

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CIV-2018-404-317  
[2023] NZHC 609**

BETWEEN

CHERYL SITARA SINGH  
Plaintiff

AND

BODY CORPORATE 207650  
Defendant

Hearing: 14 March 2023

Appearances: S P Bryers for Plaintiff  
T P Kelly for Defendant

Judgment: 24 March 2023

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**JUDGMENT OF ASSOCIATE JUDGE LESTER**

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This judgment was delivered by me on 24 March 2023  
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date .....

[1] The plaintiff, Ms Singh, applies to lift a stay of the remaining cause of action in this proceeding.

[2] Ms Singh was the owner of Unit 16 of the Richmond Terraces at 28 Chapel Road, Flatbush, South Auckland. That Unit Title development was discovered to have significant weathertightness issues. The following is a precis of a much fuller background given by Courtney J in *Singh v Boutique Body Corporates Ltd*.<sup>1</sup>

[3] The weathertightness problems were discovered in 2009 and at that time, the cost of remediation was estimated at approximately \$5 million. The Body Corporate 207650 (**the Body Corporate**) brought a claim against those involved in the construction of the Richmond Terraces and achieved a settlement. Over time and with the remediation underway, it became obvious that the repairs were going to cost much more than the sum obtained in the settlement of the proceedings. The final cost of repairs was in the region of \$13 million. At the time the weathertightness issues were discovered, the cost of remediation was estimated at approximately \$5 million.

[4] The Body Corporate applied for approval of a scheme governing the remedial works for Richmond Terraces under s 74 of the Unit Titles Act 2010. The Court gave its approval to that scheme in August 2016.<sup>2</sup>

[5] The Body Corporate imposed levies to fund the shortfall. Ms Singh and another owner applied for an order declaring a second levy imposed by the Body Corporate was ultra vires. Ms Singh and another unit owner argued that the remedial works being undertaken went beyond the scope of the s 74 scheme. They also alleged that the Body Corporate Committee (**the Committee**) had failed in its responsibilities to undertake the repair work in a cost effective and economic manner. Lang J held that the levies had been properly imposed. Significantly, his Honour found it unnecessary to reach a conclusion on the allegation that the Committee had failed to control the cost of the repairs, but he noted that he could not see “what motive the

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<sup>1</sup> *Singh v Boutique Body Corporates Ltd* [2018] NZHC 3233.

<sup>2</sup> *Body Corporate 207650 v Speck* [2016] NZHC 1826.

Committee would have had to spend the unit owners' money in a profligate manner" given that they were all unit owners themselves.<sup>3</sup>

[6] A third levy was imposed after Lang J's decision and in July 2017 the Body Corporate issued proceedings against Ms Singh in the District Court seeking summary judgment in respect of her unpaid levies which by then totalled \$166,573.27. Summary judgment was entered in the District Court.<sup>4</sup> In short, the learned District Court Judge dismissed Ms Singh's submission that the remediation costs were excessive and held that the counterclaim Ms Singh wished to bring, was not a defence to the summary judgment.

[7] Ms Singh appealed unsuccessfully against the summary judgment decision.<sup>5</sup>

[8] By the time the appeal against the District Court summary judgment was heard, Ms Singh had commenced this proceeding which was originally against members of the Committee and the Body Corporate Managers. Those defendants applied to have Ms Singh's proceeding struck out.<sup>6</sup> In dealing with that application, Courtney J said:

It is clear from the outcome of the earlier proceedings that the scope of the s 74 Scheme and the validity of the levies is now beyond argument. As a result, any collateral attack on the scope of the work done *or the amount of the levies will inevitably fail ...*

(emphasis added)

[9] However, Courtney J concluded that there had been no rulings in respect of allegations of negligence and/or misconduct in relation to the Body Corporate's management of the remedial work. Her Honour was critical of many aspects of Ms Singh's statement of claim but gave her a chance to replead.

[10] Ms Singh was bankrupted on 4 July 2019 upon an application by the Body Corporate as Ms Singh had not paid the District Court judgment. Ms Singh's bankruptcy was annulled on 20 August 2021. The Official Assignee, having sold Ms Singh's unit in Richmond Terraces, paid the Body Corporate the District Court

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<sup>3</sup> *Body Corporate 207650 v Speck* [2017] NZHC 966, (2017) 18 NZCPR 742.

<sup>4</sup> *Body Corporate v Singh* [2017] NZDC 29041.

<sup>5</sup> *Singh v Body Corporate 207650* [2018] NZHC 1932.

