IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-000818
[2020] NZHC 926

UNDER	the Declaratory Judgments Act 1908 and Part 18 of the High Court Rules
IN THE MATTER	of a Body Corporate under the Unit Titles Act 2010
BETWEEN	BODY CORPORATE 406198 Plaintiff
AND	PROPERTY OPPORTUNITIES LIMITED Defendant
	SHIRAZ HOLIDAY LIMITED Second Defendant
	BIANCO LIMITED Third Defendant
	AVONDALE PROPERTIES LIMITED Fourth Defendant

Hearing: 11 November 2019

Appearances: I J Stephenson for Plaintiff
C Pendleton for the First Defendant (excused)
T Rainey for the Second Defendant
P Sills for the Third and Fourth Defendants (excused)

Judgment: 7 May 2020

JUDGMENT OF ASSOCIATE JUDGE SARGISSON

This judgment was delivered by me on 7 May 2020 at 11.30 a.m.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date.....

The proceeding

An overview

[1] This proceeding concerns a unit title development known as Bianco Off Queen in the Auckland CBD. The plaintiff, Body Corporate 406198, is the body corporate for the development. In its statement of claim, it claims declaratory relief regarding the validity of its body corporate rules adopted in December 2008 (the Amended Rules), a deed of lease for principal unit 1F/2 and its ancillary carpark units[1] (the Lease) — which it entered as guarantor — and a management agreement for provision of services (the Management Agreement). The Body Corporate applies for an order for summary judgment of a number of claims set out in its statement of claim.

[2] At its heart, the Body Corporate's claim arises out of a dispute about significant financial obligations that it has borne and are said to be underpinned by the allegedly invalid Amended Rules, Lease and Management Agreement[2] —all of which are said to have been masterminded by the developer of Bianco Off Queen when it was the sole controlling mind of the Body Corporate.

[3] There are four defendants:

(a) Bianco Ltd (formerly Turn and Wave Ltd), the third defendant. It is the developer and original sole proprietor of Bianco Off Queen (and the Body Corporate, which is now comprised of multiple proprietors) and the original landlord of the Management Unit under the Lease.

(b) Avondale Properties Ltd (formerly Bianco Off Queen Ltd), the fourth defendant. It is the original tenant under the Lease and owned by the developer of Bianco Off Queen.

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1 The principal unit 1F/2 and the ancillary carpark units are henceforth referred to collectively as the "Management Unit".

2 The obligations relate primarily to the rent and outgoings payable under the lease for unit 1F/2 and the management fee for the provision of services purportedly to the Body Corporate under the Management Agreement.

(c) Property Opportunities Ltd, the first defendant. It is the current landlord/lessor and registered proprietor of the Management Unit under the Lease, having acquired such from Bianco Ltd.

(d) Shiraz Holiday Ltd, the second defendant. It is the current tenant/lessee of the Management Unit, having been assigned Avondale Properties Ltd's interest in the Lease.

The current summary judgment application

[4] On 7 June 2019, the Body Corporate filed an application seeking summary judgment on its statement of claim. No issue is taken with the late filing of the application.

[5] In a memorandum filed shortly before the hearing of the application, which counsel expanded upon at the hearing, counsel for the Body Corporate clarified that it presently seeks summary judgment on part of its claim only. To that end, it seeks declarations as follows:

(a) That the rules which are said to have authorised the Body Corporate to enter into the Lease — namely, rr 3.1(v) and 3.2(l) of the Amended Rules — are ultra vires the Unit Titles Act 1972 (UTA 1972) and therefore were, from inception, void and of no effect; and

(b) That the Lease was entered into ultra vires the UTA 1972 and therefore was, from inception, void and of no effect.

[6] In its statement of claim, the Body Corporate has a further claim for relief relating to the Management Agreement. However, counsel clarified that it did not seek summary judgment on that claim.

Some preliminary matters

[7] The application for summary judgment is opposed by the first and second defendants, namely Property Opportunities Ltd and Shiraz Holiday Ltd. Both filed

documents in opposition, but only Shiraz Holiday Ltd took an active role at the hearing. This was on the basis that counsel for Property Opportunities Ltd advised, at the commencement of the hearing, that it wished simply to rely on its notice of opposition and supporting affidavit and did not want to appear further or be heard at the hearing. Counsel was excused on that basis.

