



[1] Ms Singh appeals the judgment of the High Court declining to lift a stay of her proceeding.<sup>1</sup> The stay was imposed following Ms Singh's bankruptcy.<sup>2</sup> That bankruptcy has since been annulled. Ms Singh sought to lift the stay to allow her to pursue her claim against the Body Corporate for failure to supply her with adequate reports pursuant to a scheme of arrangement approved under s 74 of the Unit Titles Act 2010.

[2] The High Court declined to lift the stay on the basis that to do so would not serve any practical purpose and it would only result in further costs being incurred by the Body Corporate.<sup>3</sup>

[3] The appeal proceeds by way of leave from the High Court.<sup>4</sup> Ms Singh applies to adduce new evidence on appeal. The evidence relates to the calculation of levies and the production of the Official Assignee's report. As we explain further in this judgment, we do not consider the evidence to be relevant to the issue of whether the stay should be lifted. Accordingly, we decline the application to adduce new evidence.

### **Key events**

[4] There is a long history of litigation between Ms Singh and the Body Corporate. The background to the current proceeding is summarised in the judgment of Courtney J from 2018.<sup>5</sup> We touch only on those events relevant to the current appeal.

[5] Ms Singh was the owner of unit 16 of the Richmond Terraces in Flatbush, South Auckland. That development was discovered to have significant weathertightness issues in 2009. The Body Corporate commenced proceedings against those involved in the construction of Richmond Terraces and subsequently settled its claim.

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<sup>1</sup> *Singh v Body Corporate 207650* [2023] NZHC 609 [judgment under appeal].

<sup>2</sup> *Singh v Body Corporate 207650* HC Auckland CIV-2018-404-317, 28 February 2020 [stay decision].

<sup>3</sup> Judgment under appeal, above n 1, at [40].

<sup>4</sup> *Singh v Body Corporate 207650* [2023] NZHC 1269 [leave decision] at [15].

<sup>5</sup> *Singh v Boutique Body Corporates Ltd* [2018] NZHC 3233 [judgment of Courtney J] at [9]–[25].

[6] The settlement funds were not sufficient to cover the estimated cost of repairs, so in 2015 the Body Corporate levied the unit owners for the shortfall. Ms Singh paid her share of these costs in November 2015. However, it soon became obvious that the repairs were going to cost much more than originally estimated and the Body Corporate resolved to raise a second levy to cover the additional costs. Ms Singh did not pay the second levy.

[7] The Body Corporate had applied for approval of a scheme of repair under s 74 of the Unit Titles Act. That scheme was approved by the High Court in August 2016.<sup>6</sup> The terms of the s 74 scheme included an obligation on the Body Corporate to keep each unit owner fully informed of the details of the repairs and their progress by reporting every three months. The scheme set out the information to be included in the reports.

[8] Later that same year, Ms Singh and the owners of another unit commenced a proceeding challenging the validity of the second levy. They argued that the remedial works being undertaken went beyond the scope of the s 74 scheme. Lang J held that the levies had been properly imposed and dismissed the application.<sup>7</sup>

[9] A further levy was imposed on 24 May 2017. Ms Singh did not pay that levy either or any other levies subsequently imposed. A month later, the Body Corporate began proceedings in the District Court against Ms Singh and the other unit holders seeking summary judgment for the unpaid levies. Ms Singh defended those claims and counterclaimed with a challenge to the costs of remediation (upon which the levies were based) and the way those costs had been approved.

[10] The Body Corporate's application for summary judgment was granted by Judge G M Harrison in the District Court.<sup>8</sup> The Judge rejected Ms Singh's counterclaim on the basis that it essentially repeated issues raised before Lang J in

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<sup>6</sup> *Body Corporate 207650 v Speck* [2016] NZHC 1826.

<sup>7</sup> *Body Corporate 207650 v Speck* [2017] NZHC 966, (2017) 18 NZCPR 742 at [56]–[57].

<sup>8</sup> *Body Corporate 207650 v Singh* [2017] NZDC 29041.

relation to the scope and the amount of cost increases.<sup>9</sup> An appeal against the summary judgment decision was dismissed.<sup>10</sup>

[11] Ms Singh commenced the present proceeding in February 2018. It was initially commenced against the Body Corporate manager and the seven members of the Body Corporate committee. Those defendants applied to have Ms Singh's proceedings struck out. The application was determined by Courtney J, who found that the scope of the s 74 scheme and the validity of the levies were now beyond argument.<sup>11</sup> The Judge noted that any collateral attack on the scope of the work done or the amount of the levies would inevitably fail.<sup>12</sup> However, the Judge 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.<sup>13</sup> Ms Singh was afforded an opportunity to replead these causes of action.<sup>14</sup>

[12] The amended statement of claim was filed on 1 February 2019. It contained three causes of action. The first cause of action alleged a failure by the defendants to supply adequate reports to Ms Singh as required by the scheme under s 74 of the Unit Titles Act. The remaining two causes of action were in negligence.