<sup>6</sup> *Singh v Boutique Body Corporates Ltd*, above n 1.

judgment sum and a further approximately \$138,0000 was made up of further levies and costs.

[11] On 19 July 2019, Associate Judge Bell considered a strike-out application against an amended statement of claim filed in this proceeding being the amended claim Courtney J gave Ms Singh the opportunity to file. The amended statement of claim contained three causes of action. First, a failure by the then named defendants to supply adequate reports to Ms Singh as required by the scheme under s 74 of the Unit Titles Act 2010. Second, a claim of gross negligence or wilful misconduct by the Committee members in administering the scheme. Third, negligence by Boutique Body Corporates Ltd in advising and assisting the Committee and the Body Corporate to administer the scheme.

[12] The cause of action against Boutique Body Corporates Ltd was struck out on the basis that the company did not owe a duty of care to individual unit owners.

[13] The claim against the members of the Committee members was struck out on the same basis as ordinarily, committee members do not owe a duty of care to individual owners. The Committee members had not assumed responsibility to Ms Singh so as to impose on them a duty of care. While the individual members of the Committee are answerable to the Body Corporate, they do not owe duties of care to the individual unit owners. Accordingly, the second and third causes of action were struck out. The remaining cause of action, being the one subject to the present stay, was not struck out and it was not subject to the strike out application.

[14] Associate Judge Bell's strike-out judgment was released on 19 July 2019.<sup>7</sup> As noted in the meantime, Ms Singh had been bankrupted on 4 July 2019.

[15] On 26 August 2019, Associate Judge Bell made an order substituting the Body Corporate for the members of the Committee who were previously the second to seventh defendants, as the Body Corporate was the correct defendant in respect of Ms Singh's cause of action for failure to supply information required under the scheme.

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<sup>7</sup> *Singh v Boutique Body Corporates Ltd* [2019] NZHC 1707, (2019) 20 NZCPR 297.

[16] Associate Judge Bell adjourned the proceeding for six months as he anticipated that Ms Singh's bankruptcy may well be annulled following the Official Assignee selling her unit.

[17] The annulment of Ms Singh's bankruptcy took longer than expected. With annulment not imminent, Associate Judge Bell stayed the present proceeding which, again, was limited to the cause of action relating to the provision of information. In the Minute recording the stay, Associate Judge Bell recorded that Ms Singh had told him the Body Corporate had made a further claim in her bankruptcy and she considered the Body Corporate's claim to be excessive. Associate Judge Bell told Ms Singh that once the Official Assignee had made a decision on the amount of the Body Corporate's claim, she had the right to consider it, and she had a right to review the Official Assignee's decision.

[18] As noted above, in addition to paying the judgment debt obtained by the Body Corporate, the Official Assignee paid a further sum to the Body Corporate which included costs awards arising from various proceedings brought by Ms Singh, together with further levies for remedial work. Ms Singh did not act on Associate Judge Bell's advice that she had the ability to challenge the Official Assignee's acceptance of the Body Corporate's further claims.

### **The effect of the Official Assignee's payment to the Body Corporate**

[19] The Official Assignee reviewed and accepted in part the Body Corporate's claim in Ms Singh's bankruptcy. Absent a challenge under s 266 of the Insolvency Act 2006 (**the Act**) to the Assignee's decision to pay the sum fixed by the Official Assignee, I do not see how it is now open to Ms Singh to challenge the quantum of the Body Corporate's claim in her bankruptcy.

[20] With Ms Singh having had her bankruptcy annulled, s 311 of the Act applies. That section provides:

#### **Effect of annulment**

- (1) On annulment of the adjudication, all property of the bankrupt vested in the Assignee on bankruptcy and not sold or disposed of by the

Assignee reverts in the bankrupt without the necessity for any conveyance, transfer, or assignment.

- (2) Any contract, sale, disposition, or payment duly made or anything duly done by the Assignee before the annulment—
- (a) is not prejudiced or affected as to validity by the annulment; and
  - (b) has effect as if it had been made or done by the bankrupt while no adjudication was in force.

[21] Section 311(2)(b) of the Act means payment by the Official Assignee of the Body Corporate's claims has the same effect as if payment had been made by Ms Singh if she not been adjudicated.

### **What Ms Singh must show to have the stay lifted**

[22] Mr Bryers, counsel for Ms Singh, in his submissions, noted there is not a specific High Court Rule relating to the lifting of the stay and the issue is therefore determined within the Court's inherent jurisdiction. He submitted that:<sup>8</sup>

...a stay may be removed if good cause or proper grounds are shown or the continuance of the stay could cause or produce injustice or prejudice or where there has been a change in the law.

