IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV-2011-463-000292
[2012] NZHC 1131

UNDER	the Unit Titles Act 1972
IN THE MATTER OF	a declaratory judgment pursuant to the Declaratory Judgments Act 1908
BETWEEN	ABCDE INVESTMENTS LIMITED MARIO AUGUSTIN HALENAR AND KATARINA HALENAR MARIO AUGUSTIN HALENAR AND DIANA HALENAR MARIO AUGUSTIN HALENAR EDWIN CLARENCE CAMPBELL, JILLIAN MARIAN CAMPBELL AND DONALD BRUCE THOMAS AS TRUSTEES OF THE CAMPBELL FAMILY TRUST
AND	GARY MEWETT LEWIS, SUSAN MIRA LEWIS AND DAVENPORTS WEST TRUSTEE COMPANY (NO 1) LIMITED AS TRUSTEES OF THE LEWIS FAMILY TRUST AND DUNCAN MINORS KENT AND RAYE RAILALA KENT Plaintiffs
AND	JOHN BERNARD VAN GOG AND KIM MARGARET VAN GOG First Defendants
AND	BODY CORPORATE S89906 Second Defendant

Hearing: 16 May 2012

Counsel: T J Rainey and J P Wood for Plaintiffs
M D Branch and K I Bond for First Defendants
No appearance for Second Defendant

Judgment: 24 May 2012

In accordance with r 11.5 I direct the Registrar to endorse this judgment with the delivery time of 4.00pm on the 24th day of May 2012.

Table of Contents

RESERVED JUDGMENT OF COLLINS J

Introduction

[1] This proceeding concerns a 23 unit complex in Mt Maunganui called "The Terraces". The Terraces were built during the course of 1999 and 2000 to provide holiday accommodation. It is agreed by the parties that the owners of Units 1-22 of The Terraces can use their units as holiday accommodation for themselves, family and friends and/or as short term rental units. Owners are not able to reside permanently in units or have permanent tenants.

[2] The key dispute between the parties concerns the meaning and validity of a clause in a memorandum of encumbrance (the encumbrance). The plaintiffs' case is

that the encumbrance cannot lawfully require them to let their units solely through the building manager of The Terraces. Conversely, the building manager, submits that if a unit owner wishes to let their unit, they can only lawfully do so through them.

The parties

[3] The plaintiffs are the registered proprietors of seven of the units in The Terraces.

[4] The first defendants are the registered proprietors of Unit 23 of The Terraces and are the building managers.

[5] The second defendant is the body corporate for The Terraces.

Background

Amended rules

[6] On 8 November 2000 the directors of the original owner of The Terraces, Ocean Beach Custodians Ltd signed a resolution amending the rules of body corporate No. S.89906. That body corporate was still to become incorporated. This did not happen until 6 December 2000 when unit plan S.89906 was deposited.[1]

[7] The relevant provisions of the amended rules are set out and explained in [28] and [42]. For introductory purposes it is sufficient to note that the amended rules:

(1) confer on the building manager the right to exercise letting services in respect of the units in the body corporate;

(2) confer on the body corporate the power to enter into a management agreement on certain terms and conditions; and

---

1 Refer [22(1)] and footnote 2.

(3) place restrictions on the use which unit owners can make of their units.

Encumbrance

[8] The encumbrance is dated 27 November 2000. The "encumbrancee" is defined to mean "Ocean Beach Custodians Ltd and its successors or transferees being the proprietor from time to time of Unit 23 deposited plan S.89906". The "body corporate" is defined to mean body corporate S.89906. "Units" is defined to mean Units 1-22 inclusive in deposited plan S.89906.

[9] The rent charge clause in the encumbrance provides:

> The encumbrancer encumbrances the land for the benefit of the encumbrancee for a term of 999 years subject to the provisions of this encumbrance providing for a release of the encumbrance, ... with an annual rent of $1 ... .

