IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2005-404-445

UNDER	the Unit Titles Act 1972
BETWEEN	BILL BETA CREAK Plaintiff
AND	BODY CORPORATE NO. 180838 First Defendant
AND	JOHN ROBERT WHILE & ORS Second Defendants
AND	DANIEL JOHN WELLS Third Defendant
AND	VANESSA SMITH Fourth Defendant

Hearing: 7 and 8 November 2007

Appearances: G B Lewis for plaintiff
No appearance for fist, second and third defendants
G J Thwaite for fourth defendant

Judgment: 21 April 2008

JUDGMENT OF WOODHOUSE J

This judgment was delivered by me on 21 April 2008 at 4:45 p.m.. pursuant to r540(4) of the High Court Rules 1985.

Registrar/Deputy Registrar

……

Solicitors:
Mr G B Lewis, Grimshaw & Co., Solicitors, Auckland
Mr G J Thwaite, Solicitor, Auckland

INTRODUCTION

[1] This case concerns contested voting by members of a body corporate under the Unit Titles Act ("the Act") on a resolution required by the Act to be unanimous. There are two principal questions for me: of those entitled to vote, did at least 80% vote in favour of the resolution; and, if so, should I exercise a discretion under s 42 of the Act to declare the vote sufficient? If I declare the vote sufficient it will be deemed to be a unanimous vote.

BACKGROUND

[2] The plaintiff ("Mr Creak") wishes to proceed with an extension to an existing residential unit title development. The extension was contemplated when the existing development was completed. The agreements for sale and purchase of units bound purchasers to do all things necessary to enable the extension to proceed, to sign powers of attorney for that purpose, and to secure similar obligations from the purchaser on an on-sale.

[3] In December 2002 Mr Creak acquired all the rights of the original developer and vendor. For some years he has been trying to proceed with the extension. Under the Act the extension is a "redevelopment". To proceed, Mr Creak has to deposit a plan of redevelopment. A plan of redevelopment cannot be deposited unless, amongst other things, "the application is made by … the proprietors of all the units pursuant to their unanimous resolution" (s 44(4) of the Act).

[4] Mr Creak has been unable to obtain a unanimous resolution at three body corporate meetings held in February 2004, April 2005 and June 2007, but claims that at each meeting 80% or more of those entitled to vote voted in favour. Section 42 of the Act provides that, in cases where a unanimous resolution is required and not obtained, but there is support from at least 80% of those entitled to vote, any person in the majority may apply to the Court for an order declaring the actual vote sufficient. Mr Creak is a person entitled to apply and does so.

THE ISSUES FOR DETERMINATION

[5] The statement of claim seeks orders under s 42 in respect of each of the meetings. There are further claims seeking damages and other relief against numbers of unit proprietors or former proprietors.

[6] It is unnecessary to consider the claims for damages in this judgment. This is because the affected parties consented to an order for determination of preliminary questions pursuant to r 418 of the High Court Rules directed to the s 42 issues only.

[7] As refined in a minute of Cooper J dated 27 August 2007, the preliminary questions are:

> [a] Whether the resolutions pleaded in the plaintiffs' first, second and third causes of action were supported by 80% or more of those entitled to vote; and if so
>
> [b] Whether the Court should declare that the resolutions as supported are sufficient to authorise the acts proposed by the resolutions, with the proviso that if the Court determines that the merits of the resolutions are relevant to this question (b) (not including an enquiry as to whether there was information upon which a reasonable person could support the resolution) then this question (b) is not to be decided as a separate question but rather determined at trial.

THE DEFENDANTS OPPOSING THE S 42 APPLICATION

[8] There is a total of 18 defendants and 36 units in the existing development. However, only four defendants, being four current unit proprietors, oppose Mr Creak's application under s 42. To avoid confusion, I will refer to these four defendants as "the opponents". The four opponents, represented by Mr Thwaite, are Mr Wells, the third defendant, Ms Smith, the fourth defendant, and two of the second defendants, Messrs Kulma and Combes.

PRELIMINARY MATTERS

[9] The parties' agreement as to the issues for this r 418 hearing proposes consideration of the three meetings. However, I am able to determine the application

by consideration of the 2007 meeting only. One consequence of this is that it is unnecessary for me to consider submissions for the opponents that there were procedural irregularities in the calling of the meetings in February 2004 and April 2005. The opponents do not submit there were procedural irregularities with the meeting in June 2007.

[10] Mr Thwaite made a submission that Mr Creak was not entitled to continue to call meetings putting resolutions to the same effect as had been put at earlier meetings. This was directed principally to the April 2005 meeting. It was not clear whether the same submission was made in respect of the July 2007 meeting. There was a further submission that it was, in essence, an abuse of process to convene meetings after this proceeding was issued in February 2005. I do not agree with either submission. There is no statutory prohibition against the calling of successive meetings to consider the same resolution. It would, in fact, be appropriate to do so if there is some question of procedural irregularity in relation to an earlier meeting. And I do not consider it was an abuse of process, or otherwise irregular, for a body corporate meeting to be convened in respect of a matter before the Court. Where there are proceedings affecting a body corporate it will often be necessary to convene meetings. It would also be sensible to convene a meeting if a resolution successfully passed will avoid the need for further litigation.

[11] The evidence-in-chief for Mr Creak and for the opponents was given in affidavits, with substantial numbers of documents produced by this means. There was no cross-examination. In large measure there were no significant factual disputes. The one prominent factual dispute was whether the further development proposed in the resolutions was the same as that proposed when the original development was completed and the units sold to the first purchasers. As I will discuss later, I am satisfied the point is readily resolved by reference to documents signed by the affected parties.

[12] I will now proceed to consider the two issues as defined in the minute of Cooper J, but limited to consideration of the voting at the June 2007 meeting.

WERE THE JUNE 2007 RESOLUTIONS SUPPORTED BY 80% OR MORE OF THOSE ENTITLED TO VOTE?

