

Supreme Court upholds trespass claim of locked out owner of unit title

In an important case for body corporates and body corporate managers (*Wu v Body Corporate 366611 & Theta Management Ltd* [2014] NZSC 137), the Supreme Court has upheld a unit owner's claim in trespass after he was effectively locked out of his apartment by the Body Corporate for refusing to sign up to an informal "Security Protocol" and pay a "security deposit". The Court reversed a Court of Appeal ruling that the Body Corporate had power under its Rules to restrict access for certain owners and occupiers.

The Supreme Court found that there was nothing in the Body Corporate Rules or Unit Titles Act that permitted the Body Corporate to restrict the access of the unit owners. The Body Corporate had therefore "unlawfully excluded" the appellant (Mr Wu) from accessing the common property in which he had a legal interest. The High Court's award of damages including loss of net income from rent and costs of locksmiths was restored.

In addition, a majority of the Court (William Young J dissenting) held that Mr Wu could also have succeeded in a claim in nuisance. Finding an "implied (and fundamental) right to access one's unit under the Unit Titles Act", the majority recognised as arguable a claim in nuisance by analogy with well-established "rights of access" enjoyed by owners of land fronting highways.

**Partner, Stuart Dalzell and Senior Associate, James Wollerman discuss the case and the key points for those involved in management of body corporates, below.*

Facts:

Empire Apartments is a 19-storey building in Auckland purpose-built for and operated as student accommodation. Mr Wu owned an apartment in the building which he leased directly to students (unlike other owners, who leased units indirectly via the building manager, Theta Management Ltd (**Theta**)).

Security concerns arose from a series of incidents of property damage, vandalism, fire alarm activations, access by unauthorised persons and tenant safety concerns, as a result of which there had been some difficulty in obtaining insurance for the building. Given this, Theta purported to require unit owners to sign a so-called Security Protocol and pay a refundable \$2,925 security deposit as a condition of getting an access card. The Security Protocol further provided that all common areas would be under the control of Theta and that Theta had the right to create, modify and enforce any rule relating to the common area.

Mr Wu refused to enter into the Protocol or pay the security deposit. As a result, Mr Wu and others were not issued with access cards and were prevented from accessing the common property or their units – effectively, they were locked out. Mr Wu commenced proceedings for damages, alleging trespass and nuisance.

In response, the Body Corporate and Theta relied on Clause 3.10 of the Body Corporate Rules. Clause 3.10 stated:

"If for security reasons the Body Corporate or its agent...restricts the access of any proprietor or occupier to Common Property it may make available to that person a security key."

The High Court and Court of Appeal:

In the High Court and Court of Appeal argument focused on the causes of action in trespass and nuisance. In the High Court, Asher J found the Body Corporate and Theta both liable in nuisance for unreasonably interfering with the right of Mr Wu to access his unit and the common property by restricting access to the building.

That finding was upheld by the Court of Appeal, but on a somewhat narrower basis. The Court of Appeal differentiated between the access

rights of owners and tenants, holding that the Body Corporate could invoke cl 3.10 to restrict access to a tenant for security concerns, but that it was not reasonable to restrict Mr Wu's access to his unit as he posed no security risk.

The Court of Appeal also quashed Asher J's award of damages. It held that the appropriate measure of loss was the loss of a chance of renting the unit, rather than damages based on loss of rental and the cost of locksmiths to replace the locks which was awarded by the High Court.

Both the High Court and Court of Appeal rejected arguments that Mr Wu had failed to mitigate his losses by not accepting a settlement offer from the Body Corporate. Mr Wu was not required to accede to what was essentially a demand from a wrongdoer to sign the Protocol and pay a deposit.

Mr Wu appealed the Court of Appeal's judgment. The Supreme Court addressed the following issues on appeal:

(1) Did the Unit Titles Act 1972 or Body Corporate Rules allow the Body Corporate to require owners enter into the security proposal and pay a security deposit?

Clause 3.10

The Supreme Court regarded clause 3.10 as straightforward. It was not directed at restricting access for certain owners and occupiers. Rather, it was "an enabling provision" which allowed the issue of electronic keys where access has to be restricted. The Court noted that that reading was consistent with cl 3.10 when read as a whole. No argument was made that clause 3.10 allowed the Body Corporate to require payment of a security deposit.

Accordingly, there was nothing in the Body Corporate Rules which authorised the Body Corporate to require the Protocol to be signed or a

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Address:

Level 14, Vodafone on the Quay
157 Lambton Quay
PO Box 23270, Wellington, 6140
New Zealand

T: 04 499 0390
F: 04 499 0391
W: www.parkerandassociates.co.nz
E: info@parkerandassociates.co.nz

deposit paid. The Body Corporate did not have the power they thought they had.

Unit Titles Act 1972

Mr Wu argued that by restricting access to his unit the respondents' had contravened sections 11 and 37(6) of the Unit Titles Act. Section 11 provides for incidental rights for easements to units and to full, free and uninterrupted access to light. Section 37(6) provides that no rule shall prohibit or restrict any transfer, lease or mortgage of any unit.

In response, the Body Corporate and Theta submitted that the relevant power could be found in sections 15 and 16 of the Act. The Body Corporate and Theta argued that ss 15 and 16 generally deal with the duties and powers of a Body Corporate and provided sufficient legal authority for the Body Corporate to require owners to sign the Security Protocol and pay the deposit.