[10] The clauses in the encumbrance include:

> (3) The Proprietor of the relevant unit comprising the Land agrees that the Encumbrancee is entitled exclusively to exercise the Letting Service in respect of the Units and for that purpose the Body Corporate may enter into an appropriate agreement with the Encumbrancee on such terms and conditions as the Body Corporate may deem fit (all as set out in the body corporate rules registered on or about the date of registration of this encumbrance).
>
> (4) The proprietor of the relevant unit comprising the Land agrees with and for the benefit of the Encumbrancee that the Body Corporate shall not without the prior written consent of the Encumbrancee:
>
> (a) authorise any person to, nor permit any person nor any of its staff, nor itself exercise the Letting Service or any letting service of the same or similar nature as that carried on by the encumbrancee; or
>
> (b) licence, lease or grant restrictive or exclusive use of any part of the common property other than to the encumbrancee for the purpose of allowing any person to exercise the Letting Service or carry on any letting service (all as set out in body corporate rules registered on or about the date of registration of this encumbrance).

Management agreement

[11] On 20 December 2000 the body corporate executed a management agreement with the building managers who were the original proprietors of Unit 23. For present purposes the key provisions of the management agreement are:

(1) That the body corporate appoints the building manager for a term of 10 years, with a right of a further renewal for a further period of 10 years.

(2) That the body corporate must "permit the building manager to carry out the Letting Service".

(3) The terms "Letting Service" and "Letting Service Rights" are defined in the following way:

> "Letting Service" means the business of letting units to be conducted by the building manager on behalf of the proprietors.
>
> "Letting Service Rights" means the provision of the services by the building manager incidental to the Letting Service including, without limitation:
>
> (a) advertising and promotion;
>
> (b) offering units for letting;
>
> (c) negotiating with persons to occupy or use units for reward;
>
> (d) terminating any agreement or arrangement for occupation or for use of the units;
>
> (e) collecting fees and other moneys payable for occupation and use of the units.

Letting agreement

[12] Each of the plaintiffs appointed the building manager as their exclusive agent for the purposes of letting their units to the public. The agreement between the building manager and each unit owner is referred to as an annexure to the

management agreement. The example provided to the Court is dated 26 August 2009 and is the agreement between the building manager and the owners of Unit 14 of The Terraces. The terms of that agreement are referred to in more detail in Schedule 1 to this judgment. For present purposes it is sufficient to note that this agreement explains:

(1) the duties of the building manager to use their best endeavours to secure short term tenants;

(2) the duties of the building manager to collect and account for rent;

(3) the duties of the building manager to keep the units well maintained;

(4) the obligation of the unit owner to pay a fee to the building manager in relation to letting the unit; and

(5) the term of the agreement and how the agreement may be terminated.

[13] Two of the plaintiffs have cancelled their Letting Services Agreements and three other plaintiffs have given notice of their intention to cancel their Letting Service Agreements with the building manager. The building manager has, however, asserted that they have the exclusive right to let the plaintiffs' units. As a consequence, the plaintiffs have sought declarations under the Declaratory Judgments Act 1908. Those declarations are designed to determine the respective rights and obligations of the parties in relation to the matters in dispute between them.

Pleadings

[14] Five causes of action are pleaded.

[15] In the first cause of action the plaintiffs seek a declaration that the amended rules were not adopted in accordance with the relevant provisions of the Unit Titles

Act 1972 and that, accordingly, they are invalid and do not bind the body corporate or its members.

[16] In their second cause of action the plaintiffs seek a declaration that the management agreement was not validly entered into by the body corporate and that, accordingly, it is not binding on the body corporate.

[17] The third cause of action is pleaded on the premise that the amended rules are held to have been validly adopted. In that event the plaintiffs seek declarations that:

(1) certain specified clauses in the amended rules are ultra vires the Unit Titles Act 2010; and

(2) the management agreement is ultra vires and void ab initio.

[18] The fourth cause of action focuses upon cl 3 of the encumbrance. In that cause of action the plaintiffs seek declarations that:

(1) the building manager is not entitled to the exclusive right to let units in the body corporate to the public.

Alternatively,

(2) the encumbrance is invalid and unenforceable.

[19] In the fifth cause of action the plaintiffs sought an order that the management agreement be terminated pursuant to s 149 of the Unit Titles Act 2010. That cause of action is not being pursued and need not be considered any further.

[20] The first defendants abide the decision of the Court in relation to the first three causes of action. The first defendants only oppose the fourth cause of action (and would have opposed the fifth cause of action if it had been pursued). The body corporate abides the Court's decision in relation to all four remaining causes of action.