[13] To determine this question a large number of subsidiary issues raised by the opponents need to be determined. I will deal with these issues under the following headings:

1. Which body corporate voting rules apply?

2. Entitlement to vote: one vote per person for each unit owned, one vote per unit, or one vote per person irrespective of units owned?

3. Section 42: meaning of "support".

4. Votes by attorneys or proxies: validity?

5. Other points raised by the opponents.

6. Result on the first issue: the June 2007 resolution was supported by more than 80% of those entitled to vote.

1. Which body corporate voting rules apply?

[14] Schedule 2 of the Act contains rules which apply unless they have been changed by unanimous resolution of the proprietors ("default rules"). Rule 23 of the default rules provides:

> Subject to the provisions of section 41 of the Unit Titles Act 1972, at any general meeting of the Body Corporate –
>
> (a) where a unanimous resolution is required each person who is a proprietor shall be entitled to exercise 1 vote;
>
> (b) in all other cases 1 vote only shall be exercise in respect of each principal unit, and no separate vote may be exercised in respect of any accessory unit.

Section 41 of the Act is not relevant.

[15] In this case new body corporate rules were filed in the Land Transfer Office on 6 January 1998 ("new rules"). Rule 2.23 of the new rules provides:

> Subject to the provisions of Section 41 of the Act, at any General Meeting of the Body Corporate:
>
> (a) where a unanimous resolution is required each proprietor shall have 1 vote;
>
> (b) in all other cases 1 vote shall be exercised in respect of each principal unit and no separate votes may be exercised in respect of any accessory unit and each vote shall be of equal value;
>
> (c) …

[16] I heard argument as to whether default rule 23 or new rule 2.23 was in force. This was directed to a question whether each person registered as a proprietor of a unit has a vote or whether there is only one vote for each unit. This is relevant because numbers of the units in this case have more than one owner. The parties contended that the default and new rules have different meanings which make a difference to the counting of votes and therefore the percentage. In my opinion, although there is a superficial difference in the manner of expression, when a definition of a term used in rule 2.23 is brought into the body of the rule, the wording of the default rule and the new rule is essentially identical. The default rule and the new rule therefore mean the same thing, whatever that meaning may be. In case I am wrong, I will deal with the question as to which rule applies, but deal first with my conclusion that in substance the clauses are expressed in the same way.

[17] New rule 2.23(a) says "each proprietor" has a vote rather than, as in the default rule, "each person who is a proprietor" has a vote. This could mean there was a deliberate change in the new rule intended to limit each unit to one vote, irrespective of the number of owners (individual proprietors on the title). However, the word "proprietor" used in new rule 2.23(a) is defined in the new rules as "a person registered as a proprietor of a stratum estate in a unit or units on the unit plan". This definition, if inserted into sub-paragraph (a) of the new rule, means there is no difference between it and the default rule 23(a).

[18] Assuming there is a material difference between the default rule and the new rule, it is necessary to determine which rule is in force. Mr Lewis for Mr Creak

submitted that, although the new rules were lodged with the Land Transfer Office, they have no effect because the statutory requirements for amendment of the default rules were not followed. Default rule 23 is in Schedule 2 of the Act. Section 37(3) of the Act governs amendment of Schedule 2 rules:

> The rules in Schedule 2 and any additions thereto or amendments thereof may be added to or amended or repealed in relation to any body corporate by unanimous resolution of the proprietors and not otherwise.

[19] Mr Lewis submitted that there was no effective amendment of the default rules (the Schedule 2 rules) because amendment had to be done by the proprietors of the body corporate. The body corporate was not in existence when the plans were lodged with the Land Transfer Office. The body corporate was not in existence because it only comes into existence when the unit plan is deposited and that had not occurred: s 12. These facts are not in dispute. The question is whether Mr Lewis' submission is correct as a matter of law. There is need also to consider an alternative argument for the opponents that the indefeasibility principles under s 62 of the Land Transfer Act mean the new rules are binding notwithstanding non-compliance with s 37(3) of the Act.

[20] Given the accepted facts, Mr Creak's submission on its face appears correct, subject only to the indefeasibility argument. The same point was considered by Rodney Hansen J in *Fifer Residential Ltd v D R Gieseg and others* (HC AK CIV 2004-404-2189 15 June 2005). In that case the amended rules were lodged with the application to deposit the unit title plan. The plan was deposited six days later. The Judge said:

> [50] As earlier noted, rules in the Second Schedule can be amended only by the unanimous resolution of the "proprietors" (s 37(3)) and rules in the Third Schedule can be amended only by resolution of the body corporate at a general meeting (s 37(4)). A "proprietor", is the person for the time being registered as proprietor of the stratum estate in a Unit (s 2). A stratum estate is not created until the deposit of a unit plan (s 4) nor does the body corporate come into existence until then (s 12(1)).
>
> [51] Until a unit plan is deposited, there are therefore no proprietors and no body corporate with the ability to amend the rules under s 37(3) or (4). In the present case, they did not come into existence until 20 April. The prior attempt to amend the rules was therefore of no effect. An amendment to any rule pursuant to subs (3) or subs (4) of s 37 does not have effect until the

> body corporate has lodged a notification with the Registrar and the Registrar has recorded it in accordance with s 37(7). As, after 20 April, there was no attempt to further amend the rules, the amendments relied on by Fifer have never come into existence. The rules of the body corporate are those set out in the Second and Third Schedules to the Act.

[21] In Hinde McMorland & Sim *Land Law in New Zealand*, it is said, in respect of *Fifer*, that "the reasoning in the judgment appears to be correct and logical" (Chp 14, pg 14.33A, note 2 at p 111,144). I agree.

