IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2010-404-00140

BETWEEN	BODY CORPORATE 183059 Applicant
AND	SOKOL LIMITED, CATHERINE ISABEL LIND, RAPHAEL INVESTMENTS LIMITED, ANDREW JULIAN LONSDALE and DAVID THOMAS LONSDALE, WILLIS WEI HSU, ANNE SHIRLEY REED, TONY GLENN KERMODE, CHONG KEE CHEW AND SOCK HOON CHEW, CRAIG JAMES KILPATRICK and EMMA CATHERINE KILPATRICK, DESMOND JAMES CUTLER, DAVID RONALD BUTLER, BROOK ANN WITT and JOHN SCOTT RAMSAY, PING ZHANG and YIFAN WU, NICHOLAS PHILIP BOWYER, LK and LM HOLDINGS LIMITED, OUTWORX NZ LIMITED, SUSAN COHEN, PATON-BEVERLEY PROPERTIES LIMITED, MARTIN JOHN CHANDLER and MARY TENG PUAY CHANDLER, DOMINIC LAW and IDA LAW, WILLIAM EARLE BAKER,

...../continued

Hearing: 19 May 2010

Appearances: E St John for the Applicant
H K Williams for first-named respondent

Judgment: 20 May 2010

RESERVED JUDGMENT OF ELLIS J

This judgment was delivered by me on 20 May 2010
at 12.30 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors: Price Baker Berridge, PO Box 21-463 Waitakere City 0650
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Copy To: H K Williams, 72 Wade River Road, Arkles Bay, Whangaparaoa

	MARY PATRICIA NELSON, SEAN ROBIN KENNEDY and LIANNE JUNE KENNEDY, CYMRU KIWI LIMITED, ELVON YOUNG, IONA YOUNG, SUSAN SUET-SUN YOUNG and ADVISORY TRUSTEES LIMITED, JUNEAU INVESTMENTS LIMITED, VEER MATI CHARAN and SUSAN MARGARET GLEN, SARAH ALICE-EVA GLEN and WILLIAM PATRICK GLEN First Respondents
AND	ASB BANK LIMITED Second Respondent
AND	ANZ NATIONAL BANK LIMITED Third Respondent
AND	THE HONG KONG AND SHANGHAI BANKING CORPORATION LIMITED Fourth Respondent
AND	BANK OF NEW ZEALAND Fifth Respondent
AND	GE CUSTODIANS Sixth Respondent
AND	WESTPAC NEW ZEALAND LIMITED Seventh Respondent
AND	KIWIBANK LIMITED Eighth Respondent
AND	TEA CUSTODIANS (PACIFIC) LIMITED Ninth Respondent
AND	MORTGAGE HOLDING TRUST COMPANY LIMITED Tenth Respondent
AND	THE NATIONAL BANK OF NEW ZEALAND LIMITED Eleventh Respondent

AND	DONAL BARRY KENNEDY, MAUREEN MARY KENNEDY AND JEREMY GILBERT OAKLEY STUBBS Twelfth Respondents
AND	PUBLIC TRUST Thirteenth Respondent
AND	NEW ZEALAND HOME BONDS LIMITED Fourteenth Respondent
AND	VERO INSURANCE NEW ZEALAND LIMITED Fifteenth Respondent
AND	DISTRICT LAND REGISTRAR Sixteen Respondent

[1] Body Corporate 183059 has applied to the Court for orders settling a scheme under s 48 of the Unit Titles Act 1972. The application relates to buildings at 42 St Benedict Street, Newton, which are to a greater or lesser extent damaged as a result of "leaky building syndrome". Named as parties to the proceedings are the registered proprietors of the 30 units in the Body Corporate (the first respondents) and the mortgagees of the units in the Body Corporate (the second to thirteenth respondents). The fourteenth respondent is a statutory land charge holder. The fifteenth respondent is the insurer of the Body Corporate. The sixteenth respondent is the District Land Registrar who is required to be served under the Act.

[2] The hearing of the application under s 48 has been set down for hearing on 12 July 2010. The two matters presently requiring resolution relate to one of the first respondents, Sokol Limited a company which is the registered proprietor of three of the units. Those matters are:

a) An application for leave permitting Sokol Limited to be represented in the s 48 application by the sole director and shareholder of the company, Mr Keith Williams; and

b) An issue as to whether there is a conflict of interest said by Mr Williams to arise from the fact that Mr Clinton Baker represents both the applicant in the substantive proceedings (namely Body Corporate 183059) and also Body Corporate Administration Limited (BCAL) which acts as the secretary to Body Corporate 183059, and has done for a number of years. On 5 May 2010 Associate Judge Faire indicated that it would be desirable to have this issue resolved prior to the substantive hearing in July

Representation issue

[3] Body Corporate 183059 quite properly took no formal position on this issue.