[23] Mr Kelly, counsel for the Body Corporate, also referred to that passage.

[24] In addition, Mr Bryers submitted that the circumstances in which a stay was ordered are important. He submitted here that the stay was something of an administrative convenience to avoid the need for the matter to be repeatedly called in the list. Mr Bryers also noted that when ordering the stay, Associate Judge Bell recorded the stay was not a dismissal or a strike-out.

### **Why should the stay be lifted?**

[25] The application seeking the lifting of the stay asserts that Ms Singh has a good cause of action against the Body Corporate and wishes to continue the proceeding. The application seeks an order that if the stay is lifted, that Ms Singh file and serve

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<sup>8</sup> *Heenan v Alpers*, HC Christchurch, CIV-2001-409-042, 3 June 2009 at [21]; and *Kidd v van Heeren* [2006] 1 NZLR 393 (HC) at [42].

a further amended statement of claim within 10 working days of the stay being lifted. A draft further amended statement of claim has not been filed.

[26] The Body Corporate submits that as Ms Singh is no longer a member of the Body Corporate (the Official Assignee having sold her unit), she is not entitled to information under the provisions of the s 74 Scheme. I do not accept this submission. The order sanctioning the scheme provided that the Body Corporate had to keep each owner fully informed of a range of matters. The Body Corporate had, by way of three-monthly reports, to provide information in relation to the repairs including details of costs and its apportionment. In my view, every three months Ms Singh had an accrued right as an owner to a report, and I am not convinced she lost that entitlement when she ceased to be a unit owner. Ms Singh says the information she was provided with under the order was either incomplete or the Body Corporate failed to provide some of the three-monthly reports. If the Body Corporate failed to comply with this Court's order made for the benefit of Ms Singh, in my view, she did not lose the benefit of that order on the sale of her unit.

[27] The real issue is what injustice or prejudice will be caused to Ms Singh if she is unable to pursue relief in respect of those reports? That question must be linked to what purpose Ms Singh wishes to put the information she seeks and whether that purpose is tenable or to any practical effect.

[28] Mr Bryers submits:

17. The injustice of [Ms Singh having lost her rights to the reports], if it is upheld, is obvious. On the one hand, Ms Singh has been told by the Courts that she must pay her levies *before she can raise any arguments about them*. On the other hand, the only way Ms Singh could pay the levies was by sale of her unit, which results in her no longer being an owner. According to the BC's argument this gives rise to a classic "Catch-22" situation – the owner cannot raise any arguments about levies until they are paid, but if the levies can only be paid by sale of the unit, the owner is no longer able to raise any arguments after sale because he/she is no longer an owner.

(emphasis added)

[29] In my view, it is not correct, as Mr Bryers submits, that the Courts have denied Ms Singh the opportunity to challenge the quantum of the levies until the levies were paid. What the Court has said is that Ms Singh's counterclaims, that is her allegations

of negligence or misconduct in relation to the Body Corporate's management of the remedial work, did not give her a defence to the Body Corporate's claim. Ms Singh had to pay the levies and then bring her negligence claim.

[30] The levies Ms Singh has had to pay were either fixed by the Court in the summary judgment decision, which was unsuccessfully appealed, or assessed and accepted by the Official Assignee. The summary judgment decision held that Ms Singh was liable for the levies and fixed their quantum. A challenge to the quantum of the levy fixed by the summary judgment hearing will "inevitably fail" as per [8] above as such a challenge will be a collateral challenge to the District Court Judgment. Such a collateral challenge would be an abuse of process.

[31] Mr Bryers submitted the Court referred to the regime under the Unit Titles Act 2010 as essentially one of 'pay now, argue later'. What the Court means when referring to a 'pay now, argue later' regime is that a defendant who believes they have a counterclaim or set-off in respect of a claim by a Body Corporate, must nonetheless pay the levy and *then* pursue their cross-claim separately. The expression is most commonly encountered in the context of a no set-off clause in a contract such as a lease.

[32] However, a Body Corporate or a creditor with the benefit of a no set-off clause must nonetheless prove the quantum of their claim. The Body Corporate would not have been entitled to summary judgment in respect of its claim if the Court had not been satisfied that its claim was properly quantified. It is now too late for Ms Singh to take issue with the quantification of the Body Corporate's claim which resulted in the judgment against her. That judgment was upheld on appeal in this Court and was accepted as a final judgment for the purposes of Ms Singh's bankruptcy. Accordingly, lifting the stay to permit Ms Singh to obtain information relating to the apportionment of the remedial costs to her unit will not permit her to re-visit the quantum of the summary judgment order. Equally, a debt paid by the Official Assignee is by virtue of s 311(2)(b) of the Act treated as a payment by Ms Singh.

