Guardian Retail Holdings Ltd v Buddle Findlay

High Court Auckland CIV-2013-404-1448; [2013] NZHC 1582
22 May, 27 June 2013
Courtney J

Law practitioners — Requirement of independence — Inherent jurisdiction — Jurisdiction to restrain legal practitioners from acting — Whether conflict of interest — Defending own advice — Unit Trust — Body Corporate — Body Corporate Committee — Whether Committee has personal liability — Vicarious liability of Body Corporate — Whether Body Corporate could ratify conduct of Committee — Ratification — Effect of ratification — Lawfulness of ratification — Legality of Body Corporate funding Committee's legal costs — Whether unit title holder to fund legal costs of Committee — Lawyers and Conveyancers (Conduct and Client Care) Rules 2008, rr 1.2, 2.2(7) and (8), 6 and 13; Unit Titles Act 1972, ss 15 and 16; Unit Titles Act 2010, ss 14(4), 51(2), 78, 84, 115, 116, 117, 118, 119, 120, 121 and 210; Lawyers and Conveyancers Act 2006, s 4

GRH Ltd is a member of a Body Corporate. GRH Ltd sued the Body Corporate and members of the Body Corporate Committee alleging breaches of the Body Corporate Rules and acts of misfeasance. The Body Corporate has purported to ratify the conduct the subject of the substantive litigation. Buddle Findlay are the solicitors acting for the Body Corporate and the Committee. Buddle Findlay has been closely involved in the dispute and had advised the Body Corporate and the Committee and represented both in the substantive proceedings.

In issue is the lawfulness of the ratification by the Body Corporate of the Committee's acts. Buddle Findlay advised both during the ratification process and the legitimacy of that advice was a real issue in the litigation. Based on further advice from Buddle Findlay, the Body Corporate resolved to stand behind the Committee members and to meet their defence costs. As a result, GRH Ltd had been to date required to contribute 21 per cent to the Committee members defence costs, by virtue of its unit entitlement, as well as meeting its own costs against the Committee and Body Corporate. GRH claimed that Buddle Findlay was in a conflict of interest between the Body Corporate and the Committee, such that its own independence was compromised. In addition, GRH Ltd claimed that the Body Corporate's funding of the Committee was ultra

vires the Body Corporate and not in the Body Corporate's interests, there being a serious question whether it could indemnity the Committee, which in turn depended on the validity of the impugned ratification.

Held (restraining Buddle Findlay from acting further and restraining the Body Corporate from funding the Committee)

1 Under the Unit Titles Act 1972 and the Unit Titles Act 2010, a Body Corporate is vicariously liable for breaches of its obligations occasioned through the conduct of its Committee. However, the Committee members have personal obligations to act in accordance with the Unit Title Acts and the Body Corporate rules.

Manning v Body Corporate 126411 HC Auckland CP89/SD01, 29 November 2001 approved.

2 Under its inherent jurisdiction, the High Court will restrain counsel or solicitors from appearing, in circumstances where they are not observably independent, such as where the conduct of the counsel or solicitors are an integral part of the other party's complaint or the client has been sued in circumstances where he or she was acting on the advice of their counsel or solicitors and it is effectively that advice which is in issue. In this regard the professional obligations imposed by the Conduct and Care Rules will usually be relevant in considering whether counsel or solicitors should be restrained from acting.

Kooky Garments Ltd v Charlton [1994] 1 NZLR 587 (HC) followed.

3 The advice of Buddle Findlay regarding the ratification process was sufficiently in issue in the substantive proceedings, as to compromise its independence.

4 Although an agent who incurs liability for his wrongful acts or default is not entitled to an indemnity from its principal, the position may be different after ratification.

Thacker v Hardy (1878) 4 QBD 685 considered.

Spencer-Inight v Johnston [1999] 3 NZLR 103 (HC) considered.

5 A serious question arose as to the lawfulness of the ratification and the balance of convenience was in favour of restraining the Body Corporate from contributing to or funding the costs of the Committee.

Cases referred to in judgment

Accent Management Ltd v Commissioner of Inland Revenue [2013] NZCA 155.

Black v Taylor [1993] 3 NZLR 403 (CA).

Clear Communications v Telecom Corporation of New Zealand Ltd [1999] 14 PRNZ 477 (HC).

Kooky Garments Ltd v Charlton [1994] 1 NZLR 587 (HC).

Manning v Body Corporate 126411 HC Auckland CP89/SD01, 29 November 2001.