[8] The third and fourth defendants, Bianco Ltd and Avondale Properties Ltd, have filed a joint statement of defence but no documents in opposition to summary judgment. Their counsel appeared briefly at the hearing for summary judgment and was excused based on his advice that they would abide the Court's decision on the application.

Background

[9] Bianco Off Queen is a development made up of 157 principal units (located in two towers) that are used mainly for residential apartments, along with a hotel and associated short-term accommodation. The development was undertaken by Bianco Ltd pursuant to a resource consent for residential apartments, but it wished to convert part of the development into a hotel and/or serviced apartments. In September 2009, it obtained approval from the Auckland Council for the necessary change of use from "sleeping residential" to "sleeping accommodation".

[10] Taking a step back, in 2008, Bianco Ltd deposited Unit Plan 406198 for the development and on 18 November 2008 Body Corporate 406198 came into being under the UTA 1972 with Bianco Ltd being the sole proprietor. The rules for the Body Corporate were the default rules set out in schs 2 and 3 of the UTA 1972. In December 2008, the Body Corporate, by its sole registered proprietor, made the following arrangements to convert part of Bianco Off Queen into a hotel and/or serviced apartments.

[11] First, on 3 December 2008, the Body Corporate, by its sole registered proprietor Bianco Ltd, repealed and replaced the default rules with a new set of rules, namely the Amended Rules. The resolution for the change of rules was signed on behalf of the Body Corporate by Timothy Manning, the director of Bianco Ltd.

[12] The Amended Rules relevantly provide, in relation to the Management Unit:

> **BIANCO OFF QUEEN**
>
> **RULES FOR BODY CORPORATE NUMBER 406198**
>
> The Body Corporate rules set out in the second and third schedule of the Unit Titles Act 1972 are repealed and the following rules substituted in their place:
>
> …
>
> **3 POWERS AND DUTIES OF BODY CORPORATE**
>
> 3.1 The Body Corporate shall:
>
> …
>
> (v) pay a contribution to the Manager equivalent to the rent payable under the lease for the Management Unit and Reception and provide a rental guarantee to the lessor of the Management Unit throughout the term of that lease agreement and any renewal thereof;
>
> …
>
> 3.2 The Body Corporate may:
>
> …
>
> (l) guarantee any lease of the Management Unit and Reception.[3]

[13] Under the Amended Rules, the term "Manager" is defined as the "Manager appointed pursuant to a Management Agreement"; and "Management Unit" means "Unit 1F/2 and any associated accessory Units."

[14] Secondly, on 5 December 2008, the Body Corporate became party to a Deed of Lease for the Management Unit. The Body Corporate entered the Lease as guarantor, with Bianco Ltd as lessor and Avondale Properties Ltd as lessee. Mr Manning signed the Lease on behalf of all parties — he signed for lessor and lessee in his capacity as director of both and for the guarantor as chair of the Body Corporate.

[15] The first schedule of the Lease records the authorised use of the Management Unit is as a "Reception and Office for the building manager to be used for operation of the complex as serviced apartments". "Reception" is defined as "an area comprised

in Management Unit 1F/2". The Management Unit is used as the reception for the hotel and serviced apartments operating at Bianco Off Queen.

[16] The guarantee is laid out in the third schedule to the Lease and provides for the right of the landlord to treat the Body Corporate as if it were the tenant and for the reciprocal but contingent right of the Body Corporate to enforce performance of the Lease. The guarantee relevantly states:

> IN CONSIDERATION of the Landlord entering into the lease at the Guarantor's request the Guarantor:
>
> (a) guarantees payment of the rent and the performance by the Tenant (as a matter of damages only) of the covenants in the lease, and
>
> (b) indemnifies the Landlord against any loss in subparagraph (a) above the Landlord might suffer and/or should the lease be lawfully disclaimed or abandoned by any liquidator, receiver or other person.
>
> THE GUARANTOR covenants with the Landlord that:
>
> …
>
> 2. AS between the Guarantor and the Landlord the Guarantor may for all purposes be treated as the Tenant and the Landlord shall be under no obligation to take proceedings against the Tenant before taking proceedings against the Guarantor.
>
> …
>
> 4. An assignment of the lease and any rent review in accordance with the lease shall not release the Guarantor from liability.
>
> …
>
> 6. The Guarantee shall extend to any holding over by the tenant.