Unopposed declarations

[21] It is convenient to deal with the first three causes of action before focusing on the issues in dispute between the parties.

First cause of action

[22] The Unit Titles Act 1972 stipulated:

(1) A body corporate only came into being upon the deposit of the unit plan.[2]

(2) When a body corporate came into being, its rules were those contained in Schedules 2 and 3 of the Unit Titles Act 1972.[3]

(3) The body corporate's rules could be amended, but only by the methods prescribed in s 37 of the Unit Titles Act 1972.

Section 37(3), (4) and (7) of the Unit Titles Act 1972 provided:

> (3) The rules in the Schedule 2 to this Act 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.
>
> (4) The rules in the Schedule 3 to this Act and any additions thereto or amendments thereof may be added to, amended, or repealed in relation to any body corporate by resolution of the body corporate at a general meeting.
>
> (7) No addition to or amendment or repeal of any rule pursuant to subsection (3) or subsection (4) of this section shall have effect until the body corporate has lodged a notification thereof in form 4 in the Schedule 1 to this Act with the Registrar, and the Registrar has recorded it appropriately on the supplementary record sheet.

[23] In this case, Ocean Beach Custodians Ltd passed a resolution on 8 November 2000 purporting to amend the rules of the body corporate. That was one month

---

2 Section 12(1) Unit Titles Act 1972 provided "on the deposit of a unit plan the registered proprietor of the land to which the plan relates shall become a body corporate".

3 Unit Titles Act 1972, s 37(2).

before the body corporate existed and before Ocean Beach Custodians Ltd became a proprietor of any unit. There is no record of a resolution adopting the amended rules after the formation of the body corporate.

[24] Similar errors occurred in *Fifer Residential Ltd v Gieseg*[4] where amended rules were purported to be adopted on 14 April 2000 but the plan was not deposited and the units and body corporate did not come into existence until 20 April 2000. Rodney Hansen J found:[5]

> Until a unit plan is deposited, there are ... 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* had never come into existence. The rules of the body corporate are those set out in the Second and Third Schedules to the Act.

[25] The unchallenged evidence before me is that there was no attempt to ratify the amended rules after 6 December 2000. As a consequence, the amended rules had never been legally adopted by the body corporate. The rules of the body corporate are therefore currently those set out in the Second and Third Schedules to the Unit Titles Act 1972 to the extent that those rules have not been altered by the Unit Titles Act 2010 and the Unit Titles Regulations 2011.

[26] In these circumstances the plaintiffs are entitled to the declaration that they seek in their first cause of action, namely:

> A declaration that the amended rules were not validly adopted by the body corporate and accordingly, the operative rules applying to the body corporate are the operational rules in Schedule 2 and 3 of the Unit Titles Act 1972 in so far as those rules have not been replaced by the covenants provisions of the Unit Titles Act 2010 and the Unit Titles Regulations 2011.

---

4 *Fifer Residential Ltd v Gieseg* (2005) 6 NZCPR 306 (HC).

5 At [51].

Second cause of action

[27] The management agreement was signed on behalf of the body corporate on 20 December 2000. The authority for entering that agreement was the amended rules, unlawfully adopted on 8 November 2000.

[28] Rules 2.3(f) and (i) of the amended rules provided:

> The body corporate may ...
>
> 2.3(f) subject to r 2.3(i) enter into any agreement with a manager (whether or not incorporated) for a fixed period of time (not exceeding 10 years), for the carrying out and management of the duties of the body corporate at such remuneration and upon such terms as it may approve;
>
> ...
>
> 2.3(i) Appoint and enter into any agreement with a person or corporation to provide for the management, control and administration of the building, the common property and units which agreement may provide for:
>
> ...
>
> (iii) the exclusive provision of Letting Services including without limitation:
>
> (aa) advertising and promotion;
>
> (bb) offering units for letting;
>
> (cc) negotiating with persons to occupy or use units for reward;
>
> (dd) terminating any agreement or arrangement for occupation of use of the units;
>
> (ee) collecting fees and other money payable for occupation of use of the units.
>
> ...

[29] I have already declared that the amended rules were not validly adopted by the body corporate. Accordingly those rules could not have provided authority for the body corporate to enter into the management agreement of 20 December 2000. The rules in Schedules 2 and 3 of the Unit Titles Act 1972 do not assist the building manager because those rules relate to the body corporate's functions in relation to common property, not individual units.