Mutton v West Cork Railway (1883) 23 Ch D 654.

New Zealand Farmers Co-operative Distributing Co Ltd v National Mortgage and Agency Co of New Zealand Ltd [1961] NZLR 969 (SC).

Spencer-Inight v Johnston [1999] 3 NZLR 103 (HC).

Thacker v Hardy (1878) 4 QBD 685.

Text referred to in judgment
Peter Watts and FMB Reynolds *Bowstead on Agency: Bowstead and Reynolds on Agency* (19th ed, Sweet & Maxwell, United Kingdom, 2010) at 7-062.

Application
This was an application for restraining orders.

Editorial Note: See also *Thurlow v Clements* [2010] NZAR 172 (HC) Courtney J and *Black v Giltech Precision Castings (2004) Ltd* [2011] NZAR 539 (HC) French J, where orders were made restraining legal practitioners from acting for parties.

DJ Chisholm for the applicant.
GW Wall for the respondents.

COURTNEY J.
Introduction
[1] Guardian Retail Holdings Ltd (GRH) is a member of Body Corporate 323599. It has brought proceedings against the Body Corporate and three members of the Body Corporate Committee, alleging various breaches of the Body Corporate rules and acts of misfeasance.[1] The Body Corporate has purported to ratify the acts that are the subject of the allegations. It has also resolved to stand behind the respondent committee members and meet their defence costs. Buddle Findlay represents both the Body Corporate and the respondent committee members in the substantive proceedings.
[2] GRH asserts that there is a conflict of interest between the Body Corporate and the respondent committee members that prevents Buddle Findlay from properly discharging its obligations to the Court and puts it in breach of certain of the Conduct and Client Care Rules.[2] It says, further, that Buddle Findlay's own independence is compromised because its advice is in issue in the proceedings. GRH also asserts that the Body Corporate's funding of defence costs for the respondent committee members is ultra vires the Body Corporate and not in the Body Corporate's interests.
[3] In this originating application GRH seeks orders restraining:

(a) Buddle Findlay from continuing to act; and
(b) the Body Corporate from funding or contributing to the defence costs of the respondent committee members.

[4] The Body Corporate and the respondent committee members oppose the application. Their main contention is that because of the ratification by the Body Corporate of the respondent committee members' acts, their interests are aligned and there is no, or no significant, conflict between them.
[5] Buddle Findlay appeared at the hearing of the application on behalf of the Body Corporate and the respondent committee members.

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1 CIV-2012-404-2525.
2 Lawyers and Conveyancers (Conduct and Client Care) Rules 2008.

Although named as a respondent, it did not seek to be heard in its own right.

The substantive proceedings

The history of the dispute

[6] The building at the centre of the dispute is the Guardian building at 101–107 Queen Street, Auckland. It was redeveloped in about 2003 by Guardian Property Holdings Ltd which is related to GRH through its common director, Gregory Scott Wilkinson. Of the 176 principal units, seven are commercial units situated on the ground or basement floors. The remaining 169 are residential and located on the first to eighth floors. The respondent committee members own residential units. GRH owns all but one of the commercial units, which gives it a 21 per cent ownership interest in the Body Corporate.

[7] The developer endeavoured to put in place Body Corporate rules that would relieve the owners of the commercial units of the cost of servicing and maintaining the common areas and facilities that were used only by the residential unit owners. These included r 2.2(7) and (8), which departed from the default rules in the Unit Titles Act 1972 (UTA 1972) by providing for levying other than by reference to unit entitlement.

[8] The current dispute centres mainly around the levying for water and gas. Except for unit 6 the commercial units have their own water and gas supply. Prior to 2011 the Body Corporate administered water and gas supply to the residential units and to unit 6 and charged only the owners of those units for the utilities cost, in accordance with the Body Corporate rules as they then stood. The result was that GRH was not levied for these costs.

[9] In 2011, however, the Body Corporate received legal advice to the effect that the rules relating to the way levies were set might be ultra vires. One of GRH's complaints is that, in seeking advice, the Body Corporate Committee did not specifically direct its lawyer's attention to the issue of costs such as gas that were not truly common because they were not supplied to all the units. After obtaining further advice from another firm (Grove Darlow) the Body Corporate Committee concluded that all levies should be raised on the basis of unit entitlement.

