IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2012-485-1852
[2012] NZHC 2391

BETWEEN	TRUST PORIRUA First Plaintiff
AND	HAUTE KWISINE HOLDINGS LIMITED Second Plaintiff
AND	JACKSON HOLDINGS (2005) LIMITED Defendant

Hearing: 13 September 2012

Counsel: K P Sullivan and D A Bleier for Plaintiffs
G Dewar for Defendant

Judgment: 13 September 2012

ORAL JUDGMENT OF WILLIAMS J

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[1] Jackson Holdings Limited owns two adjoining sites along Jackson Street in Petone. The western site has on it a local bar and restaurant known as the Empire Tavern. Trust Porirua is the head leasee of the tavern site and it sub-lets the bar and restaurant business to Haute Kwisine Holdings on generally the same terms as its lease.

[2] The lease covers the lower floor of the Empire Tavern building, a right-of-way at the rear of the site and an adjoining area of clear land along the Jackson Street frontage. Haute Kwisine has established a garden bar area along that portion of the Jackson Street frontage. It takes advantage of Petone's wonderful weather. The remaining unbuilt section of the site is used for car parking and a right-of-way access to the adjoining eastern site.

[3] In September and October last year, Jackson Holdings purchased the eastern site and plans to build a three storey apartment on it. The plans involve, it is agreed, an encroachment into the air space of the western site. Counsel assessed the encroachment at 12x12 metres but that must perhaps be taken with a grain of salt given that counsel are not surveyors, and the plans were difficult to read. Nonetheless there is encroachment.

[4] Jackson Holdings obtained resource consent for the three storey development and is in the early stages of building. The plaintiffs want construction on this site to halt. They apply now for an interim injunction accordingly. They say that the building will encroach into air space to which they are exclusively entitled; that as a result of the construction they will lose up to 28 car parks on their exclusive lease site; that the nature of the air space encroachment involves cantilevering an upper floor or floors over the plaintiffs' car park area requiring poles to be placed on the leased land; that their own car parks will (as a result of this new structure, and the placement of poles), be far more difficult to use and access; and finally that construction on the adjoining land will have a spill over effect onto the leased land during the time of construction amounting in itself to trespass and nuisance.

[5] Jackson Holdings responds firstly and most vigorously that the plaintiffs agreed to the development. They consented, it is said in April when the plans were first shown to them and this position was reversed around 12 July long after commitments had already been made.

[6] Jackson Holdings' second argument is that the plaintiffs are only entitled to *car parks* in accordance with the terms of the lease, not exclusive use of the car parking area for all purposes, and the car parks are not affected. The lease involves, the defendant says, no transfer of a right to air space in the leasee.

[7] Thirdly, Jackson Holdings argues that the plaintiff is wrong in saying it will lose car parks. It was made clear before me by counsel that there are no plans to take any car parks exclusively belonging to the plaintiffs on their leased site.

[8] The fourth argument was that damages are adequate in any event and can be easily ascertained.

[9] The fifth argument was that although it is accepted that construction may be an imposition, it is a reasonable and minimal imposition in the circumstances.

[10] Finally, the argument is that the plaintiffs waited for five months in full knowledge of what was planned here before seeking injunctive relief and that delay is too long for the court in its discretion now to grant an injunction.

[11] The relevant applicable principles here are well-known and well understood. The burden is on the plaintiffs to show that they have arguable case, that the balance of convenience is with them and that the overall justice of the situation is in favour of granting the interim injunction.

Arguability

[12] The air space encroachment argument turns on the meaning of Schedule 1 to the lease which describes the lease area in these terms:

> Comprising the ground floor, the outdoor area and the car parking area outlined in red on the attached plan subject to the right-of-way recorded at clause 48.1.

[13] This is to be contrasted with the described business use in the lease: "restaurant/bar function centre or any other use permitted under the District Plan". This description is connected to clause 16.1 of the lease giving the landlord a prior consent right which consent is not to be unreasonably or arbitrarily withheld.

[14] The question here is whether the reference to "car parking area" is in itself a restriction on the use of the area to car parks only, or whether the lessees were given a general right of use in that area for all purposes expressed in the lease. If the latter, that would mean "car parking area" is simply a reference to the space but not the only allowable use of that area. It is pursuant to that argument that the plaintiff says it is entitled to expand its garden bar areas into that area, to undertake other uses in that area, and of course to protect exclusive air space for the duration of the lease.

[15] In my view, there can be no question but that the plaintiffs' case in this respect is arguable. By that I simply mean that the reference in the lease to car parking area may well be a more general reference than just to the areas used as car parks. That will no doubt require evidence, and I cannot resolve that issue finally here. It is sufficient for me to conclude that that is arguable.