[30] The ultra vires doctrine is engaged when a body corporate purports to enter into a contract that is not incidental to the body corporate's powers and duties set out in the Unit Titles Act 1972. Those powers and duties were succinctly summarised by Patterson J in the following way in *Chambers v Strata Title Administration Ltd*:[6]

> Section 37(5) permits amendments "to the powers and duties of the body corporate (other than those conferred or imposed by this Act)". Section 15 of the Act sets out the duties of a body corporate. These duties also include the duties contained in the statutory rules and any amendments thereto properly made in accordance with s 37. The duties specified in the Act relate to insuring the building and other improvements on the land, paying the premium on the insurance policies, keeping the common property in a good state of repair, complying with notices issued by local authority or public body requiring repair work, the control management and administration of the common property, the enforcement of any lease or licence under which the land is held, the enforcement of any contract of insurance, the establishment of a maintenance fund for administrative and other expenses, and the levying of proprietors to maintain this fund. The statutory rules contain a provision head "Powers and Duties of a Body Corporate". The duties relate to the repair and maintenance of chattels, fixtures and fittings, the repair and maintenance of essential services, and the production on request by certain people of insurance policies. The duties imposed by the Act are relatively limited.

The Unit Titles Act 2010 makes no changes to the powers and duties of a body corporate that are relevant to the issues raised by this case.

[31] I will refer to just two authorities which illustrate the application of the ultra vires doctrine in circumstances similar to the present case:

(1) *Russell Management Ltd v Body Corporate No. 341073*[7] concerned two rules, namely:

(a) a rule that provided for the body corporate to enter into a contract with the building manager for the exclusive provision of letting services; and

(b) a rule that entitled the proprietor of a named unit to exclusively exercise letting services for the units in the complex.

---

6 *Chambers v Strata Title Administration Ltd* (2003) 5 NZCPR 299 (HC) at [41].

7 *Russell Management Ltd v Body Corporate No. 341073* (2008) 10 NZCPR 136 (HC).

Lang J found that these rules went well beyond the powers and duties of the body corporate set out in s 15 of the Unit Titles Act 1972 and the powers contained in the rules in Schedules 2 and 3 of that Act.

(2) *Atrium Management Ltd v Quayside Trustee Ltd (In Receivership and in Liquidation)*[8] concerned rules very similar to those which were purportedly adopted on 6 November 2000 by Ocean Beach Custodians Ltd. The body corporate purported to run a holiday letting service. The Court of Appeal held that an agreement that permitted a building manager to run a holiday letting service from the complex was beyond the powers of the body corporate. In that case an owner of a unit was able to undertake a rival service from their unit. The Court of Appeal held there was nothing in the Unit Titles Act 1972 that gave the body corporate dominion over private units.

[32] Similarly, I am in no doubt that the 20 December 2000 management agreement between the body corporate and the building manager was beyond the powers of the body corporate to enter into. In these circumstances the plaintiffs are entitled to the declaration which they seek, namely:

> A declaration that the management agreement was not validly entered into by the body corporate and is accordingly not binding on the body corporate.

Third cause of action

[33] Having concluded that the amended rules were not validly adopted it is not necessary to declare that specific rules within the amended rules were also not validly adopted. Also, having concluded that the management agreement was not validly entered into by the body corporate on the grounds that the management agreement was beyond the powers and duties of the body corporate, it is not necessary to consider whether specific clauses in that agreement were ultra vires. Furthermore, declaring the management agreement void ab initio will not assist in resolving the issues in dispute between the parties.

---

8 *Atrium Management Ltd v Quayside Trustee Ltd (In Receivership and in Liquidation)* [2012] NZCA 26.

Fourth cause of action

[34] As foreshadowed in [20] the first defendants challenge the plaintiffs' right to the declarations sought in the fourth cause of action. The plaintiffs seek the following declarations in their fourth cause of action:

(1) A declaration that the encumbrancee is not entitled to the exclusive right to let units in the body corporate to the public, subject to the terms of an individual letting service agreement with individual proprietors; alternatively

(2) A declaration that the memorandum of encumbrance is invalid and unenforceable.

Analysis

Did the building manager have an exclusive right to let the units?