[17] Thirdly, again on 5 December 2008, the Body Corporate became party to a related Management Agreement under which Avondale Properties Limited, as lessee of the Management Unit, was appointed as Manager under the Agreement to "perform certain duties and provide certain services for the management and maintenance of the Property". Again, the Management Agreement was signed by Mr Manning on behalf of both the lessee and the Body Corporate.

[18] The Management Agreement stipulates that the Property is "collectively the Land, the Buildings, the Units and the Common Property" — effectively the entire property comprising Bianco Off Queen. The Agreement also states:

> 3.1 General Duties — The Manager will:
>
> …
>
> (p) provide adequate rental accommodation within the complex to the on-site building manager. If the rental for such accommodation is greater than the $20,000.00 allowance contained in the Management Fee the shortfall shall be payable by the Manager.
>
> …
>
> 5.1 In consideration of the Manager performing the Duties the Body Corporate shall pay to the Manager the Management Fee. The Management Fee at the Commencement Date is $220,000.00 per annum plus GST (if any).
>
> 5.2 The Management Fee referred to in clause 5.1 is made up as follows:
>
> $200,000.00 Management Fee (including allowances for cleaning and security);
>
> $20,000.00 Allowance towards the cost of providing adequate accommodation within the complex to the on-site building manager. Any shortfall of rental payable above this sum shall be payable by the Manager.
>
> …
>
> 5.4 The Body Corporate must pay the Management Fee without deduction, reservation or set off on any account whatsoever to the Manager in equal monthly instalments in advance on the Commencement Date and the first day of each month until the Expiry Date or earlier termination of this Agreement.
>
> 5.5 The Management Fee represents remuneration for the performance of the Duties (being the Duties set out in Clause 3). The Management Fee does not include provision of the following:
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> …
>
> (f) Any contribution towards the rent of the Management Unit and Reception.
>
> 5.6 The Management Fee is to be reviewed and adjusted on each Review Date in the following manner:
>
> …

> 5.6.6 The Body Corporate will throughout the term of this management agreement pay (in addition to the management fee) to the Manager a contribution equivalent to the rent payable under the lease for the Management Unit and Reception.

[19] Five years later, on 11 November 2013, Property Opportunities Ltd became the registered proprietor of the Management Unit and thereby the lessor under the Lease.

[20] Then, on 1 June 2014, Shiraz Holiday Ltd took an assignment of Avondale Properties Ltd's interest in the Management Agreement as the Manager. Further, on 20 June 2014, it took an assignment of Avondale Properties Ltd's interest as lessee of the Management Unit under the Lease. Shiraz Holiday Ltd currently operates the hotel and short-term accommodation business at Bianco Off Queen.

[21] The Body Corporate says that it has paid to the landlord rent and outgoings for the Management Unit leased by the tenant and the body corporate levies payable by the landlord. The purported obligation of the Body Corporate to pay rent and outgoings for the Management Unit is found in the combination of the Amended Rules, the Lease and the Management Agreement. The Body Corporate says that these arrangements were entered into by Bianco Ltd, as sole registered proprietor of the Body Corporate, ultra vires the UTA 1972 and are therefore void.

Summary judgment principles

[22] The Body Corporate seeks declaratory relief by way of summary judgment. Rule 12.2(1) of the High Court Rules 2016 provides:

> The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or a particular part of any such cause of action.

[23] The principles of summary judgment are well-established. They can be summarised as follows:[4]

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[4] *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26]; and *Gardner v Gardner* [2015] NZHC 2018 at [20].

(a) The question on a summary judgment application is whether the defendant has no defence to the claim(s), that is, that there is no real question to be tried.

