughout New Zealand on 30 July 2008 at 7.30 pm.

[9] On 8 August 2008 the Tenancy Tribunal ruled that the plaintiff's tenants are entitled to withhold payment of rent until the plaintiff arranges for them to have access by lift to their premises.

[10] The plaintiff claims that during the "Fair Go" programme, remarks were made about him to many viewers throughout New Zealand which were defamatory in that, contrary to the truth, he was described as a person who was unable to pay his debts, was insolvent, was a credit risk, was incapable of managing his affairs and was an uncaring landlord. Because of the publication of these defamatory statements, the plaintiff claims to have suffered damage to his personal and professional reputation.

[11] The plaintiff brings these proceedings seeking $1,300,000 by way of general and special damages because of the loss he suffered as a result of the defamatory statements. He also brings a claim for such damages against all defendants alleging negligence, trespass and conspiring to injure by unlawful means.

[12] The defendants apply for summary judgment claiming that none of the causes of action in the plaintiff's claim can succeed. They also apply to strike out the plaintiff's claim under rule 15.1 High Court Rules, claiming the statement of claim discloses no reasonable cause of action, the causes of action pleaded by the plaintiff are untenable and cannot succeed, are speculative without foundation are frivolous, vexatious and an abuse of the process of the Court.

[13] Shortly before the hearing, the plaintiff (who was overseas) submitted a memorandum with an amended statement of claim. He believed the defendant's applications for strike out and summary judgment would not proceed because they appeared to him to be in breach of the times for filing written synopses and other documents required by rule 7.39 High Court Rules. For reasons I gave at the

commencement of this hearing, I directed the application for summary judgment and strike out must proceed to hearing and refused the plaintiff's request for an adjournment. However, I directed that the hearing proceed on the basis of the amended statement of claim lodged by the plaintiff in anticipation of the document being filed in the correct manner.

Defendants submissions in support of application for summary judgment or strike out

[14] The defendants deny that they have published any defamatory statements relating to the plaintiff. It is pointed out that the letter from Mr Cox to the Fair Go programme of 28 July 2008 was written by Mr Cox on behalf of the Body Corporate and not on behalf of the individual defendants. There is no allegation that any of the defendants appeared on the Fair Go programme. Consequently, it is submitted that none of the defendants can be liable to the plaintiff in defamation.

[15] It was also submitted on behalf of the first, second and third defendants that to establish liability based on negligence would be to establish a duty of care in circumstances where there was insufficient proximity between the defendants and the plaintiff to justify the imposition of such a duty. Furthermore, because of a number of factors, including the existing and statutory relationship between the plaintiff and the Body Corporate which included contractual and statutory obligations under the Unit Titles Act 1972, there are good public policy considerations that weigh against the imposition of such a duty of care: see *Anns v London Borough of Merton* [1978] AC 728, *Couch v Attorney-General* [2008] 3 NZLR 725.

[16] Furthermore, it was submitted that none of the defendants could be liable to the plaintiff in trespass or for conspiracy to injure the plaintiff by unlawful means because none of them were responsible for the conduct relied upon by the plaintiff as giving rise to liability. The first, second and third defendants point out that the conduct relied upon by the plaintiff in establishing trespass was not committed by them personally but by their respective companies and the Body Corporate. It was,

they point out, the Body Corporate that restricted the plaintiff and his tenant's access to the 7th floor.

[17] The fourth defendant produced evidence of its opposition to the decision made at the meeting of the Body Corporate held on 26 June 2008 to prevent the plaintiff and his tenants from having lift access to the 7th floor. Mr Darren Powell who attended that meeting on behalf of the fourth defendant, in his affidavit filed in support of the fourth defendant's application for strike out and summary judgment, points out that:

a) He did not vote and was not entitled to vote on the proposal to shut off the lifts.

b) He did not instigate or encourage the Body Corporate to cut off the lift access by the plaintiff to the 7th floor.

c) Neither he nor the fourth defendant were involved in any way in the physical shutting down of the lifts.

d) That at the meeting on 26 June 2008 he warned those present against the proposal to shut off the lifts and told them he believed they were all on shakey ground and that he believed they could not limit services to a Body Corporate member.

Plaintiffs submissions in opposition to application by defendants to strike out plaintiff's claim and for summary judgment against plaintiff

[18] In opposing the applications the plaintiff emphasises that the levies imposed upon him by the Body Corporate are not payable as such levies have been incorrectly assessed. The plaintiff claims the defendants have acted unlawfully to enforce payment of a debt which was not due and payable by him. Relying on *Attorney-General v Jones* (2003) 16 PRNZ 715, he points out that the summary judgment procedure is not appropriate in this case because the outcome depends on disputed issues of fact.