[10] The Committee also began to take steps to replace the existing Body Corporate Secretary, Crockers, including inviting a prospective replacement, Mr Leishman of Boutique Body Corporate Ltd, to attend committee meetings. GRH's representative on the Committee, Aran Blackmore, was excluded from a Committee meeting in November 2011 because of a perceived conflict of interest. He subsequently resigned from the Committee. The remaining members proceeded to terminate Crockers' contract and engage BBCL in its place. GRH maintains that this contravened cl 2.30 of the rules which provided for the removal of a secretary only at an annual general meeting or an extraordinary general meeting called for that purpose.

[11] In January 2012 the Committee resolved to reverse the levies for the 2010–2011 year set by members at the annual general meeting in 2011 and to re-set them, levying all members, including GRH, on a unit entitlement basis.

GRH commences proceedings and the Body Corporate counterclaims

[12] Efforts to resolve the dispute were unsuccessful and, faced with the prospect of debt collection steps, GRH commenced the substantive proceedings in May 2012. It alleged breaches by the Body Corporate and the respondent committee members of UTA 1972 and the Body Corporate rules. As against the respondent committee members it also alleged failure to act in good faith in carrying out their duties as committee members, including by acting to further their own interests as proprietors of residential units.

[13] In its statement of claim GRH sought declarations that the reversal and resetting of the 2011 levies were ultra vires, as well as declarations regarding the legality of excluding Mr Blackmore from a committee meeting, terminating Crockers' appointment and incurring unauthorised legal and body corporate secretarial costs. In addition, GRH sought specific monetary relief from the respondent committee members through an inquiry into damages and orders that they pay those to GRH.

[14] The Body Corporate and the respondent committee members, both represented by Buddle Findlay, filed a statement of defence. In addition, the Body Corporate counterclaimed and sought, by way of summary judgment, declarations that the Body Corporate rules relating to levying were ultra vires and judgment for historical levies for the period 2006–2010 which it claimed GRH had been undercharged for. These levies totalled $305,469.89. GRH accepted that the Body Corporate rules were ultra vires. However, it resisted the claim for historical levies and the Body Corporate's application for summary judgment was dismissed because the levies were being sought without any Body Corporate resolution to support them.

The Emergency General Meeting and ratification

[15] The Body Corporate Committee held an emergency general meeting (EGM) on 12 February 2013. Resolutions were passed ratifying the reversal/resetting of the levies, the consulting of Grove Darlow and Wilson Harle, the termination of Crockers/engagement of BBCL and exclusion of Mr Blackmore from a Committee meeting. The Body Corporate also resolved to engage Buddle Findlay to represent it and the respondent committee members in the litigation.

[16] GRH asserts that the information circulated by the Committee for the EGM wrongly characterised the dispute as being between the residential owners on the one hand and GRH on the other and gave inaccurate and inadequate disclosure of the legal and other costs incurred by the respondent committee members up to and including the summary judgment application.

[17] On the basis of the resolutions passed at the EGM the Body Corporate and respondent committee members filed an amended statement of defence and counterclaim for $305,469.89 for the revised levies for the years 2006–2010 which substantially comprised the supply of gas and water. A second counterclaim seeks levies raised in the 2012 year of which only partial payment has been made, asserting that a further $108,584.52 remains outstanding.

GRH's amended claim

[18] Consequent upon the resolutions passed at the EGM, GRH filed an amended statement of claim with four causes of action. The first focuses on various alleged breaches of UTA 1972, Unit Titles Act 2010 (UTA 2010), the Body Corporate rules and resolutions passed by the Body Corporate at the 2013 Annual General Meeting. These breaches generally reflected the conduct ratified (or purportedly ratified) at the EGM, including the reversal/resetting of levies, termination of Crockers and incurring unauthorised legal costs. It is specifically alleged that the respondent committee members acted so as to advance their personal interest as residential unit owners. GRH seeks declarations as to the validity of these acts and resolutions, orders for reimbursement of sums levied on it, an inquiry into damages and orders that the respondent committee members reimburse the Body Corporate for legal costs incurred either without authority or for their own benefit.

[19] The second cause of action relates to the resolutions passed at the EGM purporting to ratify the respondent Committee's conduct. This cause of action is directed towards relief under s 210 UTA 2010, including the funding of the respondent committee members' defence costs.

[20] The third cause of action relates to a special levy purportedly raised by the Body Corporate on or about 21 February 2013 said to be ultra vires the Body Corporate and to prefer the residential owners over the commercial owners. It is asserted that the levy was raised in bad faith.