[35] It is convenient to consider the fourth cause of action by first determining whether or not the plaintiffs are entitled to a declaration that the building manager does not have the exclusive right to let units in the body corporate to the public.

[36] It is accepted by the parties that the existence of the rent charge clause[9] in the encumbrance means that the encumbrance is a mortgage.[10] The encumbrance therefore binds successors in title.

[37] The parties' competing interpretations of cl 3[11] of the encumbrance are based upon their different views as to which parts of cl 3 are operative.

(1) The first defendants submits that the words "the proprietor of the relevant unit comprising the land agrees that the encumbrancee is

---

9 See [9] above.

10 Refer s 101 Land Transfer Act 1952, the definition of mortgage in s 4 Property Law Act 2007 and the judgment of the Court of Appeal in *Jackson Mews Management Ltd v Menere* [2009] NZCA 563, (2009) 10 NZCPP 703 at [59].

11 See [10] above.

entitled exclusively to exercise the letting service in respect of the units ...” are the operative part of cl 3.

(2) On the other hand, the plaintiffs submit that the balance of cl 3 is the operative part of the clause. That is to say the plaintiffs submit that the words “... and for that purpose the body corporate may enter into an appropriate agreement with the encumbrancee on such terms and conditions as the body corporate may deem fit (as set out in the body corporate rules registered on or about the date of registration of this encumbrance)” are the key to the meaning of cl 3 in the encumbrance.

[38] In interpreting the meaning of cl 3 of the encumbrance I have determined the intent of the parties by reference to the language of cl 3 within its factual and legal context. This approach follows that enunciated by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society*[12] and the approach of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.[13] In that case Tipping J said:

> The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be relevant to that question. The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.
>
> Although subjective evidence would be relevant if a subjective approach were taken to interpretation issues, the common law has consistently eschewed that approach. The common law focuses strongly on the agreement in its final form as representing the ultimate consensus of the parties. Hence it is regarded as irrelevant how the parties reached that consensus. To inquire into that process would not be consistent with an objective inquiry into the meaning of a document which is generally

---

12 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912-913.

13 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19], [20], [22] and [23].

> designed to be the sole record of the final agreement. A party cannot be heard to say – never mind what I signed, this is what I really meant.
>
> Nor does the objective approach require there to be an embargo on going outside the terms of the written instrument when the words in issue appear to have a plain and unambiguous meaning. This is because a meaning that may appear to the court to be plain and unambiguous, devoid of external context, may not ultimately, in context, be what a reasonable person aware of all the relevant circumstances would consider the parties intended their words to mean. An example of that situation is when plain words, read contextually, lead to a result which does not make sense, whether commercially or otherwise: a meaning that flouts business commonsense must yield to one that accords with business commonsense. The appropriate contextual meaning, if disputed, will, almost invariably, involve consideration of facts and circumstances not apparent solely from the written contract. While displacement of an apparently plain and unambiguous meaning may well be difficult as a matter of proof, an absolute rule precluding any attempt would not be consistent either with principle or with modern authority.
>
> The proposition that a party may not refer to extrinsic evidence "to create an ambiguity" is at least potentially misleading. It does not mean context is irrelevant unless there is a patent ambiguity. Context is always a necessary ingredient in ascertaining meaning. You cannot claim to have identified the intended meaning without reference to context. Hence it is always permissible to go outside the written words for the purpose of identifying the context in which the contract was made and its objective purpose. While there are no necessary preconditions which must be satisfied before going outside the words of the contract, the exercise is and remains one of interpretation. Subject to the private dictionary and estoppel exceptions to be mentioned below, it is fundamental that words can never be *construed* as having a meaning they cannot reasonably bear. This is an important control on the raising of implausible interpretation arguments. Furthermore, the plainer the words, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say.

[39] In interpreting the parties' intended meaning of cl 3 of the encumbrance I have taken into account:

(1) cl 4 of the encumbrance;[14] and

(2) the amended rules.

Clause 4 of the encumbrance

[40] Clause 4 of the encumbrance supports the plaintiffs' argument that the parties intended the body corporate would be pivotal in future letting arrangements. Clause

[14] Refer [11] above.