(b) The onus is on the plaintiff. But where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated. In assessing a defence, the Court will look for appropriate particulars and a reasonable level of detailed substantiation. The defendant is under an obligation to lay a proper foundation for the defence in the affidavits filed in support of the notice of opposition. In the end, the Court must be left without any real doubt or uncertainty.

(c) The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, for example, where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable. In the end, the Court's assessment of the evidence is a matter of judgement.

(d) The need for judicial caution in summary judgment applications must be balanced with the appropriateness of a robust and realistic judicial attitude when that is called for by the particular facts of the case.

Issues

[24] The issues to be determined by the Court at this stage are:

(a) Whether rr 3.1(v) and 3.2(l) of the Amended Rules are ultra vires the UTA 1972 and/or unlawful and accordingly void and of no effect; and

(b) Whether the Lease was entered into ultra vires the UTA 1972 and accordingly void and of no effect.

Issue 1: Are rr 3.1(v) and 3.2(l) of the Amended Rules ultra vires the UTA 1972?

[25] In its statement of claim, the Body Corporate pleads that rr 3.1(v) and 3.2(l) of the Amended Rules are ultra vires the UTA 1972 because:

> (a) the [Amended] Rules … are not incidental to the performance of the duties or powers imposed on the Body Corporate under the Unit Titles Act 1972; and/or
>
> (b) the applicant Body Corporate held no lawful authority or otherwise acted ultra vires sections 15, 16 and 37 of the Unit Titles Act 1972 by making the [Amended Body Corporate] Rules …

Which Act applies — the UTA 1972 or the UTA 2010?

[26] Shiraz Holiday Ltd submits that the Court need not make a declaration regarding the Amended Rules as those rules were repealed under the Unit Titles Act 2010 (UTA 2010) and cease to have any legal effect.

[27] The UTA 2010 replaced the UTA 1972. Under the transitional provisions of the UTA 2010, certain provisions of the UTA 1972 continued to apply until 15 months from the first day of the month following the date of the commencement of the UTA 2010. The effect of the transitional provisions is that the default rules provided for in sch 2 of UTA 1972, or any amendments to those rules adopted by a body corporate, continued to apply until 1 October 2012.

[28] Accordingly, Shiraz Holiday Ltd submits that after 1 October 2012, the Amended Rules ceased to have any legal effect. Now, the UTA 2010 applies. And under its provisions, a body corporate may adopt amended operational rules, which the Body Corporate has done and those amended rules are not challenged in this proceeding. It argues that there is therefore simply no point to the declarations sought.

[29] Justice Muir has previously addressed this issue in the context of considering an agreement that pre-dated the UTA 2010. In *Body Corporate v Vermillion Wagener Ltd*, which was affirmed by the Court of Appeal, his Honour said:[5]

> [64] Transactions or agreements entered into ultra vires the powers of the body corporate are void *ab initio*. It is for that reason that the arguments of

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5 *Body Corporate 401803 v Vermillion Wagener Ltd* [2015] NZHC 285; aff'd [2015] NZCA 313.

> both applicant and respondents on the vires pleading proceeded under the Unit Titles Act 1972 which applied at the time the Developer Agreements were entered into.

[30] Presently, the Body Corporate seeks declaratory relief in relation to the validity of a lease that commenced in 2008 pursuant to rules that were adopted on 3 December 2008, well before the enactment of the UTA 2010. It seeks to establish that the Lease was void *ab initio.* Whether or not the operational rules adopted under the UTA 2010 are not challenged in this proceeding (and they are not) is irrelevant to the question of whether the Body Corporate had the power to enter into the Lease. Therefore, I accept the Body Corporate's submission that it is necessary to consider the vires of the Amended Rules and to treat the UTA 1972 as the relevant legislation in this case.

Are the Amended Rules incidental to, or reasonably necessary for, the performance of the duties or powers imposed on the Body Corporate under the UTA 1972?

[31] At the hearing, counsel for Shiraz Holiday Ltd accepted that, if the UTA 1972 applies, rr 3.1(v) and 3.2(l) are ultra vires. I nevertheless set out my analysis below.