[21] The fourth cause of action asserts an invalid effort by the committee to prevent or preclude free communication between unit owners by requiring unit owners to use the Body Corporate only as a conduit for communications.

[22] In its defence the Body Corporate maintains that it was entitled and obliged to reverse and reset the 2011 levies and that the resolutions passed at the EGM are valid. The respondent committee members' defence is that they were entitled and obliged to take the actions they did in relation to the incurring of legal expenses and the change of Body Corporate secretary and that they acted in good faith in doing so.

The relationship between a body corporate and members of the body corporate committee

[23] GRH's application raises questions about the relationship between a body corporate and members of a body corporate committee. A body corporate has only the powers conferred and obligations imposed on it by statute. It may only do acts that are "for the purpose of performing its duties or exercising its powers".[3] Those powers and duties are defined in s 84. The two powers that are particularly relevant in this case are the power to levy and the power to spend. Under both UTA 1972 and the UTA 2010 the power to levy is conferred for the specific purpose of maintaining and administering the common property.[4] In the present case, the Body Corporate's rules limit the power to spend to $5,000 without the authority of an annual general meeting.

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3 Section 78 Unit Titles Act 2010.

4 Sections 15 and 16 Unit Titles Act 1972 and 115–121 Unit Titles Act 2010.

[24] A body corporate that has a body corporate committee exercises its powers through its committee. It is vicariously liable for breaches of its obligations occasioned through the conduct of the committee. However, the committee members themselves have personal obligations to act in accordance with the relevant statutory powers and rules. Breaches by them of those rules may result in personal liability in two ways. First, the body corporate has a right of action against the committee members concerned for ultra vires acts that result in liability to the body corporate. Secondly, other members of the body corporate may look to individual committee members for losses caused by breaches of their duties.

[25] Counsel were unable to point to any case in which members of a body corporate committee had been sued successfully. However, in *Manning v Body Corporate 126411*, Master Faire refused to strike out such a claim on the basis that the legislation envisaged that committee members should be personally liable for their own breaches of the rules:[5]

> [69] Finding that the committee, and individual committee members, are not bound by the rules would undercut the statutory scheme for control and administration of the Body Corporate. A proprietor who had suffered loss as a result of a breach of the rules by the committee would have an action against the Body Corporate. This is insufficient, however. By virtue of s 14(4) of the Act, individual proprietors, including the plaintiff in this action, are liable to pay any sum awarded against the Body Corporate. This substantially diminishes the worth of the proprietor's ability to sue the Body Corporate.
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> [70] The committee exercise the powers and duties of the Body Corporate ... Accordingly individual committee members must be under a duty to perform the duties of the Body Corporate. Where the rules are breached the Body Corporate has breached the rules and the committee members have breached their obligation to abide by the same rules. Any other construction would render a court order enforcing the rules, or a variation of the rules by the proprietors and the committee itself, nugatory. The committee members could act as they saw fit, breaching rules and asserting that the Body Corporate was exclusively liable.
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> [71] The Act does provide mechanisms for controlling wayward committee members – voting procedures, minority relief, and the appointment of an administrator. However, this does not count against holding the committee members as being under a duty to comply with the rules that bind the Body Corporate. The Act itself contemplates committee members being under a duty to obey the rules. Section 51(2) makes it an offence for committee members to knowingly infringe the rules. This indicates that the committee members are under a duty above and beyond their obligations as proprietors to obey the rules.
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> [72] Although the rules do not explicitly state that the committee members are directly bound by the rules of the Body Corporate (Rule 4 speaks only of the committee) this is an inescapable inference to be drawn from the Act and the rules.

[26] I respectfully agree with the reasoning in that case. Individual members of a body corporate must act in accordance with the body

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5 *Manning v Body Corporate 126411* HC Auckland CP89/SD01, 29 November 2001.

corporate rules and are personally exposed for their wrongful acts. If that were not the case then, as Master Faire pointed out, there would be no constraint on committee members and, importantly, any claim brought by a member of the body corporate would be devalued by the fact that the member would be required to meet a proportion of the claim himself.

Should Buddle Findlay be restrained from acting?

The relevant principles

[27] It is within the inherent jurisdiction of this Court to restrain a counsel from acting if the interests of justice so require.[6] The Court's concern is with the efficient and effective administration of justice and the need to ensure public confidence in the judicial system. A conflict of interest that prevents counsel discharging his or her professional obligations to the client undermines this purpose and may result in counsel's removal. In this regard the professional obligations imposed by the Conduct and Client Care Rules will usually be relevant in considering whether counsel should be restrained from acting.[7] Compliance with these rules is required by s 4 of the Lawyers and Conveyancers Act 2006.