[33] As to the further levies paid to the Body Corporate by the Official Assignee, there is no detailed breakdown of those amounts. Mr Bryers' chronology suggests



there were approximately \$60,000 in further levies following the summary judgment proceeding. The Official Assignee paid the Body Corporate in round numbers \$320,000. The judgment in the District Court was \$181,561.03 plus costs. The difference is just over \$138,000 but I was told that included that \$138,000 were substantial costs awards together with the \$60,000 of levies that followed the summary judgment hearing.

[34] For the reasons I have already given at [19] to [21] above, I do not see how Ms Singh can revisit the amount of post summary judgment levies paid by the Official Assignee. The Official Assignee sought an annulment of Ms Singh's bankruptcy on the basis that her debts had been paid. No challenge was made by Ms Singh to the Official Assignee's decision to accept and pay the Body Corporate levies. Ms Singh is treated as having made the payment of the post summary judgment levies herself.

[35] I do not see how refusing to lift the stay to permit Ms Singh to pursue the obtaining of information concerning the levies raised following the summary judgment, will cause an injustice to Ms Singh when she is not able to challenge those levies.

[36] Mr Bryers did not submit that the information Ms Singh sought to obtain if the stay was lifted was needed for her to pursue her claim that the works at Richmond Terraces were not properly managed or controlled. Any claim by Ms Singh concerning mismanagement of the remedial works will need to be pleaded with particulars as to how the work was mismanaged. To quantify that claim, Ms Singh may need discovery of build costs et cetera, but she will be entitled to discovery in her negligence proceeding.

[37] Accordingly, I do not consider it is in the interest of justice to lift the present stay. The information Ms Singh seeks, if the stay is lifted and her claim was successful, is not required in respect of her possible negligence claim. While I accept the stay could be characterised as administrative in action to avoid this proceeding being repeatedly called in the list, Associate Judge Bell made no comment about the merits of the proceeding continuing. The administrative nature of the stay cuts both

ways. It was simply, as the Judge said, to avoid unnecessary appearances and did not imply anything about the merits of the proceeding.

[38] Ms Singh asserts that without the information she seeks, she is unable to assess the basis on which the cost of the remedial works had been apportioned to her. The relief as presently sought is an order requiring the Body Corporate to supply a report to her regarding the remedial works, including details of the basis of the various claims for payment made by the contractor, the legal and factual basis on which the Body Corporate settled the claims for payment by the contractor, the amount paid to professional advisors and all costs incurred under the scheme.

[39] Ms Singh is no longer able to challenge the quantum of the levies, however, that is the only practical purpose for lifting the stay. Mr Bryers submitted a challenge to the levies was not guaranteed and Ms Singh was entitled to satisfy herself as to the apportionment of the remedial costs. If Ms Singh had offered to fund the compilation of the information she seeks from the Body Corporate then the Body Corporate may have taken a different stance, but I do not consider an injustice will be produced by not allowing this proceeding to be recommenced so that Ms Singh can, if she succeeds, carry out an academic exercise.

[40] *I decline* to lift the stay. Lifting the stay will serve no practical purpose and will only impose further costs on the Body Corporate which it would have to pass on to the unit owners. The interests of justice are not assessed purely from Ms Singh's perspective. The costs to the Body Corporate members in defending a proceeding, which cannot have a practical benefit to Ms Singh, are part of the assessment.

[41] For better or for worse, the amount Ms Singh has had to pay in respect of the remedial work on her unit at Richmond Terraces has been fixed by judgment of the Court and by the unchallenged decision of the Official Assignee.

### **Costs**

Counsel were not heard on costs but for the benefit of counsel my initial view is that costs should follow the event on a 2B basis plus disbursements as fixed by the Registrar. If the Body Corporate does not file a memorandum on costs within *five*

*working days* of the date of this judgment (not more than three pages), then the *order* of the Court shall be that Ms Singh is to pay to Body Corporate costs on a 2B basis plus disbursements as fixed by the Registrar. If the Body Corporate files a costs memorandum then Ms Singh is to reply within a further *five working days* and I will deal with costs on the papers.

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**Associate Judge Lester**

Solicitors:

Richard Wood, Auckland (for Plaintiff)

Grove Darlow & Partners, Auckland (for Defendant)

Copy to counsel:

S P Bryers, Barrister, Auckland (for Plaintiff)