[22] Mr Thwaite submitted that the new rules "constitute an encumbrance upon the title, in terms of s 62 of the Land Transfer Act 1952 and (in the absence of fraud etc) are thus indefeasible: *Frazer v Walker* [1967] NZLR 1069". In support of this proposition there was reference to *Disher v Farnworth* [1993] 3 NZLR 390 at 400-401 and *World Vision of New Zealand Trust Board v Seal* [2004] 1 NZLR 673 at [51].

[23] The material part of s 62 is as follows:

> Notwithstanding the existence in any other person of any estate or interest … [which] might be held to be paramount or to have priority …, the registered proprietor of land or of any estate or interest in land under the provisions of [the Land Transfer Act] shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register … but absolutely free from all other encumbrances, liens, estates, or interests whatsoever …

On a straightforward reading of s 62, it has no application to rules under the Unit Titles Act which are concerned with "the control, management, administration, use, and enjoyment of the units and common property": s 37 of the Act.

[24] This question was considered by Paterson J in *Chambers v Strata Title Administration Ltd* (2004) 5 NZConvC 193,864. He said:

> [50] It would be surprising if these rules obtained indefeasibility status under the Land Transfer Act and could not be altered unless there is an appropriate proceeding under that Act in which the District Land Registrar was joined as a party. If a body corporate does not register amendments under s 37 of the Act, the statutory rules apply. Section 37(7) provides that no amendment "shall have effect until the Body Corporate has lodged a notification thereof" in the appropriate form with the Registrar of Lands and the Registrar has recorded it on a

> supplementary record sheet. The effect of lodging a notification, in my view, cannot make intra vires rules which are not in accordance with the amendment powers and are therefore ultra vires. The Rules are not similar to covenants and rights contained in a registered instrument protected by the indefeasibility provisions. They fall on the side of the line where they are not so protected: *see Green & McCahill Contractors Ltd v Ministry of Works* [1974] 1 NZLR 251.
>
> [51] Furthermore, "indefeasibility" merely means that the registered proprietor can defeat an adverse claim to the title he or she has: see *Frazer v Walker* [1967] AC569, 580-581, [1967] NZLR 1069, 1075-1076. The protection given a registered proprietor is twofold. First, it is against the claims of a competing or prior owner. Secondly, it is against encumbrances, liens, estates, or interests which are not noted on the register. The Rules have nothing to do with title or the other interests which are protected. The indefeasibility submission cannot assist the defendants.

[25] Paterson J concluded that the indefeasibility principles could not save amended rules which had not been perfected in accordance with the statutory requirements. I agree. In consequence, the rule for considering who is entitled to vote is rule 23 in the default rules.

2. Entitlement to vote: one vote per person for each unit owned, one vote per unit, or one vote per person irrespective of units owned?

[26] Two issues arise under this heading. The first is the meaning of rule 23(a) in the default rules. The second is one raised by the opponents: does s 42 mean that each person recorded as a proprietor of one or more units has only one vote irrespective of the number of units owned?

[27] In my opinion the meaning of rule 23(a) is clear. First, where a unanimous resolution is required then, in the case of units having more than one proprietor, each person has a vote. Further, if a person is a proprietor of more than one unit, that person will have one vote for each unit in respect of which the person is a proprietor. Both conclusions flow from the ordinary meaning of the words used in rule 23(a) and construed in the light of the quite different wording of rule 23(b). The same conclusion was reached by Ronald Young J in *Body Corporate 199883 v Beckingham* (HC AK CIV 2004-202-2859 21 October 2004; see in particular at [23]). And see *Re Bell* (HC WN M243/92 22 October 1992 Jaine J)

[28] Mr Thwaite submitted for the opponents that the right to vote, or at least the counting of votes to determine a percentage, is governed by s 42. Section 42 provides:

> **42 Relief in cases where unanimous resolution required**
>
> In any case where, in accordance with this Act or rules under this Act, a unanimous resolution, or the consent, of all the proprietors is necessary before any act may be done and that resolution or consent is not obtained, but the resolution or act is supported by 80 percent or more of **those entitled to vote**, any **person** included in the majority in favour of the resolution or act may apply to the Court to have the resolution as supported or the consents as obtained declared sufficient to authorise the particular act proposed; and, if the Court so orders, the resolution shall be deemed to have been passed unanimously or the consent of all the proprietors obtained, as the case may be. (emphasis added)

[29] Mr Thwaite submitted that the emphasised words "those entitled to vote" refer to "proprietors" and proprietors are to be identified as individuals. The emphasised word "person" confirms this, or provides an alternative basis for saying that the right to vote rests with individuals. From this it was submitted that each individual who is a member of a body corporate has one vote irrespective of the number of units in respect of which that person is a proprietor. Mr Thwaite provided a hypothetical illustration of his proposition:

> If Abel owns one unit, Baker owns two and Charlie owns three, there are six units but only three proprietors. The figure of 80% must relate to the product of that question.

Mr Thwaite further submitted:

> Predominance attaches to multiple ownership of one unit, rather than to one ownership of multiple units. It is a radical form of democracy, but not an irrational one.

[30] On its face the submission is surprising and one which would lead to startling results. This may be illustrated by expanding Mr Thwaite's illustration. If Mrs Jones is the proprietor of 98 units, Mrs Brown the owner of one unit and Mr Smith the owner of one unit, on Mr Thwaite's approach Jones, Brown and Smith would each have one vote only and the proprietors of two units could out vote the proprietor of 98 units. This would mean that the owner of 98% of the units could not even secure a simple majority, let alone 80%. The result would run counter to any

reasonable concept of voting rights in respect of shared interests in property. The result on the opponents' construction cannot be reconciled with the provision for voting rights prescribed by the Act itself in r 23 of Schedule 2. And it runs counter to the way in which shared matters other than voting are dealt with in the Act. A single example will suffice. Under s 6 unit entitlements are to be fixed on the basis of the relative value of each unit. This is required to determine, amongst other things, the extent of each proprietor's liability for damages, the extent of the proprietor's obligation to contribute to body corporate levies and a proprietor's voting rights on a poll: ss 6(1) and (3)(b), (c) and (f). Using my Jones, Brown and Smith example, I will assume, as may often be the case, that the units have equal value. This would mean Jones would bear 98% of the liability or expense and Brown and Smith 1% each, but on Mr Thwaite's construction they would each have one vote only.