[13] The Body Corporate manager applied to strike out the first cause of action in the amended statement of claim. That application was granted by Associate Judge Bell in a judgment dated 19 July 2019 on the basis that reporting obligations under the scheme were those of the Body Corporate, and not its manager.<sup>15</sup> As the committee members had not applied to strike out this cause of action, it remained against them.<sup>16</sup> The Judge encouraged the parties to consider whether the Body Corporate should be substituted for the committee members.<sup>17</sup> The remaining two causes of action in negligence were struck out.<sup>18</sup>

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<sup>9</sup> At [32].

<sup>10</sup> *Singh v Body Corporate 207650* [2018] NZHC 1932 at [43].

<sup>11</sup> Judgment of Courtney J, above n 5, at [28].

<sup>12</sup> At [28].

<sup>13</sup> At [29].

<sup>14</sup> At [57].

<sup>15</sup> *Singh v Boutique Body Corporates Ltd* [2019] NZHC 1707, (2019) 20 NZCPR 297 at [19].

<sup>16</sup> At [21].

<sup>17</sup> At [52].

<sup>18</sup> At [50]–[51].

[14] By this time, Ms Singh had been bankrupted upon application by the Body Corporate. This was referred to by the Judge who directed the parties to consider the effect of the bankruptcy on the proceeding.<sup>19</sup> Specifically, the parties were asked to consider whether the proceeding should be put on hold to ascertain whether the bankruptcy would be eventually annulled.<sup>20</sup>

[15] In a subsequent case management conference, the Judge substituted the Body Corporate as the appropriate defendant and adjourned the proceeding for six months to ascertain whether the bankruptcy would be solvent or insolvent. However, the administration of the bankruptcy took longer than expected. Following a further case management conference on 28 February 2020, the Judge issued a stay of the proceeding. He did so on the basis that a stay was preferable to adjourning the case from one list to another. The Judge recorded in his minute that the stay was not a dismissal of the proceeding or a strike-out and that either party could apply to have the stay lifted.

[16] By this time the Body Corporate had made a claim in Ms Singh's bankruptcy. The Judge recorded in his minute that Ms Singh considered that claim to be excessive and set out the procedural route by which she might challenge that claim, including by noting there are time limits.<sup>21</sup>

[17] On 28 July 2021, the Official Assignee reported to the High Court on Ms Singh's bankruptcy. The Body Corporate's claim in Ms Singh's bankruptcy had been admitted, albeit in a reduced amount. Ms Singh's unit in Richmond Terraces, along with another property, had also been sold and all creditor claims had been paid with interest.

[18] Ms Singh's bankruptcy was annulled on 20 August 2021, and she filed the application to lift the stay of proceedings on 8 November 2022. In an affidavit sworn in support of the application, Ms Singh explained that she wished to continue with the proceeding to obtain further documents from the Body Corporate to reconcile her

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<sup>19</sup> At [53].

<sup>20</sup> At [53].

<sup>21</sup> Stay decision, above n 2, at [4].

account with them. Ms Singh asserted her belief that the cost of the remedial repair work became grossly excessive as the result of mismanagement by the Body Corporate and in particular mismanagement by the Body Corporate manager and by members of the Body Corporate management committee.

### **Decision under appeal**

[19] The application came before Associate Judge Lester on 14 March 2023.<sup>22</sup>

[20] The Judge referred to the relevant test as being whether the continuance of the stay could cause or produce injustice or prejudice.<sup>23</sup> He then turned to consider whether the stay should be lifted in this case.