[28] Rule 6 of the Conduct and Client Care Rules relevantly provides that:

> 6.1 A lawyer must not act for more than one client on a matter in circumstances where there is more than negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients.
>
> 6.1.1 Subject to the above, a lawyer may act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained.

[29] Rule 1.2 defines informed consent as:

> Consent given by the client after the mater in respect of which the consent is sought and the material risks of and alternatives to the proposed course of action have been explained to the client and the lawyer believes on reasonable grounds, that the client understands the issues involved.

[30] Further, counsel may be restrained from acting where counsel's advice becomes an issue in the proceeding in a way that compromises his or her independence, a point considered by Thomas J in *Kooky Garments v Charlton*:[8]

> Where the acts or omissions of the law firm, including situations where the actions of the client are based on advice given by the solicitors, are at the heart of the question in issue, the firm is, in a real sense, "defending" its actions or advice. There is, in such circumstances, a danger that the client will not be represented with the objectivity and independence which the client is entitled to and which the Court demands. There is no sound reason to presume or accept that the solicitors must first have the opportunity to

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6 *Black v Taylor* [1993] 3 NZLR 403 (CA) at 408; *Accent Management Ltd v Commissioner of Inland Revenue* [2013] NZCA 155.

7 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

8 *Kooky Garments v Charlton* [1994] 1 NZLR 587 (HC) at 590.

> clarify whether their client is liable as a result of their actions or of acting on their advice before confronting the conflict.
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> What I have said, of course, does not apply when the advice given is unrelated to liability or the question in dispute. Advising a client to prosecute or defend a claim does not attract these observations. They are restricted to the situation where the acts or omissions of the solicitors are an integral part of the other party's complaint or the client has been sued in circumstances where he or she was acting on the advice of their solicitors and it is effectively that advice which is in issue. In such cases, apart altogether from the position of the client, the Court is not receiving the assistance of counsel who are observably independent. Independence is a function of counsel. The Court is entitled to assume that solicitors and counsel appearing before it possess that independence. Solicitors not only owe a duty to their client to do the best for them but also an overriding duty to the Court. The same overriding duty is owed by counsel who have been granted a right of audience to appear in this Court. As part of their professional responsibility, therefore, solicitors and counsel must ensure that they do not appear in a matter in which they have an actual or potential conflict or interest or where, by reason of their relationship with their client, their professional independence can be called into question ...

[31] This aspect is now the subject of r 13 of the Conduct and Client Care Rules, which relevantly provides that:

> 13. The overriding duty of a lawyer acting in litigation is to the court concerned. Subject to this, the lawyer has a duty to act in the best interests of his or her client without regard to the personal interests of the lawyer.
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> 13.5.3 A lawyer must not act in a proceeding if the conduct or advice of the lawyer or of another member of the lawyer's practice is in issue in the matter before the court ...
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> 13.6 A lawyer or lawyers who are members of the same practice must not act in a dispute for two or more parties whose interests are not the same or where the lawyer or practice will be unable to ensure the discharge of any duty owed to any party to the dispute.

[32] Finally, care is required to ensure that parties are not deprived of their choice of counsel without good reason.[9] The Court needs to be alert to the risk of applications to restrain counsel being used tactically and unfairly imposing on parties the expense of engaging alternative counsel.[10]

Conflict of interest between the Body Corporate and the respondent committee members

[33] Mr Hall argued that there was no significant risk that Buddle Findlay would be unable to discharge its obligations to either the Court or the parties because the interests of the parties were aligned, for two reasons. First, the same causes of action are pleaded against both and, although some of the particulars of those causes of action identified only

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9 *Black v Taylor* above n 6 at 409.

10 *Accent Management* above n 6 at [32]; *Clear Communications v Telecom Corporation of New Zealand Ltd* (1999) 14 PRNZ 477 (HC).

acts by the respondent committee members, a number of allegations were also made against both. Secondly, the acts complained of have been ratified and until the challenge to the validity of the ratification is determined in the substantive proceeding, it must be assumed to be effective and its effect is to align the interests of the Body Corporate and the respondent committee members.

[34] Mr Chisholm, however, asserts that a conflict exists regardless of the ratification, so that in either case Buddle Findlay's continued involvement would infringe r 6.1. He also submitted that, regardless of the validity of the ratification, the fact that it was procured by the respondent committee members means that a conflict still exists.