[31] I am satisfied there is nothing in s 42 capable of supporting the construction contended for. The approach is straightforward. Section 42 is concerned with percentages determined in accordance with the correct manner of voting and the correct manner of voting is stipulated in the rules. "[T]hose entitled to vote" are, as defined in rule 23(a) – "each person who is a proprietor".

[32] I should briefly note one further submission for the opponents as to interpretation of the voting rules. It was submitted that, even if the new rule 2.23 is not valid, its wording could still be used as an aid to interpretation of the default rule 23. This was put on the basis that it is part of the matrix of facts the Court may have regard to for the purposes of interpretation. I do not agree. Invalid rules cannot be called in aid as if they were part of the background to a contract. And invalid rules cannot be called in aid to interpret rules stipulated in a statute. In any event, as I have already concluded, there is no difference in the meaning of the default rules and the new rules.

3. Section 42: meaning of "support".

[33] Section 42 has the words "the resolution … is supported by 80% or more". It was submitted for the opponents:

> The numbers, once they are settled, establish voting. They do not establish "support". Section 44 [sic] knows [i.e. has] the word "vote", but uses the general word "support" for the attitude of a proprietor to the resolution. Accordingly, an individualised survey of proprietors is needed.

[34] The practical thrust of this submission was that, although a vote may have been cast in favour of the resolution by Mr Creak in exercise of a power of attorney, the proprietor donor of the power might nevertheless not be a supporter. It was submitted that the application of s 42 will therefore depend on a determination of fact as to the personal attitude of individual proprietors whose votes had been cast by another pursuant to a power of attorney. I do not agree with this submission. The word "supported" cannot be taken out of context and given one only of its several meanings. In the context of s 42, a "resolution … supported by 80% or more of those entitled to vote" obviously means a resolution where the vote in favour is 80% or more.

4. Votes by attorneys or proxies: validity?

[35] Numbers of votes in favour were cast by Mr Creak in exercise of powers of attorney, as a proxy, or as the authorised agent of a company, Gecko Investments Limited (all of which I will refer to collectively as "agency powers"). These appointments are in writing and were put in evidence.

[36] In the written submissions for the opponents, 17 separate arguments were advanced to seek to demonstrate that various agency powers are invalid, or were exceeded, and that the votes in favour pursuant to those purported powers must, therefore, be ignored. In my opinion, most of the arguments do not establish invalidity and those that do are insufficient to reduce the vote below 80% in favour. I will deal with each of the opponents' points, but I will deal first with a shorter route to the conclusion that the votes in favour are over 80%.

[37] The shorter route is based on two facts: the challenge to the validity of agency powers comes from only four people, but to get below 80% at least seven votes in favour must be set aside. In consequence, if the opponents are not entitled to challenge the validity of agency powers other than those they granted, the vote in

favour must remain above 80% as a matter of arithmetic, even if it is established that the four agency powers granted by the four opponents are invalid. As I will explain, this is subject to one qualification in respect of one other vote purportedly exercised by Mr Creak, but this does not alter the arithmetic.

[38] In my opinion the opponents are not entitled to challenge the validity of agency powers granted by other people. All of the agency powers relied on by Mr Creak, save one, are in writing and are in evidence before the Court. The opponents do not allege that the documents are not genuine. None of the other proprietors has challenged the validity of the vote in his, her or its name. The opponents cannot assume a right of challenge on behalf of those other proprietors. The Court is entitled to accept the votes in their names as valid.

[39] The factual detail which supports the arithmetic is as follows. At the time of the June 2007 vote there were, in terms of default rule 23(a), 54 persons who were proprietors entitled to vote. The recorded vote was 49 in favour out of 54 (90.74%). The remaining five votes consisted of two votes against the resolution and three abstentions.

[40] One of the votes against was from one of the opponents, Ms Smith. However, because Ms Smith's vote was against the resolution and because she did not give agency power, her vote does not require further consideration in relation to the percentage. Two opponents, Messrs Combes and Kulma, have challenged votes in favour exercised in their names by Mr Creak.

[41] The other opponent, making up the four opponents on this hearing, is Mr Wells. Mr Wells had been a proprietor and granted a power of attorney to Mr Creak. At a later date, before the June 2007 meeting, he transferred title to his unit to a company called Welsie Properties Limited. Welsie Properties granted a power of attorney to Mr Creak, although Mr Wells says that was done under protest. The power of attorney records that it "was signed under duress due to threat of litigation. The validity of the original power of attorney is disputed." Mr Wells' affidavit does not make it clear, but it appears that Mr Wells, possibly with his wife, is the principal

or sole shareholder of Welsie Properties. Mr Creak purported to exercise a vote in favour of the resolutions in the name of Welsie Properties.

[42] For present purposes I will treat Mr Wells' opposition as that of Welsie Properties Limited, without formally holding that Mr Wells has appropriate authority. I will also assume, without deciding at this point, that the objections of Mr Combes, Mr Kulma and Welsie Properties Limited as to the validity of their powers of attorney are sound objections.

[43] There is a challenge to one other vote in favour which does not come from an opponent, but which goes to the absence of an agency power rather than the validity of an agency power. This concerns Mr Combes' co-proprietor, Mr While. Although Mr Combes granted a power of attorney to Mr Creak, there does not appear to be a power of attorney from Mr While. The explanation for this, looking at the power of attorney granted by Mr Combes, may be that Mr Combes was signing on behalf of a trust, or a trust to be formed. Nevertheless, on the evidence and for present purposes, I will treat the vote purportedly cast on behalf of Mr While as an invalid vote.