[19] With regard to the causes of action based on negligence and conspiring to injure the plaintiff in his business by an unlawful act, it is emphasised on behalf of the plaintiff that there is evidence to establish that each defendant committed an act which would be actionable under each cause of action. It is further emphasised that individual defendants cannot escape liability because the Body Corporate may also be liable.

[20] With regard to the defamation claim, the plaintiff relies on the letter written by Mr Cox to the Fair Go programme on 28 July 2008. Although in that letter Mr Cox makes no reference to acting on behalf of the first, second and third defendants, the Court is invited to infer that as Mr Cox represents those defendants at this hearing, he wrote the letter on their instructions and consequently each defendant can be found to have published the statements in that letter to the producers of the Fair Go programme.

[21] The plaintiff also submits that the issue of whether the fourth defendant agreed to the resolution denying the plaintiff and his tenants lift access to the 7th floor is a disputed fact which cannot be resolved in a summary judgment application. In this respect the plaintiff points out that Mr Powell's evidence of his opposition to the proposal to deny the plaintiff and his tenants lift access to the 7th floor is not supported by the contemporaneous record including the minutes of the meeting. Those minutes do not record Mr Powell's objection or advice against the proposal.

Decision relating to defamation claim

[22] Paragraph 9 of the amended statement of claim refers to the Fair Go programme shown on national television on 30 July 2008, and to defamatory remarks made about the plaintiff to many viewers throughout New Zealand. The plaintiff submits that fair minded viewers could attribute a number of meaning and/or innuendoes to the programme. Paragraph 9 does not provide details of the meaning and innuendoes but lists particulars which include a statement that "the broadcaster alleged that the plaintiff was a bad landlord or words of that effect, defamatory to the plaintiff".

[23] Particulars listed under that paragraph also include reference to publication of an interview with the plaintiff's tenants in which they expressed opinions about the plaintiff's character and the following:

> Prior to the broadcast, Mr John Cox, solicitor for the first, second and third defendants, wrote to TVNZ and its Fair Go arm, confirming that the invoices were correct. His letter confirming the amount was false and he knew or ought to have known that the levy contained in the invoice was wrong.

[24] The letter that the plaintiff has produced is clearly written by Mr Cox on behalf of the Body Corporate. There is no reference in the letter to it having been written on behalf of the first, second and third defendants.

[25] The fact that Mr Cox represents the three defendants at this hearing by no means supports a conclusion that the letter he wrote to the broadcasters of the Fair Go programme was written by him on their behalf. Consequently, there is a complete lack of any evidence establishing that Mr Cox was writing the letter on behalf of anyone other than the Body Corporate.

[26] There are serious deficiencies in the way this cause of action based on defamation is pleaded. The statement of claim does not specify the statements alleged to be defamatory and untrue. The pleadings are in very general terms alleging that in an interview shown on the Fair Go programme the plaintiff's tenants expressed opinions about the plaintiff's character. They submit that the broadcast portrays the plaintiff as a person of bad character, or words to that effect.

[27] Such a pleading does not comply with r 5.26 High Court Rules or s 37(1) Defamation Act 1992. That section provides:

> **Particulars of Defamatory Meaning**
>
> (1) In any proceedings for defamation, the plaintiff shall give particulars specifying every statement that the plaintiff alleges to be defamatory and untrue in the matter that is the subject of the proceedings.

[28] As stated by the learned authors of *Laws of New Zealand: Defamation* at paragraph 157:

> The actual words complained of, and not merely their substance, must be set out verbatim in the statement of claim.

[29] It is not possible therefore, to determine whether the plaintiff claims that the words published are defamatory of him in terms of their natural and ordinary meaning. It is also not possible to determine from the pleadings whether the plaintiff is suing the defendants for:

a) Both the original publication contained in Mr Cox's letter; or

b) The original publication in Mr Cox's letter and the damage suffered by reason of its repetition.

[30] If the latter, the plaintiff must plead the basis on which it is alleged that the defendants are responsible for the statements broadcast in the Fair Go programme. see *McManus & Ors v Beckham* [2002] 4 All ER 497 and *Moodie v Ellis & Ors* HC Wellington CIV 2007-485-2212, decision of Mellon J, 18 March 2009.