4 means individual unit owners agreed that the body corporate would be the entity through which the restrictive covenant in cl 3 would be given effect. It is clear, however, that the body corporate could not lawfully play any role in the process by which individual units were let through the building manager to the public.

Amended rules

[41] Although the amended rules were not validly adopted, they nevertheless formed part of the legal and factual matrix in place at the time the encumbrance was created. In addition, cl 3 of the encumbrance specifically refers to "the body corporate rules registered on or about the date of registration of this encumbrance". This clearly conveys that the parties intended those rules would provide a point of reference to the interpretation of cl 3 of the encumbrance.

[42] There are three key provisions in the amended rules which assist in ascertaining the meaning of cl 3 of the encumbrance. Those provisions are:

(1) "Letting Service" is defined to mean "... the *exclusive* right of the building manager to let units out for rent or reward to third parties on behalf of the proprietors of the relevant units" (emphasis added).

(2) Clause 2.3(i)(iii) which provides the body corporate with the power to enter into a management agreement to provide for *exclusive* letting arrangements with proprietors.[15] (emphasis added)

(3) Clause 2.39(a) which provides:

> The proprietor for the time being of Unit 23 is entitled *exclusively* to exercise the Letting Service in respect of the Units and for that purpose the Body Corporate may enter into an appropriate agreement with the proprietor of Unit 23 on such terms and conditions as the Body Corporate may deem fit.

(emphasis added)

---

[15] Refer [29] above.

Management agreement

[43] I have considered whether or not it is necessary to place any reliance on the terms of the management agreement when interpreting the encumbrance. In my judgement it is not necessary to do so because:

(1) there is no evidence that the drafters of the encumbrance knew of the terms of the management agreement at the time the encumbrance was created; and

(2) even if I had relied on the terms of the management agreement, my interpretation of the meaning of the encumbrance would not have changed. In most respects the terms of the management agreement are consistent with the interpretation of the encumbrance which I favour.

[44] In my judgement the commercial arrangements contemplated by the amended rules and the encumbrance is that cl 3 of the encumbrance constitutes a restriction on unit owners letting their units other than through the letting service provided by the building manager. This conclusion is reinforced if the plain and ordinary meaning is given to the word "exclusively" in cl 3 of the encumbrance. This conclusion is further reinforced when regard is had to the plain and ordinary meaning of the word "exclusive" or "exclusively" found in:

(1) cl 4(b) of the encumbrance;

(2) the definition of "Letting Service" in the amended rules;

(3) cl 2.3(i)(iii) of the amended rules; and

(4) cl 2.39(a) of the amended rules.

The parties' employment of the word "exclusive" (or "exclusively") on five occasions when describing the building manager's status as provider of letting

services to the public clearly meant the parties intended the building manager would be the only provider of letting services to the public in relation to Units 1-22 of The Terraces.

Parties post contract conduct

[45] In *Gibbons Holdings Ltd v Wholesale Distributors Ltd*[16] a majority of the Supreme Court supported the proposition that evidence of conduct subsequent to the contract may be taken into account when construing the contract. Tipping J said:[17]

> If the court can be confident from their subsequent conduct what both parties intended their words to mean, and the words are capable of bearing that meaning, it would be inappropriate to presume that they meant something else.

[46] The Supreme Court did not agree on the issue as to whether or not the subsequent conduct taken into account has to be that of all the parties to the contract. Thomas J considered that the conduct of one party alone would suffice, at least if that conduct was inconsistent with the interpretation that party was arguing before the Court.[18] The Thomas J approach is supported by Professor McLauchlan.[19]

[47] In the present case the parties post contract conduct confirms my interpretation of the encumbrance. It is notable that until comparatively recently both the unit owners and the building manager proceeded on the basis that the building owner had the exclusive authority to provide letting services of The Terrace units to the public. This commercial arrangement went unchallenged for at least 10 years and has only recently been disputed by a minority of the unit owners. In my assessment it is telling that the plaintiffs are now wishing to argue against the validity of commercial arrangements which they, or their predecessors in title have given effect to for a significant period of time. It will be apparent from these observations that I consider there is force to the position taken by Thomas J in *Gibbons Holding Ltd v Wholesale Distributors Ltd* and Professor McLauchlan.