[44] The result from this detail and with those assumptions would be four further votes that cannot be counted as votes in favour. This means the votes in favour would be reduced from 49 to 45 out of a total of 54 persons entitled to vote. The result is 83% in support.

[45] For these reasons I hold that the vote on the June 2007 resolution was supported by more than 80% of those entitled to vote.

[46] In case that approach is wrong in law, I will now consider the points advanced by the opponents. These were described in Mr Thwaite's written submissions as "objections". I will list them as such and in the order advanced, including a note of those which were withdrawn.

[47] *Objection 1:* Withdrawn.

[48] *Objection 2: Restraint on alienation*. Clause 19 in the agreements for sale and purchase from the original developer to original purchasers was as follows:

> The Purchaser shall not assign or otherwise transfer the Purchaser's interest in this agreement or transfer the unit hereby sold without first obtaining the consent of the Vendor, which shall not be unreasonably withheld, provided the Purchaser's assignee or transferee provides the Vendor with a Power of Attorney in terms of clause 18 and a Deed of Covenant to carry out the Residential Developments in terms of clause 16 and 17.

[49] The opponents submitted that this clause constituted an unlawful restraint on alienation of property. In consequence, it was submitted, any power of attorney granted by an original purchaser because of the contractual obligation in the agreement for sale and purchase, or obtained from a subsequent purchaser, was also unlawful "to the extent that it prevents the purchaser from alienating any portion of the stratum title".

[50] The proposition does not establish the point of relevance. The point of relevance is whether a power of attorney is invalid. If clause 19 contains an unenforceable provision in respect of a subsequent transfer of a unit, that does not of itself mean a power of attorney granted pursuant to another provision in the agreement for sale and purchase is invalid. The submission for the opponents did not establish the link to produce the result contended for. For that reason I reject the objection.

[51] In any event, in my opinion there is no unlawful restraint on alienation. A provision which seeks absolutely to prevent a proprietor from alienating the proprietor's interest in property is likely to be unenforceable. But there is no rule prohibiting any restriction on alienation of property: see *Elton v Cavill (No. 2)* (1994) 34 NSWLR 289. A reasonable and partial restraint contractually agreed for the protection of a valid collateral objective may be upheld. In my judgment the provision in clause 19 of the agreement for sale and purchase is unobjectionable. The restraint is partial in that it allows for alienation provided a power of attorney is obtained. The provision in clause 19 is for a valid collateral objective and one which the restricted party is bound to facilitate – the extension of the unit development.

[52] Provisions similar to those contained in clause 19 of the agreement for sale and purchase are common-place in contracts dealing with property development in New Zealand. For example, with cross-leases, it is accepted practice for a developer who intends to continue the development after the sale to obtain a power of attorney: *CCH Conveyancing Law and Practice* ¶23-166. It is stated in this text that the agreement for sale and purchase should include the following clauses:

> • The purchaser should be required to deliver to the vendor on or before settlement an executed power of attorney as set out in the cross lease of the existing flat.
>
> • There should be an obligation on the purchaser not to sell, transfer or otherwise dispose of the purchaser's interest in the property prior to the completion of the further flat without obtaining from the disposee of the purchaser's interest a deed of covenant and a power of attorney ... The power of attorney should provide for the appointment of the vendor as the attorney of such disposee in accordance with the terms of the cross lease for the existing flat.

[53] *Objection 3: Exceeding authority*. It was submitted: the powers of attorney were given for the purpose of supporting a particular development plan; what is proposed is different; therefore the powers cannot be used for the purpose of putting that plan into action. This submission raises a question of fact in respect of the use of the power. The submission is not borne out by the facts.

[54] The powers of attorney are, broadly, of two types. One type does not contain any limiting description of the further development in respect of which the power is granted. For example, the power of attorney granted by Mr Combes, one of the opponents, appoints the attorney:

> To act for me in my name … for the purpose of obtaining a Principal Unit Title for any unit or buildings to be erected or constructed on any part of the common area … To sign my name and do and perform such acts, matters and things as may be necessary for the deposit of **any** unit title plan …

[55] Powers of this broad nature are consistent with the obligation contained in the original agreements for sale and purchase, which are as follows:

> The Purchaser shall … enter into a power of attorney in favour of the Vendor… appointing such person as the Purchaser's true and lawful attorney to:
>
> …

(b) execute **any** plans and obtain **any** consents that shall be required to enable the deposit of the Complete Unit Plan, or any Substituted Proposed Unit Plan or **any** Plan of Redevelopment.

[56] The other type of power of attorney grants power to do things necessary "to complete development or redevelopment of the property … in accordance with the plan of redevelopment attached hereto including and without limitation …". Most of the powers of attorney are expressed this way, or to similar effect because they are restricted by reference to a particular plan attached. It is the limiting provision in these powers of attorney which needs to be compared with the terms of the resolution at the June 2007 meeting. The simple fact is that the copy of the plan attached to each of the powers of attorney is identical to the copy of the plan which is part of the June 2007 resolution. (For the record I should note there is an immaterial difference in respect of the copies used. The copy of the plan attached to the June 2007 resolution is annexure 'B' to the affidavit of Craig Andrew Leishman sworn 13 September 2007. The plan, consisting of five pages, is a survey plan entitled "Proposed Unit Development on Lot 2 DP146737" and signed by the surveyor on 6 June 2001. The power of attorney granted by one of the opponents, Mr Kulma, is annexure 'N' to the affidavit of Mr Creak sworn on 16 February 2006. The copy of the "plan of redevelopment" attached to his power of attorney is the same as the copy attached to other powers of attorney of this type. It is also the same as the copy attached to the June 2007 resolution except that the signature of the chief surveyor appears on the resolution copy, with the date 7 March 2002, but does not appear on Mr Kulma's copy. This makes no difference to the point in issue.)