[35] I am satisfied that, as at the date of the EGM on 12 February 2013, there existed a conflict of interest between the Body Corporate and the respondent committee members that would have prevented Buddle Findlay from acting further without the Body Corporate members receiving independent advice.

[36] As at the date of the EGM the committee members were already facing allegations of breaching Body Corporate rules. Some of these allegations seemed likely to be sustained, such as the incurring of unauthorised legal and body corporate secretarial costs; the proposed motions for ratification implicitly acknowledge this much. Prior to ratification the Body Corporate would have had a right of action against the committee members in respect of these acts.

[37] The Body Corporate could choose to ratify such acts and/or elect not to proceed against the committee members and that is, in fact, what happened; one of the current committee members, Mr Plummer, deposed that Buddle Findlay has:

> ... repeatedly explained to the Committee that it is unable to advise the Body Corporate on any potential claims against the Second Defendants and has recommended that it seek independent legal advice if it wished to explore that option further.

[38] Mr Plummer explained that the Body Corporate does not wish to obtain legal advice as to possible claims against the respondent committee members:

> The Committee has carefully considered this advice. It has concluded that the interests of the Body Corporate and the second defendants are the same insofar as the Guardian proceeding is concerned. From our perspective, the second defendants – who were unpaid, elected volunteers – were acting in good faith on behalf of the Body Corporate and in accordance with what they understood their obligations to be. They undertook the actions complained of on behalf of the Body Corporate as a whole, on the basis that they had a legal duty to do so.

[39] This decision was open to the Body Corporate and the reasons that Mr Plummer gave for it are understandable. However, it was a decision that could only be made properly with the benefit of independent legal advice and knowledge of the relevant facts. There are two aspects of the decision-making process that I find concerning.

[40] The first is that the decision was made without full knowledge of some of the relevant facts. The agenda circulated before the EGM did not refer specifically to any proposal to ratify unauthorised expenditure and did not identify the level of such expenditure. On 8 February 2013, BBCL circulated a memorandum with an attached summary of costs incurred in the proceedings brought by GRH. The summary showed a total of $75,974.88, On 11 February 2013, the day before the EGM, BBCL sent GRH a copy of the Body Corporate's financial statements to 31 January 2013. It showed the level of expenditure for legal, body corporate secretarial and associated costs at $152,588.19. Mr Wilkinson prepared a summary of these costs from the financial statements, which the Body Corporate now acknowledges to have been accurate, but was not permitted to table it.

[41] My second concern is that the Body Corporate did not obtain independent legal advice prior to the resolution to ratify the committee members' acts. Buddle Findlay acted for both the Body Corporate and the committee members on the original litigation, including the unsuccessful summary judgment and also advised on the resolutions that led to the ratification. The EGM minutes record discussion on this point. A Body Corporate member, Mr Lewenz, is recorded as saying, before the resolutions were voted on that permitting Buddle Findlay to act for both the Body Corporate and the committee members was a "significantly controversial issue" and that:

> Buddle Findlay has made it clear to the current committee that they believe the issues and the interests of the Body Corporate and the second defendant are aligned such that no conflict exists ... The current committee believe that requiring the second defendants to obtain their own legal counsel at very significant cost to defend allegations over a modest sum is inappropriate, and satisfied with Buddle Findlay's advice that there is not a conflict the committee are happy to recommend the motions which continue to authorise Buddle Findlay to act for the both the Body Corporate and the second defendants.

[42] If the minutes are accurate the members voting were given the distinct impression that no conflict existed between the Body Corporate and the committee members. But until the motions ratifying the Committee's acts had been passed there was a conflict. It is implicit in the evidence (and Mr Hall's submissions) that the parties gave informed consent to Buddle Findlay continuing to act. But advice to the effect that no conflict existed could only relate to the period after ratification; it is only at that point that one could view the interests of the Body Corporate and the respondent committee members as aligned. It is not at all clear that advice was given regarding the conflict that undoubtedly existed up to that point.

[43] It therefore seems that the Body Corporate made the decision to ratify the unauthorised expenditure and continue with the litigation in the belief that the costs to that point were half what they actually were and without legal advice as to its rights. For the reasons that Mr Plummer has given the Body Corporate may well have come to the same decision even with the benefit of independent advice. There must, however, be a risk that

some members would have taken a different view of the resolutions had the correct information been before them. Indeed, the minutes of the meeting recorded the vote of one proxy, Mr Collins, against the resolutions that Buddle Findlay be instructed on the basis that the EGM had not been called to seek prior approval of the expenditure that was proposed be ratified.