[16] The second argument relates to the loss of car parks. The plans filed with the consent application indicated that Jackson Holdings would take 28 car parks from the plaintiffs' leased land and make them available for the eastern apartment complex.

[17] In court before me, Mr Dewar indicated that the defendant does not wish to use any spaces in the defendant's exclusive leased area notwithstanding the terms of the resource consent. Mr Dewar rather enigmatically (but nonetheless clearly) indicated that how Mr Melville for Jackson Holdings resolved that question was a matter for him and I need not trouble myself further about it, nor need the plaintiffs.

[18] I must say this argument has troubled me a little, but counsel has given that indication and I am not the Environment Court. It has been said in open court, in clear and firm terms, that the 28 car parks referred to in the resource consent application will not be taken from the leased site. It would be wrong for me to ignore that at this stage, and even more wrong to disbelieve it. I therefore set that matter aside and conclude that it is not arguable.

[19] The next point is the placement of poles.

[20] If it is true that cantilever poles will be placed in the exclusive lease area of the plaintiffs in order to hold up the second and third floors of the apartment complex, then, with or without the air space argument, that is a clear trespass. Of course it will depend in turn upon the plaintiffs successfully arguing that their right in the area is greater than a car parking right, but I have already concluded that that is at least arguable. It follows therefore that under this head the plaintiffs have an arguable case for trespass and incursion into quiet possession and enjoyment.

[21] The next argument was that the construction design and the placement of the poles would make access to the plaintiffs' car parks more difficult to achieve and the car parks themselves more difficult to use. I cannot resolve that matter as a question of fact but if for practical purposes it is true, then that is also a detraction from the quiet enjoyment right. It follows that that head too, must be arguable in law. I would conclude generally therefore that the plaintiffs have an arguable case here subject to the defendant's point about consent.

[22] It is unnecessary for me to address the construction trespass.

Did Mr Rowan consent to the adjoining development?

[23] Jackson Holdings says that Mr Rowan (the principal of Haute Kwisine) originally consented to its development in April and that the defendant relied on that consent in proceeding before Mr Rowan did an about turn in July this year.

[24] Mr Rowan simply, and I might say boldly, denies that this is so. His evidence appears to be that the overall impact on this development dawned on him late and as soon as it did, he took steps. I cannot finally resolve the consent issue today. What is clear is that there is no written consent in the evidence. In the absence of written consent, it would be dangerous for me at this stage to reject the plaintiffs' argument on the basis of an unwritten implied consent, even though that argument may be available to the defendant and very relevant later.

[25] I must therefore proceed in considering this application on the basis that Mr Rowan did not consent, and I prefer to leave the final resolution of that issue to a later stage if necessary.

What of the balance of convenience then?

[26] Mr Dewar rightly says delay has been significant. Five months if, as he argues, the consent plans had been with both Trust Porirua and Haute Kwisine for that long. It appears on the evidence that he is right in this respect and that to some

extent at least Mr Rowan has sat on his hands. Delay counts against an interim injunction in this case.

[27] On the other hand, the second to final exhibit to the affidavit of Mr Rowan goes the other way. In it Mr Melville says to Mr Smith of Trust Porirua that he will continue with construction even if the decision went against Jackson Holdings. He says he will just build exclusively on the western site leaving the area over the car park and the contentious air space as Stage 2 to be built at a later date when the legal challenges are resolved. This suggests the impact of an injunction on Jackson Holdings may not be as great as suggested in submission.

[28] A final factor in the balance of convenience is of course the plaintiffs' undertaking as to damages. There was no argument in this case that the plaintiffs were not good for the undertaking, or that it could not be relied upon.

[29] I conclude therefore that the balance of convenience favours the plaintiffs in this case.

[30] I also consider (stepping back and looking at the matter in the round) that the overall justice of the case favours the plaintiffs here. Despite their delay, they do have clear arguable grounds to suggest that their proprietary rights under the lease are being, and will be interfered in. As the learned authors of *Todd: The Law of Torts in New Zealand* make clear such interference is generally speaking a trump, and so it should be here in my view.

[31] The plaintiffs therefore will be entitled to an order on the terms applied for in paragraphs 1.1 and 1.2 of the application. I will hear from counsel as to the appropriate terms of paragraph 1.3 in terms of removal and reinstatement. And I will reserve costs.

[32] I finally note Mr Dewar's application for stay. It seems to me this is the very sort of case where the arbitration/mediation clause in the lease agreement should be resorted to with all possible speed. There will be an order therefore staying any

further steps in the substantive proceeding pending resort to the arbitration clause in the lease agreement.

[33] Counsel will file memoranda with respect to clause 1.3 of the draft orders if that becomes necessary.

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Williams J

Solicitors:
K P Sullivan, Barrister, Wellington
Thomas Dewar Sziranyi Letts, Solicitors, Lower Hutt