[57] The opponents have expressed concerns on matters such as design in respect of Mr Creak's proposed extension, and there may have been changes in this regard at various points. These matters, however, do not bear on the question as to whether or not the power has been used for the authorised purposed as defined in the power of attorney. I am satisfied that the power has been used in accordance with its terms. Further, for reasons earlier dealt with, the objection here, even if it had merit, would not make any difference to the question whether the vote in favour exceeded 80%.

[58] *Objection 4: Duress*. It was argued that Welsie Properties Ltd and Mr Kulma may have felt compelled to vote for the development; specifically, that they may

have given powers of attorney as they were misled into thinking they had to. The submission amounted to a plea of duress. Because it relates to the votes of two opponents only (treating Welsie Properties Limited as the same as Mr Wells) the correctness of the submission will make no difference to the result. However, I will deal with it briefly.

[59] The Privy Council has stated that "Duress, whatever form it takes, is a coercion of the will so as to vitiate consent": *Pao On v Lau Yiu Long* [1980] AC 614 at 635. Duress has been considered in terms of whether or not the action of the person claiming relief can properly be regarded as voluntary. The will need not be completely overborne, but the illegitimate pressure must actually coerce the will of the complainant.

[60] The fact that the parties may not support the development does not mean the pressure was illegitimate and caused them to vote against their will. In my judgment the evidence falls short of the proof required. Mr Kulma said he would, if free from "restraint", be actively opposing the development. I take "restraint" to mean contract. This is not evidence of illegitimate pressure. Mr Wells made the same complaint, but also stated that Mr Creak advised him that if he did not sign the power of attorney, Mr Creak would commence litigation against him, claiming $2 million plus costs. Mr Wells was "not convinced" of Mr Creak's right to such damages, but indicated that he did not take any legal advice, and signed because he could not afford to take the risk. Mr Kulma gave no evidence of being pressured into signing the power of attorney. While Mr Wells gave some evidence of this, it does not establish that the prospect of litigation was sufficient to overcome his will.

[61] *Objections 5 & 6:* Withdrawn.

[62] *Objection 7: The powers of attorney are not irrevocable, despite purporting to be*. In his submissions Mr Thwaite relied on the Property Law Act 1952. The 1952 Act was in force at the date of the hearing. However, the Property Law Act 2007 came into force on 1 January 2008. The 2008 Act applies to instruments coming into operation before, on, or after 1 January 2008: s 8. It therefore applies in this case and I will refer to it.

[63] Mr Thwaite submitted that the powers of attorney contain a provision to the effect that it is irrevocable but this is incorrect as a matter of law. Assuming the submission is correct, it will not mean the power of attorney is invalid. And, as a matter of fact, there is no evidence of any notice of revocation, or purported revocation, from a sufficient number of donees of powers of attorney to raise a question as to whether the valid vote in favour was below 80%.

[64] Additionally, the foundation for Mr Thwaite's submission is, with respect, flawed. He relied on ss 136 and 137 of the Property Law Act 1952. These have been replaced by s 21 of the 2008 Act, but s 20 is also relevant.

[65] Section 20 of the 2008 Act provides:

> (1) A power of attorney continues in force until notice of an event revoking the power is received by the attorney.
>
> (2) Subsection (1) applies unless the power of attorney provides otherwise.

[66] Section 21 provides:

> (1) Subsections (2) and (3) apply in favour of a purchaser.
>
> (2) An irrevocable power of attorney given for valuable consideration is not revoked by notice of an event that would otherwise revoke the power of attorney if the notice is received when the power of attorney cannot be revoked.
>
> (3) An irrevocable power of attorney not given for valuable consideration is not revoked by notice of an event that would otherwise revoke the power of attorney if the notice is received during—
>
> > (a) the period of 1 year after the date of the instrument; or
> >
> > (b) any shorter period for which the instrument is expressed to be irrevocable.
>
> (4) In this section,—
>
> **event** includes the death, mental deficiency, or bankruptcy of the donor of a power of attorney
>
> **irrevocable power of attorney** means a power of attorney that is expressed in the instrument by which it is given to be—
>
> > (a) irrevocable; or

(b) irrevocable for a fixed time

purchaser includes a lessee or mortgagee, or other person who, for valuable consideration, takes or deals for any property.

[67] Mr Thwaite submitted that the provisions in favour of purchasers contained in s 21 support his submission that the powers of attorney in this case were wrongly expressed to be irrevocable. Section 21 (and the former ss 136 and 137) do not support the submission. Section 21 is concerned with powers of attorney granted to purchasers. This case is concerned with powers of attorney granted by purchasers to the vendor. Additionally, as ss 20 and 21 make clear, powers of attorney may be expressed to be irrevocable, or not revocable except in defined events. The powers of attorney in this case provide, in essence, that they are irrevocable until the attorney resigns or the redevelopment has been completed. Those are lawful provisions.

[68] *Objection 8: Absence of agency authority*. This concerns Mr Combes' co-owner of unit 12, Mr John While. As discussed at [43] above, there is no evidence of an agency authority (power of attorney or proxy) from Mr While to Mr Creak. Mr Creak does have a power of attorney from Mr Combes and it appears that Mr Creak's vote pursuant to that power was treated as a vote in favour by Mr While as well as by Mr Combes. I am satisfied on the evidence that the apparent vote in favour in the name of Mr While should not be counted.

[69] *Objection 9: Conditional power of attorney from Mr Combes?* A clause in the power of attorney from Mr Combes says that the power "shall be effective only if the Rules of the Body Corporate record prior to the deposit of any substituted or redevelopment plan" a provision for a boundary set-back in favour of Mr Combes' unit. The necessary amendment to the body corporate rules does not appear to have been effected. It is therefore arguable that the power of attorney from Mr Combes could not be used by Mr Creak. There is an alternative argument that it could be used, but with the effect of use suspended pending amendment to the body corporate rules. However, because the success on this objection, standing alone or added to any other successful objections, would not reduce the vote below 80%, I do not consider it necessary to resolve the issue.