---

16 *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC 37, [2008] 1 NZLR 277.
17 At [63].
18 At [135] per Thomas J.
19 David McLauchlan "*Contract Interpretation: What is it About?"* (2009) 31 Syd L Rev 5 at 45, David McLauchlan *"Contract interpretation and subsequent conduct"* [2009] NZLJ 125.

[48] My interpretation of the encumbrance means the plaintiffs cannot obtain a declaration to the effect that the building manager does not have exclusive right to let units in The Terraces to members of the public.

Is the encumbrance invalid and unenforceable?

[49] It remains therefore to determine whether or not the plaintiffs are entitled to a declaration that the memorandum of encumbrance is invalid and unenforceable.

[50] The effect of my findings thus far are that:

(1) the amended rules were not validly adopted by the body corporate;

(2) the management agreement was not validly entered into by the body corporate; and that

(3) the building manager is entitled exclusively to exercise the Letting Service in respect of Units 1-22 in the Terraces.

[51] The plaintiffs urge this Court to conclude that no realistic sense can be made of the encumbrance unless additional provisions are grafted onto the memorandum of encumbrance. The plaintiffs point out that as the encumbrance is a mortgage its terms must be in writing and enforceable[20] and that in the absence of further terms that explain how the Letting Service is to be conducted as between the building manager and unit owners, the encumbrance is invalid and unenforceable.

[52] In my assessment, the Court should not be constrained solely by the language of the encumbrance when determining the full extent of the commercial agreement between the building manager and unit owners.

[53] While the framers of s 4 Statute of Frauds[21] desired the inclusion of all contractual terms in a single document, both common and statutory law have evolved considerably since the 17th century. In New Zealand, s 2 Contracts

---

[20] Property Law Act 2007, s 24.
[21] Statute of Frauds 1677.

Enforcement Act 1956 removed these strict requirements of the Statute of Frauds. A similar approach had previously been taken in the United Kingdom with the passing of s 40 Property Act 1925 (UK). More recently, s 24 Property Law Act 2007 has replaced s 2 Contracts Enforcement Act 1956 in New Zealand.

[54] Today it is accepted that:[22]

> The prerequisites to formation of a contract are ... :
>
> (a) an intention to be immediately bound (at the point when the bargain is said to have been agreed); and
>
> (b) an agreement, express or found by implication, or the means of achieving an agreement (eg an arbitration clause), on every term which:
>
> (i) was legally essential to the formation of such a bargain; or
>
> (ii) was regarded by the parties themselves as essential to their particular bargain.

[55] Prior to the passing of s 24 of the Property Law Act 2007, a party who wished to establish the full terms of a property contract through an amalgamation of documents had to establish:

(1) the existence of at least one document signed by the party challenging the existence of a contract;

(2) a sufficient reference (express or implied) to a second document; and

(3) a sufficiently complete agreement formed by the combination of the two documents.

[56] This is a distillation of the following passage of the judgment of Jenkins LJ in *Timmins v Moreland Street Properties Ltd*:[23]

> [I]t is still indispensably necessary, in order to justify the reading of documents together for this purpose, that there should be a document signed

---

22 *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA) at [53].

23 *Timmins v Moreland Street Properties Ltd* [1958] Ch 110 (CA) at 120.

> by the party to be charged which, while not containing in itself all the necessary ingredients of the required memorandum, does contain some reference, express or implied, to some other document or transaction. Where any such reference can be spelt out of a document so signed, then parol evidence may be given to identify the other document referred to, or, as the case may be, to explain the other transaction, and to identify any document relating to it. If by this process a document is brought to light which contains in writing all the terms of the bargain so far as not contained in the document signed by the party to be charged, then the two documents can be read together so as to constitute a sufficient memorandum for the purposes of s 40 of the Law of Property Act, 1925.[24]

[57] The ability of a Court to join documents concerning property agreements to determine the full terms of the contract has not been compromised by the passing of the Property Law Act 2007. I endorse the following passage from *Law of Contract in New Zealand*:[25]

> It seems probable that the rule allowing joinder of documents to provide a sufficient record of the contract will continue to apply under the Property Law Act 2007. Section 24 may be satisfied by a written record of the terms of the contract. There is no logical reason why such a record must be in a single document.

[58] Although the term "Letting Service" is not defined in the memorandum of encumbrance, it is possible to interpret the meaning of that concept from the encumbrance and related documents.