[21] The Judge rejected the Body Corporate's submission that as Ms Singh was no longer a member of the Body Corporate (her unit having been sold), she was no longer entitled to information under the provisions of the s 74 scheme. The Judge held that Ms Singh had an accrued right as an owner to a report under that scheme and she did not lose that entitlement when she ceased to be a unit owner.<sup>24</sup>

[22] The Judge considered the real issue was assessing what injustice or prejudice would be caused to Ms Singh if she was unable to pursue relief in respect of those reports.<sup>25</sup> The Judge said that the answer to that question must be linked to the purpose of obtaining the report and whether that purpose was tenable or had any practical effect.<sup>26</sup>

[23] The purpose of obtaining the information was to enable Ms Singh to challenge the quantification of the levies imposed by the Body Corporate. The Judge considered it was too late for Ms Singh to launch this challenge given the summary judgment issued against her in the District Court which had been upheld on appeal, and the lack

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<sup>22</sup> Judgment under appeal above n 1.

<sup>23</sup> At [22], citing *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].

<sup>24</sup> Judgment under appeal, above n 1, at [26].

<sup>25</sup> At [27].

<sup>26</sup> At [27].

of any challenge to the Official Assignee's decision to accept and pay the Body Corporate levies.<sup>27</sup> The Judge concluded as follows:<sup>28</sup>

[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.

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<sup>27</sup> At [34].

<sup>28</sup> Emphasis in original.

## Decision granting leave

[24] An application for leave to appeal was granted by the Judge.<sup>29</sup> He identified two issues on appeal:<sup>30</sup>

- (a) First, he questioned whether it was correct to find that Ms Singh had to demonstrate a practical purpose for lifting the stay, or whether an established right to the information was sufficient to warrant the stay being lifted.
- (b) Second, he questioned whether it was correct to find that Ms Singh was able to challenge the decision of the Official Assignee to accept the Body Corporate's claim notwithstanding that Ms Singh did not challenge that decision at the time.

[25] In granting leave, the Judge also acknowledged that the decision was “practically a final determination of Ms Singh’s ability to pursue her proceeding”.<sup>31</sup>

## Relevant law

[26] The power to lift a stay derives from the Court’s inherent jurisdiction. A stay may be lifted if continuing it would produce injustice or prejudice. That formulation of the test accords with this Court’s decision in *Kidd v van Heeren*.<sup>32</sup>

[27] The parties approached the appeal on the basis that the decision whether to lift a stay involves the exercise of a discretion and so the principles in *Kacem v Bashir* apply.<sup>33</sup> Those principles provide that the appellant must show that the court below made an error of law or principle; took account of irrelevant considerations; failed to take account of relevant considerations; or was plainly wrong.<sup>34</sup> In the absence of any contest around this issue, we have approached the appeal on this basis.

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<sup>29</sup> Leave decision, above n 4, at [15].

<sup>30</sup> At [11]–[12].

<sup>31</sup> At [13].

<sup>32</sup> *Kidd v van Heeren* CA191/05, 23 March 2006.

<sup>33</sup> *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.

<sup>34</sup> At [32].



## **Submissions**

[28] Mr Bryers, for Ms Singh, submits that the Judge erred in declining to lift the stay. He says that the Body Corporate is in default of its obligations to provide the documents sought by Ms Singh and that the continuance of the stay is an unjustifiable denial of her right to check that she has been correctly charged by the Body Corporate.

[29] Moreover, Mr Bryers submits that the Judge's determination that Ms Singh was no longer able to challenge the Body Corporate levies was not correct. He submits that, contrary to the Judge's conclusions, the District Court summary judgment was not a final determination of quantum because it was decided on the principle of "pay now, argue later". Along those same lines, Mr Bryers submits that the Official Assignee's payments of the levies issued by the Body Corporate were made in accordance with the District Court judgment, and therefore the "pay now, argue later" principle applies. He contends that Ms Singh's challenge to the quantification of the levies has not been finally determined.

[30] Mr Orpin-Dowell, for the Body Corporate, submits the Judge was correct to conclude that lifting the stay would not serve a practical purpose. Mr Orpin-Dowell says that Ms Singh was bound by previous court decisions in relation to the quantum of the levies. He submits that Ms Singh was informed of her right to challenge the Official Assignee's decision to accept the Body Corporate's claim but chose not to do so. In those circumstances, the decision of the Official Assignee to admit the Body Corporate's claim for levies (albeit in a reduced amount) cannot now be challenged.

[31] In addition, Mr Orpin-Dowell submits that Ms Singh has no proper interest in the information she seeks. That is because Ms Singh is no longer an owner of the unit and the time for raising issues about a lack of information relevant to the quantum of the levies has long since passed. Further, the fact that the quantum of the levies has been finally determined and paid by the Official Assignee, means Ms Singh does not have a proper interest in the provision of information and no continuing right to obtain it.