[32] Schedule 2 of the UTA 1972 sets out the default body corporate rules. Those rules may be amended by unanimous resolution. However, s 37 provides that:

> (5) Any amendment of or addition to any rule shall relate to the control, management, administration, use, or enjoyment of the units of the common property, or to the regulation of the body corporate, or to the powers and duties of the body corporate (other than those conferred by this Act):
>
> provided that no powers or duties may be conferred or imposed by the rules on the body corporate which are not *incidental to the performance of the duties or powers imposed on it by this Act* or which would enable the body corporate to acquire or hold any interest or any chattel real or to carry on business for profit.
>
> (emphasis added)

[33] Section 15 sets out the duties of a body corporate. Section 16 then provides that "the body corporate shall have all such powers as are reasonably necessary to

enable it to carry out the duties imposed on it by this Act". Those provisions can be summarised as follows:[6]

> [41] … The duties specified in the Act relate to insuring the buildings and other improvements on the land, paying the premium on the insurance policies, keeping the common property in a state of good 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 administration and other expenses, and the levying of the proprietors to maintain this fund. …
>
> [42] … In summary, amendments to the rules which add or amend powers must be "reasonably necessary" to enable the Body Corporate to carry out the duties imposed on it by the Act and the Rules. …

[34] The Body Corporate says, with some force, that rr 3.1(v) and 3.2(l) of the Amended Rules are not incidental to or reasonably necessary to carry out its duties. Rules 3.1(v) and 3.2(l) respectively provide that the Body Corporate shall "pay a contribution to the Manager equivalent to the rent payable under the lease for the Management Unit and Reception … and provide a rental guarantee to the lessor of the Management Unit" and that it may "guarantee any lease of the Management Unit". The Body Corporate submits that none of the duties under s 15 or indeed the repealed default rules under sch 2 require a body corporate to contribute to the rental costs or guarantee the lease for a management unit that is a reception and office used for the operation of serviced apartments.

[35] It points out that the Court of Appeal has previously held that the sch 2 default rules do not contain any power that could be construed as authorising or obliging a body corporate to commit to a guarantee of a manager's unit lease, saying:[7]

> … we are satisfied that neither the default rules nor the … amended rules … conferred a power on the Body Corporate, incidental to an express statutory duty or power, to guarantee the manager's lease obligations. None of the default rules nor the amended rules could possibly be construed as authorising or obliging the Body Corporate to assume that duty.

[36] As noted above, counsel for Shiraz Holiday Ltd does not dispute that the relevant Amended Rules were adopted ultra vires the UTA 1972. But it has one

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6 *Chambers v Strata Title Administration Ltd* (2004) 5 NZCPR 299 (HC).

7 *Vermillion Wagener Ltd v Body Corporate 401803* (CA), above n 5, at [26].

reservation — in relation to r 3.1(v), counsel argues that a body corporate does have the power to contract with a building manager, and that it is within the discretion of a body corporate to employ a building manager to provide services from a location within the building convenient to all members of the body corporate, and to reimburse the manager for the costs incurred to provide the services, as part of the manager's remuneration.[8]

[37] However, the terms of r 3.1(v) go well beyond such a scheme. Under that rule, the Body Corporate is empowered, indeed obliged, to pay a contribution to the Manager equivalent to the rent payable under the Lease for the Management Unit. Nothing in the UTA 1972 could possibly be construed as authorising the Body Corporate to make replacement rules authorising or obliging it to assume a responsibility to contribute to the rent of the lessee for the Management Unit which must, in terms of the lease, be used for a reception and office for the serviced apartments. Further, counsel for Shiraz Holiday Ltd properly acknowledges that, "[i]f the rule places an obligation on the Body Corporate to provide a rental guarantee regarding the lease of the management unit, the rule would not appear to be incidental to performing the duties or powers imposed on the Body Corporate under the UTA 1972."

[38] For the above reasons, I can only conclude that rr 3.1(v) and 3.2(l) of the Amended Rules are ultra vires the UTA 1972.

Issue 2: Is the Lease ultra vires the UTA 1972?