[44] In reaching this view I am not purporting to determine the validity of the ratification. That is a matter for the trial judge. My interest lies only in determining whether it is proper that Buddle Findlay continue acting in the circumstances that are described in the affidavits filed for the purposes of this application. My view is that, until the Body Corporate has had the opportunity to fully consider the position of the respondent committee members with the benefit of independent legal advice and knowledge of exactly what expenditure was being ratified, there is a risk that is more than negligible that Buddle Findlay will be unable to properly discharge its obligations to it.

Is Buddle Findlay's advice an issue in the proceeding?

[45] It is evident that Buddle Findlay has been closely involved in the dispute between GRH on the one hand and the Body Corporate and committee members on the other. There are references to Buddle Findlay's advice recorded in the minutes of the EGM and it is referred to by Mr Plummer in his affidavit. In particular, Buddle Findlay advised the Body Corporate regarding the summary judgment application, which was unsuccessful because of the absence of any resolution to support the revised levies. Buddle Findlay also advised on the preparation of motions for ratification of the committee members' conduct, which GRH now seeks to impugn.

[46] GRH argues that Buddle Findlay's continued involvement in these circumstances contravenes r 13.5.3, which precludes a lawyer from acting if the advice of that lawyer or another member of the lawyer's practice is in issue in the matter before the Court. Although Buddle Findlay's advice is not in issue in as direct a sense as was the solicitor's letter in *Kooky Garments*,[11] it will, nevertheless, be faced with the task of arguing for the validity of resolutions it advised on in the face of a direct challenge to their validity.

[47] For this reason I consider that Buddle Findlay would find itself in a most difficult position at trial. It is not realistic to expect that Buddle Findlay will be able to confidently act with the level of independence required of it.

Should the Body Corporate be restrained from funding the respondent committee members' legal costs?

[48] Mr Hall submitted that the funding application is essentially the same as the substantive proceeding and therefore amounts to an abuse of process. Although Mr Chisholm resisted this on the basis that the substantive proceeding related to past funding whereas the present application relates to future funding, I find that there is a degree of overlap

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11 *Kooky Garments* above n 8.

between them. However, I do not need to consider this aspect further because Mr Hall also accepted that the funding application could have been brought as an interlocutory application for interim relief in the substantive proceeding and that it was open to me to treat it in that way.[12] I agree and I proceed accordingly.

A serious question to be tried?

[49] Treating the application as if it were an application for interim relief requires consideration of whether there is a serious question to be tried regarding GRH's claims that the resolutions ratifying the allegedly wrongful acts by the committee members were invalid or, alternatively, that they are unjust for the purposes of relief under s 210 UTA 2010,

[50] Mr Chisholm characterised the litigation as hostile litigation insofar as the committee members are concerned and argued that there are no circumstances in which the Body Corporate is entitled to indemnify them. He argued that an agent who incurs liability for his wrongful acts or defaults is not entitled to an indemnity from its principal.[13] As a result, the committee members who are facing legal action personally over allegedly wrongful acts cannot look to the Body Corporate for indemnity. Consequently, it must be ultra vires the Body Corporate to fund their defence costs, which is effectively an indemnity.

[51] Mr Chisholm drew heavily on trustee and company law cases, which he submitted could be applied by analogy. The trustee facing hostile litigation at the instigation of a beneficiary cannot look to the trust estate for defence costs. Shareholders cannot use company funds in shareholder disputes; company funds can be used only for purposes that are reasonably incidental to the company's business.[14]

[52] I have reservations about the usefulness of this analogy but, in any event, I consider that the issue turns, as have the other issues in this application, on the ratification of the committee members' acts. Although an agent sued for wrongful acts is not entitled to be indemnified, the position may be different if the act has been ratified. So if the subject acts were validly ratified, Mr Chisholm's characterisation may prove not to be fair.

[53] On the other hand Mr Hall submitted that the inquiry did not require any consideration of whether it is ultra vires the Body Corporate to fund the defence of committee members. He argued that until the validity of the ratification had been determined I should treat the resolutions ratifying the acts of the committee members as valid. Instead, he identified the relevant considerations as the fact that all factors would, ultimately be relevant to the decision, including the position of the majority of Body Corporate members as well as unfairness to the minority, the fact that a resolution is not inequitable simply because the

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12 Mr Chisholm indicated that the application had only been brought as an originating application so that Buddle Findlay itself might be heard.