### **Did the Judge err in declining to lift the stay?**

[32] We consider this appeal may be resolved without engaging in an assessment of the merits of any challenge Ms Singh may make to the Body Corporate levies. Indeed, we consider the merits of such a challenge to be irrelevant to the decision whether to lift the stay. The only considerations relevant to that decision in this case are the nature of the proceeding that was stayed, the circumstances in which the stay was entered, and the effect of the stay on Ms Singh's right to pursue her claim.

[33] Turning to the first of these considerations, the stayed proceeding in this case comprises a single cause of action. The pleaded allegation is that the Body Corporate has failed to supply 11 categories of documents.<sup>35</sup> Ms Singh seeks an order requiring the Body Corporate to supply a report to Ms Singh regarding the remedial works and the information sought in those 11 categories of documents.

[34] Counsel for the Body Corporate submits that Ms Singh is unable to enforce her rights to reports under the scheme as she is no longer a unit holder, and much of the information sought falls outside the scope of the reporting obligation under the scheme. We observe that Associate Judge Lester rejected the first of these two arguments on the basis that Ms Singh had an accrued right to the information which was not lost when the unit was sold. We make no comment on the correctness of that position. The merits of the Body Corporate's defences may be tested at trial. The short point for present purposes is that Ms Singh's claim is reasonably arguable, and there is nothing to suggest that it is so hopeless or without merit that it should be permanently stayed. Indeed, but for her intervening bankruptcy, the trial of this cause of action would have proceeded in the ordinary course.

[35] The circumstances in which the stay was imposed are also relevant here. As Mr Bryers submits, the stay was not imposed for any reasons relating to the merits of the claim. Rather, it was imposed to avoid the proceeding being adjourned from one chambers' list to another while the administration of Ms Singh's bankruptcy was continuing. Judge Bell made clear in his minute that the stay was not intended to be

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<sup>35</sup> Ms Singh has indicated an intention to amend her statement of claim if the stay is lifted. The description of her claim is taken from a draft amended statement of claim submitted for the purposes of the appeal.

permanent, and it did not amount to a dismissal or a strike out of the proceeding. The expectation reflected in Judge Bell's minute was that Ms Singh would be entitled to pursue her claim if the bankruptcy was annulled.

[36] As for the third of the relevant considerations, the effect of the stay in this case was to prevent Ms Singh from pursuing a reasonably arguable claim against the Body Corporate. That is a significant curtailment of Ms Singh's right to seek redress in a court of law. Such a right should not be curtailed unless there is very good reason to do so.

[37] We do not consider the merits of a potential claim regarding the Body Corporate levies provides a good reason in this case. We accept that Ms Singh had made it clear in her affidavit and submissions that she required the information to be able to challenge the quantification of levies. Given the background to the proceeding, it is understandable that the Body Corporate focused on this likely consequence of lifting the stay.

[38] However, we consider that focus led the Judge into error. A new claim challenging Body Corporate levies is not pleaded and is yet to be formed. It is a claim which appears to be contingent in nature, that is, it depends on Ms Singh obtaining the information she seeks, identifying a discrepancy, and formulating a legal basis for her claim. It is far too early to assess the merits of such a claim. More importantly, the merits of that potential claim were irrelevant to a decision about whether to lift the stay of the pleaded claim before the Court. It follows from this analysis that it is not necessary (nor appropriate) to engage with the parties' submissions regarding Ms Singh's ability to challenge the Body Corporate levies.

[39] We consider the interests of justice in this case weigh in favour of lifting the stay. Ms Singh has a reasonably arguable claim against the Body Corporate for reports and information under the scheme. Her claim was stayed pending the outcome of her bankruptcy. That bankruptcy has now been annulled with her cause of action revesting in her. There is no reason why Ms Singh should not be able to pursue her claim against the Body Corporate and we consider the stay should be lifted to allow her to do so.

## **Result**

[40] The application to adduce fresh evidence is declined.

[41] The appeal is allowed.

[42] We order that the stay over *Singh v Body Corporate 207650 CIV 2018-404-317* be lifted.

[43] Ms Singh is the successful party and is entitled to an award of costs. Mr Bryers sought an opportunity to make further submissions on the question of costs. That was not opposed by the respondent. We grant leave to file and serve memoranda relating to costs. Any memorandum in support of an order of costs shall be filed and served 10 working days after delivery of this judgment. Any memorandum in response shall be filed and served five working days thereafter. Memoranda shall be no longer than five pages in length.

Solicitors:  
Grove Darlow & Partners, Auckland for Respondent