[4] The starting point is the general rule that in the superior courts a company must be represented by a barrister and/or solicitor of the High Court although the Court has a residual discretion to permit representation by persons not legally qualified. The leading New Zealand authority remains the decision of the Court of Appeal in *Re G J Mannix Ltd.*[1] In that case Cooke J summarised the position as as follows (at 314):

> In general, and without attempting to work hard and fast rules, discretionary audience should be regarded, in my opinion, as a reserve or occasional expedient, for use primarily in emergency situations when counsel is not available or in straightforward matters where the assistance of counsel is not needed by the court or where it would be unduly technical or burdensome to insist on counsel. Especially in minor matters, cost saving could also be a relevant factor. A 'one-man' company might be allowed to be represented by its owner if the Judge saw fit in a particular case. But it could not be right, for instance, to issue some sort of tacit continuing or general licence to an unqualified agent to appear in winding up or in any other class of proceedings.

[5] McMullin J put it this way (at 315):

> But, apart from the impossibility of devising a formula which would allow representation in some limited cases, to afford an absolute right of audience to a company for the considerations already mentioned would ignore the fact that there is not always an unanimity of viewpoint in small companies,

[1] *Re G J Mannix* Ltd [1984] 1 NZLR 309.

> which along with others can be the subject of internal dissension, with the consequent difficulty of ensuring that the officer seeking to appear for the company truly represents the interests of the company and not his own. ... There is also the fact that litigants in person through their lack of expertise in conducting legal proceedings often pursue irrelevant matters ad nauseum, unduly prolong proceedings and require indulgences from the Court and from their opponents to meet their non-professional approach. That litigants in person sometimes succeed is not so much a result of their advocacy as the ability of the Judge to discern the essential facts and determine where the justice of the case lies. It is interesting to note that the report of the *Royal Commission on Legal Services* in England in 1979 (Cmnd 7648-1), while recognising the long established right for a litigant in person to speak on his own behalf, recommended that laymen should have no right of audience in superior Courts.

[6] Somers J was of a similar view, noting that while cases will arise where the due administration of justice may require some relaxation of the general rule against lay persons appearing on behalf of companies, "their occurrence is likely to be rare, their circumstances exceptional or at least unusual, and their content modest".

[7] The position as outlined in the *Mannix* decision has effectively been preserved by virtue of s 27 of the Lawyers and Conveyancers Act 2006.

[8] The reason representation of Sokol Ltd is required is because Mr Williams opposes certain aspects of the proposed s 48 scheme and wishes to be heard in that respect at the upcoming July hearing. The matters upon which he wishes to be heard seem to be:

a) the conflict of interest issue that is said to arise by virtue of clause 13.3 of the Scheme (and which is the subject of the latter part of this judgment);

b) whether there is insufficient statutory mandate for the bringing of the application by the Body Corporate; and

c) certain specific provisions in the proposed Scheme that Mr Williams says require amendment, addition or omission. The amendments sought appear to be of a relatively minor nature.

[9] In light of Mr Williams' sole directorship and shareholding in Sokol Limited there can be no question that that is not also his company's position. It appears, however, that the s 48 application is not opposed by any of the other respondents.

[10] The reason Mr Williams seeks leave to appear on his company's behalf is that the company has insufficient funds to retain counsel. I am satisfied that that is in fact the case as regards both the company and Mr Williams himself.

[11] Insofar as I can tell, the pending s 48 application does not seem to be particularly complex. As I have said, the application is not opposed by anyone other than Mr Williams, who has a real and undoubted interest in it. His opposition is focused on those matters I have summarised above.

[12] Accordingly I do not consider it likely that the Court's hearing and determination of the application will be significantly impeded if Mr Williams is permitted to appear, notwithstanding his absence of legal qualifications. I consider that Sokol Limited has a right to be heard and, as I have said, I am satisfied that this will not be possible unless Mr Williams is permitted to appear. Leave is granted accordingly.

[13] At the hearing before me a question was also raised as to whether the Court would also permit an appearance for the company by Mr Williams' "legal advocate" a Mr Greg Bennett. Mr Bennett is not, as I understand it, a lawyer.

[14] It seems to me that it is one thing effectively to lift the corporate veil and permit a small company to be represented in Court by its owner or managing director, if circumstances dictate. In the words of McMullin J in *Mannix*, Sokol Limited can legitimately be seen simply as Mr Williams "business alias". It is quite another matter, however, to invite other, unrelated and unqualified, persons into the Court to appear on behalf of the company. While Mr Williams may of course get advice from whomever he wishes outside the courtroom door, I decline to grant leave for Mr Bennett to appear for Sokol Limited.

Alleged conflict of interest

[15] As I have said the conflict said by Mr Williams to arise relates to the fact that Mr Baker represents Body Corporate 183059 (the applicant in the substantive proceedings) and also the Body Corporate's Secretary, BCAL.

[16] BCAL is not a party to the present proceedings but the proposed scheme contains a clause (clause 13.3) which would provide that the owners jointly and severally indemnify BCAL against all costs, expenses, claims and proceedings incurred by it in the exercise of powers granted to the Body Corporate under this scheme. Mr Williams says that a conflict arises because this clause is plainly in BCAL's interests but not in the interests of the Body Corporate.