[39] In its statement of claim, the Body Corporate further pleads that there was no duty or power for it to enter the Lease as guarantor because:

> (i) the [Amended] Rules … are not incidental to the performance of the duties or powers imposed on the Body Corporate under the Unit Titles Act 1972 [contrary to s 15]; and/or
>
> (ii) the power to agree to guarantee the Lease is not reasonably necessary for the Body Corporate, in order to carry out the duties under the Unit Titles Act 1972 [contrary to s 16]; and/or

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8 Relying on *Low v Body Corporate 384911* (2010) 12 NZCPR 142 at [35] and [51].

(iii) the Lease confers an interest in land to the Body Corporate [contrary to s 37(5)].

[40] Again, Shiraz Holiday Ltd accepts that "the Body Corporate did not have the power to give a guarantee of the lease of the management unit under the UTA 1972". However, it makes three points in support of its position that the Lease (as opposed to the guarantee) is nevertheless not void *ab initio* and/or of no effect.

Is the renewal of the Lease relevant to the present application?

[41] First, in the nature of a preliminary point, Shiraz Holiday Ltd says the original guarantee of the Lease, dated 5 December 2008, is irrelevant as the terms of that lease (and thereby the guarantee) expired on 5 December 2018. In a memorandum dated 1 April 2020, counsel for Shiraz Holiday Ltd clarified that:

> 3. At the time of the hearing, the lease of the management unit had expired. The first defendant and second defendant were negotiating the renewal of the lease.
>
> 4. Since the hearing, the first defendant and the second defendant have agreed to a renewal of the lease [on 18 March 2020]. … The Body Corporate is not the guarantor of the renewed lease.

[42] Counsel submits that the Deed of Renewal and Variation of Lease replaces the Body Corporate as guarantor of the Lease with a Masoud Bassamtabar, the director of Shiraz Holiday Ltd. However, the Body Corporate says, "while the Deed substitutes the Body Corporate as guarantor for another guarantor … it does not resolve the questions about vires and consequent questions of the plaintiffs [sic] rights and obligations". Indeed, the Body Corporate's application concerns the vires of the Lease entered into on 5 December 2008, not the terms of the Deed dated 18 March 2020. The Deed of Renewal and Variation is therefore irrelevant to the present application.

Is the guarantee severable from the Lease?

[43] Secondly, in the alternative, Shiraz Holiday Ltd says that it is at least arguable that the Court can sever the guarantee, set out in part at [16] above, from the Lease and that the Lease itself remains valid and enforceable as between the lessor/landlord and lessee/tenant even if the guarantee is ultra vires and therefore void.

[44] The Court may sever an invalid or unlawful contractual term from a contract to preserve the contract as an enforceable bargain between the parties. The Supreme Court clarified that the severability of certain provisions is to be assessed objectively; it is an issue of construction of the contract.[9] Severance of a provision that is subsidiary to the main purpose of the contract is permissible, but severance may not destroy the main purpose and substance of what has been agreed.[10] In other words, severance must leave the matter of the contract and the primary obligations of the parties unchanged.[11] Ultimately, the question is "whether the invalid promise was so material that an intention should be inferred that, but for the inclusion of the invalid words, the parties would not have entered the bargain".[12]

[45] On the one hand, the Body Corporate says that the guarantee is not severable from the Lease because it is clear on the terms of the guarantee — which is a schedule to the Lease — that the Lease is predicated on provision of the guarantee. The Body Corporate relies on the words of the guarantee that state:

> *IN CONSIDERATION of the Landlord entering into the lease at the Guarantor's request the Guarantor*:
>
> (a) guarantees payment of the rent and the performance by the Tenant (as a matter of damages only) of the covenants in the lease, and
>
> (b) indemnifies the Landlord against any loss in subparagraph (a) above the Landlord might suffer and/or should the lease be lawfully disclaimed or abandoned by any liquidator, receiver or other person.
>
> (emphasis added)

[46] On the other hand, Shiraz Holiday Ltd submits that the guarantee is severable from the Lease on the grounds that:

(a) A lease is primarily a contract between the landlord and the tenant. The central bargain is that the landlord leases to the tenant the Management Unit for the term specified in consideration of the tenant's agreement to the covenants provided for in the first and second schedules to the Lease. Those covenants include an obligation to pay the specified

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9 *Carr v Gallaway Cook Allan* [2014] NZSC 75, [2014] 1 NZLR 792 at [62].
10 At [62].
11 At [66].
12 At [63]–[66].

annual rent for the Management Unit and other outgoings and are separate from the covenants assumed by the Body Corporate as guarantor.