13 Peter Watts and FMB Reynolds *Bowstead on Agency: Bowstead and Reynolds on Agency* (19th ed, Sweet & Maxwell, United Kingdom, 2010) at 7-062, citing *Thacker v Hardy* (1878) 4 QBD 685; *New Zealand Farmers Co-operative Distributing Co Ltd v National Mortgage and Agency Co of New Zealand Ltd* [1961] NZLR 969 (SC).

14 *Mutton v West Cork Railway* (1883) 23 Ch D 654.

minority objects to it and the fact that the Court retains a discretion even where there is inequity.[15]

[54] I do not accept that the *vires* issue is irrelevant. Where the allegations against the committee members turn largely on whether their acts can be regarded as intra vires by virtue of ratification that must be a factor relevant to the determination of the second cause of action. For the reasons already discussed, I consider that there is a serious issue over the validity of the ratification. That being so, it would be wrong to simply view the ratification as valid until it is declared to be invalid. It follows that, without having to reach a firm conclusion on whether the committee members are entitled to an indemnity, I can nevertheless be satisfied that a serious issue exists as to whether the Body Corporate should be meeting the defence costs of the committee members.

Where does the balance of convenience lie?

[55] Mr Hall argued that the balance of convenience lies with the respondent committee members and the Body Corporate. He submitted that damages would be an adequate remedy for GRH, that GRH had delayed in bringing this application and that the prejudice to GRH in maintaining the status quo was less than requiring the respondent committee members to find funding for legal fees when the matter is to proceed to trial in a few months.

[56] I do not accept that there has been undue delay in bringing the application. Although concern over Buddle Findlay's continued involvement was signalled last year, the real focus of the case as it is now pleaded is on the ratification of the committee members' acts. The concerns regarding Buddle Findlay's involvement now focus to a large extent on the part it played in the EGM. It was the EGM that prompted the filing of the amended statement of claim and the present application. The application was filed shortly after that amended pleading.

[57] Nor do I consider that the balance of convenience favours maintaining the status quo. It is true that the respondent committee members will be inconvenienced by having to find alternative sources of funding. But on the other hand, they have had the benefit of funding to date. Notwithstanding the uncertainty over whether an indemnity will ultimately be available, GRH has, over that period, been required to contribute 21 per cent to the respondent committee members' defence costs by virtue of its unit entitlement, as well as meeting its own costs. Finally, although the issues are monetary and therefore could be met with an award of damages, the information before me does not indicate that GRH will be able to recover damages from the respondent committee members.

[58] For these reasons, I conclude that I should restrain the Body Corporate from contributing to or otherwise funding the defence costs of the respondent committee members.

Conclusion

[59] In relation to the application restraining Buddle Findlay from acting in this matter I have concluded that:

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15 *Spencer-Inight v Johnston* [1999] 3 NZLR 103 (HC) at 106.

(a) prior to the impugned acts being ratified at the EGM there was a conflict of interest between the Body Corporate and the respondent committee members;
(b) there is doubt as to whether the Body Corporate received adequate and independent advice regarding that conflict;
(c) there are grounds for concern over the validity of the ratification because of the accuracy of information provided to Body Corporate members at the EGM and the lack of independent legal advice;
(d) in these circumstances it cannot be said that the interests of the Body Corporate and the respondent committee members are aligned to the extent that there is no more than a negligible risk that Buddle Findlay will be unable to discharge its obligations to both;
(e) Buddle Findlay's advice regarding the ratification process is sufficiently in issue in the substantive proceeding as to compromise the firm's independence.

[60] In relation to the application to restrain the Body Corporate from funding the defence costs pending the determination of the substantive proceedings, I have concluded that:

(a) the application is properly determined as if it were an application for interim relief brought in the context of the substantive proceedings;
(b) there is a serious question to be tried over whether the Body Corporate may indemnify the respondent committee members; that is likely to turn on the validity of the ratification of their acts; and
(c) the balance of convenience favours GRH.

[61] For these reasons the application is granted. I make orders that:

(a) Buddle Findlay is restrained from acting further in this matter; and
(b) the Body Corporate is restrained from contributing to or funding the defence costs of the respondent committee members.

[62] Costs are reserved and will follow the outcome of the substantive proceedings.

Reported by: Gerard McCoy QC