[17] Mr Williams also makes wider allegations to the effect that BCAL has not acted, or may not in future act, in the interests of the Body Corporate although there was no evidence before me in relation to those allegations.

[18] Rule 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 provides:

> A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 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.
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> 6.1.2 Despite rule 6.1.1, if a lawyer is acting for more than 1 client in respect of a matter and it becomes apparent that the lawyer will no longer be able to discharge the obligations owed to all of the clients for whom the lawyer acts, the lawyer must immediately inform each of the clients of this fact and terminate the retainers with all of the clients.
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> 6.1.3 Despite rule 6.1.2, a lawyer may continue to act for 1 client provided that the other clients concerned, after receiving independent advice, give informed consent to the lawyer continuing to act for the client and no duties to the consenting clients have been or will be breached.

[19] Notwithstanding the fact that BCAL is not a party to the present proceedings it nonetheless does have a role in relation to the proposed Scheme; the indemnity

given to it by clause 13.1 is a reflection of that role. BCAL is necessarily a distinct entity from Body Corporate 183059 and on that basis it is probably fair to say that Mr Baker is acting for more than one client in relation to the same matter – the "matter" in question being the devising, approval and implementation of the Scheme. Whether a prima facie conflict arises, however, depends on whether the present circumstances are such that there is "a more than negligible risk that [Mr Baker] may be unable to discharge the obligations owed by him" either to BCAL or to Body Corporate 183059.

[20] At a general level, the role of the Secretary of a Body Corporate has been considered by Heath J in *Body Corporate 318566 v Strata Title Administration Ltd (No 2)*[2] where he said:

> [10] In the context of the Body Corporate's duty to manage and administer the common property and to do all things reasonably necessary for the enforcement of the rules, it has power to appoint a secretary. A secretary is engaged to carry out general administrative functions and to undertake such other functions as may, from time to time, be delegated to it by the Body Corporate. Rule 31 of the default rules in Schedule 2 accurately captures the secretary's primary role. In my judgment of 17 March 2009, I said:
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> > [32] The function of the secretary shall be to keep proper books of account in which shall be kept full, true, and complete accounts of the affairs and transactions of the body corporate and to carry out such other functions as may from time to time be delegated to him by the body corporate.
> >
> > [33] In the absence of an express delegation requiring the secretary to perform other duties, the secretary acts as an administrative functionary to relieve individual proprietors of the need to manage those aspects of its activities that fall within rr 31 and 31A of Schedule 2. While it has become common for body corporate secretaries to be given responsibility for managing such things as "leaky home" claims, that is because the individual proprietors have elected to delegate that function. The fact that such delegations may occur does not alter the nature of the secretary's function. The Body Corporate decides what an appointed secretary may do, not *vice versa.* That is confirmed by rr 4-13 of Schedule 2, which deal with the duties and powers of the Body Corporate that can be exercised by an owners' committee.

[2] *Body Corporate 318566 v Strata Title Administration Ltd (No 2)* HC Auckland CIV-2008-404-6294,12 June 2009.

[21] Thus while it is conceivable that the interests of a Body Corporate and its Secretary could part ways (the *Strata* litigation itself being an example of this) there is certainly no inherent conflict in their respective functions and indeed there must logically be a presumption in favour of the opposite conclusion. This in itself suggests that the risk against which Rule 6.1 is intended to guard is, indeed, "negligible" in the present case.

[22] Nor do I consider that the indemnity given by proposed clause 13.1 of the Scheme give rise to a conclusion to the contrary. In particular, I accept Mr St John's submission that such clauses are standard in Schemes of this kind and are merely reflective of the effective impossibility of obtaining insurance cover in "leaky buildings" matters. Even if that were not the case, the appropriateness of the content of clause 13.1 is a matter that (in light of my conclusion on the representation issue) Mr Williams can ask the Court to consider in the context of his opposition to the Scheme at the hearing in July.

[23] If I am wrong in these conclusions, however, there is a further reason why I do not consider that the Court should intervene in relation to the alleged conflict. Consequent upon Mr Williams raising his conflict concerns, the Committee of Body Corporate 183059 (appointed to exercise the powers and perform the duties of the Body Corporate under Rule 2.4 of the Body Corporate Rules) sought independent legal advice on the issue. The evidence before me (in the form of an affidavit from the Committee Chairman, Mr Bowyer) was that following receipt of that advice the Committee has consented to Mr Baker and his firm continuing to act both for Body Corporate 183059 and for BCAL.

[24] Mr St John's submission as to the desirability of avoiding the additional cost to the Body Corporate of instructing a separate lawyer when the circumstances do not clearly warrant that course also applies with particular force in a leaky building context.

[25] Thus while there remains under Rule 6.1 an ongoing obligation to keep the position under review, this step confirms my view that there is presently no basis

upon which the Court could or should restrain Mr Baker or his firm from acting for either entity.

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Rebecca Ellis J