(b) The covenants assumed by the Body Corporate as guarantor are provided for in the third schedule and are between the guarantor and the landlord. The words relied on by the Body Corporate only appear in the third schedule and do not appear in the Lease itself or any of the covenants between the landlord and tenant.

(c) The Body Corporate's obligations are ancillary to the obligations of the tenant. So, even if the Court severs the guarantee from the Lease, the essential terms of the bargain between the landlord and the tenant are unchanged.

(d) There is no objective evidence to suggest that the parties would have intended the Lease to fall over in the event the guarantee was invalid. That is particularly so where the parties to the Lease were aware that the Body Corporate had entered into the Management Agreement with the tenant, under which the Body Corporate agreed to pay the manager a contribution equivalent to the rent payable under the Lease, as set out at [18] above. Therefore, given the obligations assumed by the Body Corporate in the Management Agreement, the guarantee of the Lease by the Body Corporate was unnecessary — and the Body Corporate does not challenge the Management Agreement in this application.

[47] Remembering the need for judicial caution in summary judgment applications and the fact that the plaintiff bears the onus of showing that there is no defence or real question to be tried, I consider that it is at least arguable that the guarantee is severable from the Lease. I acknowledge the Body Corporate's reply to [46](d)], namely that whether the obligation to guarantee (or contribute to) the rent payable for the Management Unit under the Lease is found in the Lease or the Management Agreement is irrelevant as the obligation is equally invalid either way. Nevertheless, I consider that there is still some arguable merit to Shiraz Holiday Ltd's point at

[46](a)–(c)]. Arguably, there is also some substance in the point that the question is one of contractual intention and, though that does not involve a subjective enquiry, safe conclusions cannot be reached as to how fundamental the guarantee was to the lessor and lessee's bargain on the limited evidence that is presently before the Court.

[48] All in all, I do not consider that the Body Corporate has satisfied the summary judgment threshold on the issue of severability. Accordingly, I find that while the Body Corporate did not have the power to give a guarantee of the lease of the management unit under the UTA 1972, it cannot be said at this summary stage that the Lease was void *ab initio* and therefore of no effect as a result.

Is the Body Corporate estopped from challenging the validity of the Lease as between the landlord/lessor and tenant/lessee?

[49] Thirdly, Shiraz Holiday Ltd further submits that the Body Corporate is arguably estopped from challenging the validity of the Lease as between landlord/lessor and tenant/lessee. It accepts that estoppel cannot operate to make lawful that which is unlawful, but estoppel may nevertheless preclude the Body Corporate from arguing that the Lease (as between the landlord and tenant) is void because of the guarantee. Given my finding in relation to the issue of severability, however, it is unnecessary for me to consider this further issue of estoppel.

Result

[50] For the above reason, I find that:

(a) Rules 3.1(v) and 3.2(l) of the Amended Rules, dated 5 December 2008, are ultra vires ss 15, 16 and 37(5) of the Unit Titles Act 1972, and therefore void and of no effect.

(b) The guarantee in the third schedule to the Lease, dated 8 December 2008, is ultra vires the Unit Titles Act 1972. However, at this summary stage, I make no determination as to whether the Lease itself is accordingly void *ab initio* and of no effect.

[51] I reserve the issue of costs. I remind counsel of the Court of Appeal's decision in *NZI Bank Ltd v Philpott*.[13] If counsel cannot agree on costs, they are to file and serve memoranda within 5 working days of the date of this judgement.

[52] The Registrar is requested to allocate a case management conference for the purpose of discussing what timetable directions are needed to deal with the outstanding matters raised in the statement of claim.

Associate Judge Sargisson

Solicitors / Counsel:

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13 *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403 (CA).