[70] *Objection 10: Conditional power of attorney from Welsie Properties Limited?* The power of attorney granted by Welsie Properties Limited to Mr Creak (and signed by Mr Wells) contains the following provisions:

> 8. This power of attorney shall be deemed invalid if it is shown that the original power of attorney from Daniel Wells in favour of Bill Creak is shown to be invalid.
>
> 9. This power of attorney was signed under duress due to threat of litigation. The validity of the original power of attorney is disputed.

[71] From the evidence before me, I am not satisfied that the original power of attorney from Mr Wells was invalid. There is an affidavit from Mr Wells referring to his providing the power of attorney to Mr Creak. There is no mention of anything untoward in that regard. And the power of attorney itself (annexure 'H' to Mr Creak's affidavit of 13 September 2007) appears unremarkable. I conclude that there is no basis for applying clause 8 of the Welsie Properties' power of attorney. The question of duress, noted in clause 9, was dealt with in paragraph [58] above.

[72] *Objection 11: Powers of attorney not assignable.* Two powers of attorney purportedly used by Mr Creak were not granted directly to him. The power of attorney from Mr Combes appoints as his attorney "Eden Studios Limited [the original developer], Eden Studios Limited (in liquidation) and/or its or their Nominee". Eden Studios Limited (in liquidation) assigned to Mr Creak "all of its rights in relation to the property at 3 Akiraho Street, Mt Eden" (i.e. the property in question).

[73] The questions raised by this objection are, in this case, ones of construction. Mr Combes granted a power to Eden Studios Limited and to such other person as might be nominated by Eden Studios Limited. Mr Thwaite did not point to any legal principle invalidating a power of attorney in those terms. The question then is whether the assignment from Eden Studios Limited (in liquidation) of its "rights in relation to the property" includes nomination in terms of the power of attorney. It is the assignment that Mr Creak relies on. The assignment needs to be construed in its relevant context. It was recorded in a short letter drafted in an essentially informal way by the liquidator. The plain intention was to transfer all relevant powers to Mr Creak, although literally it is only "rights" that are referred to. I am satisfied that the

intention of all parties, as recorded in Mr Combes' power of attorney as well as in the liquidator's informal letter of assignment, was to transfer Mr Combes' power of attorney from Eden Studios Limited to Mr Creak, the latter being nominated by the former. If I am wrong in that conclusion, this again is an objection which, as a matter of arithmetic, will make no difference to the percentage result.

[74] The other power of attorney involving an assignment question is one from Dublin Limited. The power of attorney was to "Katherine Irene Reeves or her nominee or assignee ("the Attorney")". The assignment from Ms Reeves to Mr Creak is as follows:

> I Katherine Irene Reeves hereby assign all my rights in relation to the powers of attorney held for propertys [sic] at 3 Akiraho Street to Bill Beta Creak.

[75] I am satisfied that there are no grounds for setting aside the vote passed by Mr Creak in the name of Dublin Limited for two reasons; there is no objection from Dublin Limited and there was an effective transfer of a power which expressly permitted assignment.

5. Other points for opponents

[76] Some proprietors are companies. Mr Creak voted in favour of the June 2007 resolution on behalf of two companies. One was Dublin Limited, just dealt with. The other is a company controlled by Mr Creak, Gecko Investments Limited. Mr Thwaite submitted that these companies had not given authority to Mr Creak in the manner required by the body corporate rules. The rule relied on is rule 2.23(c) in the new rules. Because I have held that the applicable rules are the default rules, the argument cannot succeed; there is no rule equivalent to new rule 2.23(c) in the default rules. In any event, new rule 2.23(c) simply prescribes a procedure by which a company may appoint a person to vote on its behalf at a body corporate meeting with notice to be given by the company to the body corporate. This does not preclude voting pursuant to a power of attorney as occurred in the case of Dublin Limited. In the case of Gecko Investments Limited there is ample evidence of sufficient authority having been given by Mr Creak's own company to Mr Creak to

conclude that there is no substance in the objection. And, of course, it is another objection made in respect of a proprietor not represented by Mr Thwaite and which has raised no objection.

[77] Mr Thwaite submitted that new rule 2.26 does not permit voting pursuant to a power of attorney. If this was the relevant rule, as opposed to the default rules, the provision relied on does not prevent voting pursuant to a power of attorney. The relevant part of new rule 2.26 merely provides: "any vote to be cast at a general meeting of the body corporate may be exercised personally or by proxy". Voting by power of attorney is neither expressly nor impliedly prohibited. And it is doubtful that such a restriction would be enforceable, but this does not require further consideration.

6. Result on the first main issue: the June 2007 resolutions were supported by more than 80% of those entitled to vote?

[78] On these alternative grounds I hold that the June 2007 resolutions were supported by more than 80% of those entitled to vote.

[79] The arithmetical analysis which assumes that three of the opponents' votes and that for Mr While should be set aside (paragraphs [39]-[44]), results in 83% in favour. My findings on the opponents' specific objections result in one vote being set aside (that of Mr While: paragraphs [43] and [68]) and one vote on which I made no finding (that of Mr Combes on the condition issue: paragraph [69]). The established votes in favour on this approach are 47 out of 54; that is 87%.

SHOULD THE COURT EXERCISE ITS DISCRETION UNDER S 42 IN FAVOUR OF PLAINTIFF?

[80] The second r 418 issue is whether the Court should exercise its discretion under s 42 in favour of the plaintiff. Determination of this issue is to be left for trial if I consider that the merits of the resolutions are relevant. Whether the merits are relevant is therefore the first matter to be considered.