[31] These are fundamental defects in pleadings which simply cannot be cured by an amendment, or the supply of further particulars. As stated by Tipping J in *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316, 324, the pleadings are so deficient as to require a de novo start rather than amendment. It must therefore follow that at the very least this part of the claim must be struck out under r 15.1 in the exercise of this Court's inherent jurisdiction.

[32] However, there is a more fundamental problem with the plaintiff's claim for damages for defamation in that is there is absolutely no evidence establishing the defendants' publication of the statements contained in the letter from Mr Cox. The letter does not refer to the statements therein being made by the defendants. On its face, the letter is written by Mr Cox on behalf of the Body Corporate. Consequently, as the letter is the only evidence relied on by the plaintiff to establish publication by the defendants, the plaintiff's claim against the defendants cannot succeed and the defendants are entitled to summary judgment, provided none of the other causes of action pleaded by the plaintiff can succeed.

Decision relating to the second cause of action – negligence

[33] The plaintiff pleads the basis of this cause of action at paragraph 25 of the proposed amended statement of claim as follows:

> The defendants owed him a duty of care to ensure that neither their positive acts nor omissions whether lawful were such as to cause any loss or damage to the plaintiff ("the duty of care").

[34] Particulars of the breaches of duty of care are pleaded at paragraph 26 of the amended statement of claim in the following way:

> **Particulars**
>
> a) The defendants acted in bad faith when they acted to prevent the lifts from serving Level 7 of the building, being the plaintiff's unit on 7 July 2008 and since that time to date.
>
> b) The defendants by their solicitor, knew or ought to have known that the Body Corporate levy account issued to the plaintiff was disputed and/or wrong but perpetrated their conduct out of malice, with an intention to cause injury to the plaintiff.
>
> c) The defendants knew that shutting down the lifts was unlawful means of enforcing their alleged debt but nevertheless continued to pursue that course of action against the plaintiff, and they knew the direct and indirect consequences of so acting towards the plaintiff.
>
> d) The defendants failed to take a lawful means of enforcing the alleged debt, but rather resorted to unlawful means of doing so because of their consciousness of their mendacity, deceit and malice and in particular the fact that a lawful process to enforce the alleged debt alleged stated in the invoices would fail because of its numerical inaccuracy.

[35] This part of the plaintiff's claim is based on a general duty of care not to harm the plaintiff whether by positive acts or omissions and whether lawful cannot succeed. As stated by Lord Wright in *Grant v Australian Knitting Mills Ltd* & Ors [1936] AC 85, 103:

> the mere fact that a man is injured by another's act gives in itself no cause of action:
>
> If the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists.

[36] I am in no doubt that the duty of care pleaded by the plaintiff has no basis in law. Furthermore, to say that the defendants owe a duty "whether lawful" contradicts the argument that they have breached a duty owed to the plaintiff.

[37] In any event, the decision to shut down the lifts was not the defendant's but the decision of the Body Corporate. The plaintiff and two of the companies of which the first and second defendants are directors are members of the Body Corporate. The action in shutting down the plaintiff's and his tenant's access by lift was not taken by any of the defendants personally but by the Body Corporate a separate, limited liability company.

[38] Based on decisions such as *Trevor Ivory v Anderson* [1992] 2 NZLR 517 and *Williams & Anor v Natural Life Health Foods Ltd* [1998] WLR 830, in cases of economic loss for the tortious acts of a company where the claim is against the officer or servant of a company there must be an assumption by the servant or officer of a duty of care, actual or implied. As pointed out by Cooke P in *Trevor Ivory v Anderson* and confirmed by the House of Lords in *Standard Chartered Bank v Pakistan National Shipping Corporation & Ors* [2003] 1 AC 959, the situation is different in cases involving intentional torts such as deceit or knowing conversion. Although in the particulars of negligence the plaintiff refers to the defendants acting "in bad faith" and "enforcing debt by unlawful means", the cause of action is based on a breach of duty of care. In this respect, Cooke P in *Trevor Ivory v Anderson* at page 524, lines 16 to 46 states:

> Where damage to property or other economic loss is the basis of a claim, it may well be possible to sheet home personal responsibility for an intentional tort such as deceit or knowing conversion. And of course if the individual defendant has placed himself in a fiduciary position towards the plaintiff, he will be personally liable for breach of his fiduciary duty. But if an economic loss claim depends on establishing a personal duty of care, it is especially important to consider how far the duty asserted would cut across patterns of law evolved over the years in the process of balancing interests. Some discussion of that subject will be found in the *South Pacific* judgments to which I refer without repetition. In the instant case it is patent that the object of Mr Ivory in forming a limited liability company, an object encouraged by long-established legislative policy, would be undermined by imposing personal liability.
>
> Perhaps the contrary result reached in the High Court reflects partly the inculcated belief of many present-day lawyers that there is a clear and water-tight division between contract and tort, and that the two heads of liability

> should be considered quite separately. *Hedley Byrne*, now a quarter of a century old, may be cited to show that it can be a simplistic belief.
>
> Without venturing further into what some would see as unduly theoretical, if not heterodox, I commit myself to the opinion that, when he formed his company, Mr Ivory made it plain to all the world that limited liability was intended. Possibly the plaintiffs gave little thought to that in entering into the consultancy contract, but such a limitation is a common fact of business and, in relation to economic loss and duties of care, the consequences should in my view be accepted in the absence of special circumstances. It is not to be doubted that, in relation to an obligation to give careful and skilful advice, the owner of a one-man company may assume personal responsibility. *Fairline* is an analogy. But it seems to me that something special is required to justify putting a case in that class.

[39] There is no evidence that the defendants assumed a duty of care to the plaintiff. As already pointed out, it was the actions of the Body Corporate that prevented the plaintiff and his tenants from having lift access to their premises. Even if the Body Corporate is in breach of a duty of care and consequently liable in negligence for economic loss suffered by the plaintiff, there is absolutely no evidence to establish that any of the defendants held out to the plaintiff that they were acting on their own behalf and not on behalf of the Body Corporate. Consequently, I am satisfied that the plaintiff's claim based in negligence cannot succeed and must be struck out or the defendants entitled to summary judgment in their favour in respect of such cause of action if all other causes of action pleaded by the plaintiff cannot succeed.

Third cause of action – Trespass

[40] The third cause of action pleaded by the plaintiff is that by preventing the plaintiff and his tenants from having lift access to their premises, the defendants committed a trespass. According to the learned authors of Todd & Ors *The Law of Torts in New Zealand* (4th ed 2005) at 9.2.05, pages 369-374, there are five ways in which a defendant may act so as to interfere with the plaintiff's possession of land and commit trespass. They are as follows:

a) Entry by defendant.

b) Causing a thing or person to enter another's land.

c) Remaining on land after one's right to be there has ceased.

d) Allowing a thing to remain on land after its right to be there has ceased.

e) Interfering directly with another's profit a prendre.

[41] In the present case there is no suggestion that any of the defendants have interfered with the plaintiff's right to possession of land in the ways set forth above. What is claimed is that the defendants stopped the plaintiff and his tenants from using the lift for access to their premises. In these circumstances, I fail to see how the plaintiff's claim based on trespass can succeed. Accordingly, the plaintiff's claim based on trespass must be struck out and if none of the other causes of action can be maintained, the defendants are entitled to summary judgment in respect thereof.

Fourth cause of action – conspiring to injure by unlawful means

[42] This cause of action is based on the defendants agreeing to prevent the plaintiff and his tenants from having access by lift to the plaintiff's premises. The plaintiff bases this cause of action on the allegation that the conduct of the defendants in shutting down, immobilising or stopping the lifts was lawful. There is no specific pleading of any unlawful means. Consequently, this cause of action cannot succeed and the defendants are entitled to an order striking it out.

Conclusion

[43] Pursuant to rule 12.2(2) the defendants are entitled to summary judgment if the Court is satisfied "that none of the causes of action in the plaintiff's statement of claim can succeed". For the reasons set forth above, I am satisfied that none of the causes of action pleaded by the plaintiff can succeed. Consequently, the defendants are entitled to summary judgment.

Costs

[44] Clearly the defendants having been successful are entitled to costs. However, there is nothing placed before me at this hearing which would justify increased costs and indemnity costs and in particular, there is nothing in the proceedings which would justify the application of rule 14.6. Consequently, in the absence of any requests by any of the defendants for increased costs, there will be an order requiring the plaintiff to pay the defendants costs assessed on a 2B basis with disbursements as fixed by the registrar. If any party wishes to be heard further on costs then that party must advise the registrar within fourteen days of delivery of this judgment. On receiving such advice the registrar should arrange a short hearing for one hour before me to hear submissions from the parties on the issue of costs.

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Associate Judge Robinson