[59] On its face the term "Letting Service" in the encumbrance means a service whereby the encumbrancee lets out units on behalf of the unit owners. This conclusion is reinforced when regard is had to the amended rules.

[60] The term "Letting Service" is defined in the amended rules executed close in time to when the encumbrance came into being. It is clear that the drafters of the encumbrance had the amended rules in mind when drafting the encumbrance (hence the specific reference to the amended rules in the encumbrance).

[61] The fact that the amended rules were invalidly adopted and did not as a matter of law become the rules of the body corporate does not prevent those rules from forming part of an agreement between unit owners and the building manager.

---

[24] Refer s 2 Property Law Act 1956, replaced by s 24 Property Law Act 2007.

[25] John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at 9.3.4.

The definition of "Letting Service" in the amended rules makes no reference to the body corporate. The definition does, however, refer to the exclusive right of the building manager to let units out for rent or reward to third parties on behalf of the unit owners.

[62] Finally the terms of the letting agreement fully explain the basis upon which the building manager conducts letting services on behalf of the unit owners. For convenience the key relevant provisions in the letting agreement are annexed as Schedule 1 to this judgment.

[63] When the encumbrance is construed in conjunction with the amended rules and the letting agreement it is possible to understand the full terms of the commercial agreement which the parties reached and that, when considered together, these documents satisfy the requirements of s 24 Property Law Act 2007.

[64] For these reasons I am unable to conclude that the encumbrance is invalid and unenforceable.

Conclusion

[65] The plaintiffs are entitled to:

(1) The declarations set out in [26] and [32] of this judgment.

(2) The plaintiffs are not entitled to the declarations they have sought in their third and fourth causes of action.

(3) The defendants are entitled to costs. The parties have leave to refer back to the Court on the issue of costs if agreement is not able to be reached between them. If it is necessary to return to the Court on the question of costs the defendants must file a memorandum with the Court within 15 working days of this judgment. The plaintiffs will respond within a further five working days.

D B Collins J

Solicitors:
Rainey Law, Auckland for Plaintiffs
Harkness Henry, Hamilton for First Defendants

ANNEXURE

SCHEDULE 1

Letting Agreement

Clause 2

(a) The Building Manager shall use their best endeavours to secure tenants to occupy the Property subject to the terms and conditions set forth in this agreement. No warranty or representation of any kind is made or is implied with respect to the number of days that the Property may be occupied, nor in relation to the total income receipts to be produced from the Property.

(b) The Building Manager shall have an authority and exclusive right to negotiate tenancies with existing and prospective tenants on terms approved by the Owner.

(c) The Building Manager shall collect and enforce the collection of all rentals and other charges due to disperse income after deduction of expenses as hereinafter provided in accordance with the terms and conditions outlined in this agreement.

...

(f) The Building Manager shall endeavour to do everything necessary to ensure that the Owner's Property is properly maintained in a tradesman like manner and competitive price subject to any expenditure limitations imposed by the Owner. Such duties include:

(i) making or arranging for periodic inspections;

(ii) arranging for and supervising all maintenance or repairs;

...

(v) arranging as the Owner's agent any improvements, alterations and repairs as may be specifically required by the Owner, Housekeeping, Cleaning and Consumables.

Clause 3

3.2 The Ownership shall pay to the Building Manager a fee relating to the letting of the Property. The fee is equal to 12% plus GST of the gross rental for the lease term plus a

standard service fee per week of $20.00 plus GST to cover accounting and administrative charges. No deduction for expenses associated with the management and operation of the Property by the Building Manager shall be made by the Owner, to the intent that the Building Manager shall receive the fee free and clear of any deductions whatsoever.

Clause 7

7.1 The term of this agreement shall commence on [ ] and end 10 years from the Commencement Date. Under no circumstances shall the Term of this Agreement extend beyond the term of the Management Agreement between the Body Corporate or the development and the Building Manager.

Clause 10

10.1 Any dispute arising directly or indirectly out of this agreement shall be referred to mediation or arbitration in New Zealand under the Arbitration Act 1996. If the parties cannot agree on a single arbitrator within ten days of notification of the dispute then a sole arbitrator shall be appointed by the President of the Arbitration and Mediators Institute of New Zealand.