[81] The question whether the Court should try to assess the merits of a resolution on an application under s 42 was carefully considered by Jaine J in *Re Bell* (supra). Jaine J held that the Court should not consider the merits. *Re Bell* was considered by Heath J in *World Vision of New Zealand Trust Board v Seal* (supra) at [46]. Heath J agreed with the analysis of Jaine J, subject to two qualifications which do not limit the essential conclusion in *Re Bell*. The relevant passages in *Re Bell* are set out in the *World Vision* judgment at [46], with Heath J's further observations, as follows:

> [46] In Re Bell Jaine J considered ss 42 and 43 of the Act in the context of an application under s 42. At pp 5 – 7 of his judgment, Jaine J said:
>
> > "Section 42 gives no guidance to the Court as to the principles upon which it is to act. There is no report of the section having been considered by this Court before. This Court is of the view that it is insufficient for an applicant to do no more than provide evidence which establishes that the resolution was supported by 80 per cent or more of those entitled to vote. If that were so then that would reduce the Court merely to a rubber stamp role. It was for that reason that the hearing was adjourned to enable further information to be provided. But on the other hand neither, in the view of this Court, should the wishes of a large majority democratically and properly determined, be thwarted by the views of a small minority, and the section is clearly designed to prevent that, enabling a Body Corporate to organise its affairs according to the wishes of a substantial majority.
> >
> > *The merits of the matter are best determined by those who are affected by it and have personal knowledge of it and after the matter has been considered by them with the opportunity for debate at a properly convened meeting of the Body Corporate. It should not be for the Court to substitute its view on the merits of the proposal and this Court is not persuaded that the reasons for opposing the motions must be examined with a view to considering whether the minority view on the merits of the proposal should be upheld with the result that the wishes of the majority could not be given effect to.*
> >
> > *This Court's attention should be directed towards the procedures that led to the passing of the resolutions rather than the merits of them and a consideration of whether there was some material that could justify the decision, even though a contrary view was tenable. If there was an irregularity or impropriety in the procedures followed or it was apparent that there was no information upon which any reasonable person could reach the decision contained in the resolutions, then this Court may consider refusing an order sought under s 42 even though the required majority was obtained.*
> >
> > *Section 42 covers management decisions, and the view is repeated that with a general provision of this nature the merits of the matter are best determined by those who are affected by it.*

> *If the Court was required to go further and inquire into the reasons for dissent then it could be expected that the section would say so. Such a direction is contained in the section which follows. Section 43 provides opportunity for relief for a minority affected by a decision of a specified majority. The Court is given power to declare a majority decision of no effect on the grounds that 'the effect of the act would be inequitable for the minority'. . . There is no similar direction in s 42 to consider the effect of a decision on a dissenting minority." (Emphasis added.)*

> Accordingly, Jaine J's view was that s 42 was limited to a consideration of procedural or motivational irregularities or improprieties rather than the merits of a decision; whereas under s 43, by dint of the more specific wording employed, the Court could consider the merits. Jaine J's view on s 42 is supported by reasoning of Gallen J's judgment in a case under s 205 of the Companies Act 1955 (dealing with voting rights for creditors on a proposed scheme to reconstruct a company), namely Re Farmers' Co–operative Organisation Society of New Zealand Ltd [1992] 1 NZLR 348 at p 354; see also Whiteman v UDC Finance Ltd [1992] 3 NZLR 684 (CA) at p 691 (creditor voting rights in a proposal under Part XV of the Insolvency Act 1967). With two qualifications, I agree with Jaine J's analysis. First, proprietors in a unit development should not be treated as belonging to a particular class of proprietor. In consequence, a motivation to vote in a particular way will rarely be called into question if fraud has not been established: see Whiteman at p 691. Secondly, it would be unwise to exclude use of the s 42 discretion in cases involving apathetic proprietors not prepared to participate in the democratic process. In such a case there is no real adverse view on the merits to consider.

[82] I also agree with Jaine J's analysis and conclusion. The question then is whether I should exercise my discretion in favour of Mr Creak leaving aside any question of the merit of the proposal. Jaine J referred to some relevant considerations other than merit. In respect of those I find that there is no evidence of procedural impropriety or irregularity. I further find that there was sufficient information provided for the purposes of the June 2007 resolution to enable those entitled to vote to reach a decision.

[83] Those factors favour Mr Creak. There are more. What Mr Creak proposes, and what the resolution would authorise, is a project which was planned from the beginning of this unit development. All of the original purchasers of units were aware of what was proposed.

[84] Further, at the June 2007 meeting, there were three abstentions and only two votes against the resolution. For the purposes of determining whether the vote reached 80% in favour, the abstentions cannot be counted in favour. But in

considering my discretion, I am satisfied that regard can be had to the fact that those three proprietors did not oppose. The same point was made by Heath J in the *World Vision* case as the second of his two qualifications of what Jaine J said.

[85] For the purposes of the discretion, the abstentions can be taken as indifference or an absence of opposition. This is confirmed by the absence of the abstainers as opponents on this rule 418 hearing. If the three abstainers are added to the established votes in favour (47 – see paragraph [79]) the result is 50 out of 54 persons entitled to vote being in favour or not opposed, or at least indifferent; this is a total of over 92% of those entitled to vote. And if the count is done on the basis that there is one vote for each unit, the result is over 91% in favour or not opposing.

[86] For these reasons I am satisfied that the broad discretion provided in s 42 should be exercised in favour of Mr Creak.

RESULT

[87] There is an order that the resolutions passed at the meeting on 28 June 2007 of the proprietors of the units in unit plan 180838 under the Unit Titles Act 1972 shall be deemed to have been passed unanimously for the purposes of s 44(4) of the Unit Titles Act 1972.

[88] The plaintiff is entitled to costs. Those costs are to be paid by the defendants to the rule 418 hearing, described in this judgment as "opponents"; namely, the second defendants Mr Combes and Mr Kulma, the third defendant and the fourth defendant.

[89] The plaintiff is to file a memorandum as to costs within 14 working days. The defendants to the r 418 application are to file any memorandum within a further 14 days.

[90] Leave is reserved to either party to apply for any further or supplementary relief that may be required as a consequence of the principal order.

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Peter Woodhouse J