The Supreme Court found for Mr Wu. It found that the Body Corporate had no power to impose a requirement for the owners to sign the Security Protocol or to pay the security deposit. In summary, this was because:

- While s 15 required the Body Corporate to maintain a fund sufficient for the control and management of the common property, *the Act did not permit a specific levy for possible specific expenses that may be recoverable from a unit holder*. The requirement to pay a security deposit was not related to forecasted expenses but was aimed at ensuring expenses did not arise (i.e. preventing vandalism, property damage, sprinkler alarm activations etc).
- Additionally, *section 15(2)(c) only allows levying in accordance with unit entitlement*, whereas the security deposit was a specific levy and only required to be paid by owner-managed units and not those units managed by Theta.
- While section 11 only concerns incidental rights and does not deal with rights of access to units, the Supreme Court found that *'the right to use common property...as a thoroughfare for access is a right so basic and fundamental to the Unit Titles Act it goes without saying'*. There was accordingly an implied right of access incidental to unit title ownership which if abrogated, would invalidate the relevant Body Corporate Rule.

- The restriction of access imposed on Mr Wu was a contravention of Mr Wu's right to lease his unit under section 37(6) of the Act.
- Section 37 provides that control, management, use and enjoyment of units and common property **shall** be regulated by Body Corporate Rules. Informal rules such as the security Protocol purport to cut across the procedural processes of the Unit Titles Act, which is not permitted. *Any rules governing the use of common property are determined under the processes of the Unit Titles Act*.
- Additionally, the Supreme Court noted the importance of any incoming purchaser having access to the Body Corporate Rules to understand their rights and duties before purchasing a unit. Having informal rules outside of this regime which may not be available for review would prevent an incoming purchaser from understanding their rights and duties prior to purchase.
- Subject to the provisions of the Unit titles Act 1972, section 16 provides a Body Corporate with such powers *'as are reasonably necessary'* to enable it to carry out the duties imposed by the Act. Being subject to other provisions in the Act, section 16 could not be read to override the mandatory nature of section 37 (discussed above) or provide the Body Corporate powers which were otherwise inconsistent with the Act. The Security Protocol could not be enforced as it was inconsistent with the provisions of the Act.

(2) Did the respondents' actions constitute trespass?

Trespass is an unjustified direct interference with land in possession of another. Where land is owned in common (such as the common property) co-owners cannot sue unless one co-owner expels the other from the land or destroys the subject matter of the tenancy.

The Supreme Court rather succinctly found that the Body Corporate and Theta had committed trespass. Mr Wu was unlawfully excluded from the common property and was unable to access his unit.

(3) Did the respondents' actions constitute nuisance?

A classic case of nuisance requires an interference with the enjoyment or use

of the plaintiffs land as a result of a nuisance emanating from the defendant's land. Examples include noise, dirt, noxious substances or vibrations emanating from land controlled (or owned) by the defendant to the plaintiff's property.

The allegation of nuisance in this case involved the electronic reprogramming of locks to common areas and Mr Wu's unit which prevented him from accessing his unit and renting it to prospective tenants. The Supreme Court commented that it was hard to see how this act emanated from the common property. Accordingly, the Court considered an alternative cause of action in nuisance based on interference with a landowner's right to access their land.

The Court drew a comparison between the *'implied (and fundamental) right to access one's unit under the Unit Titles Act'* and the right of a landowner to access their land from an adjacent highway. It was arguable, the Court found, that the right to access one's unit is a natural right which is an incident of unit ownership, similar to the right to access one's land from an adjacent highway as a legal incident of owning the land.

It was concluded that, if there was a right to bring an action in nuisance, Mr Wu would have succeeded given the substantial interference with his right to access his unit.

(4) Damages and mitigation of loss

The Supreme Court restored Asher J's assessment of damages including lost rent and locksmithing costs. As was held in the Courts below, the Supreme Court also found that Mr Wu had not acted unreasonably or failed to mitigate his losses by refusing to accept a settlement offered by the Body Corporate. That would have been inconsistent with interim injunctions Mr Wu had won in the High Court. It would also have required Mr Wu to pay the deposit and sign the agreement with Theta, a third party that was not involved in the injunction proceedings.

Concluding remarks

The Supreme Court's decision in *Wu* confirms a number of fundamental points in relation to unit titles.

Firstly, any informal rules or protocols which might be considered by the Body Corporate and owners as generally agreed as a matter of course

should be formalised in the Body Corporate Rules. This should be done in light of the relevant duties and powers of the Body Corporate under the Unit Titles Act 2010 and in accordance with the correct voting procedures.

Secondly, the Supreme Court's judgment is clear that owners of unit titles have certain fundamental or inherent rights that cannot be abrogated. Any action taken by a Body Corporate which might interfere with the rights of a unit owner to unrestricted access of the common property or their unit is likely to be seen to be a contravention of the Unit Titles Act. The right to use common property as a thoroughfare for access to individual units is to be implied into the Unit Titles Act as a fundamental right.

Further, the Supreme Court has sent a pretty clear message that it is prepared to develop the property rights of unit title owners consistently with the Unit Titles Act and by analogy with other established areas of law – here, well-established “rights of access” enjoyed by owners of land fronting highways

Thirdly, where the Act requires a Body Corporate to establish a fund for the management and governance of the unit title development, only general levies based on unit entitlement are envisaged. The recovery of specific levies for specific expenses from individual unit holders is not permitted.

Although the Supreme Court addressed the Unit titles Act 1972, we anticipate that the key findings of the Supreme Court will be similarly relevant to future determinations of rights as between unit owners and Body Corporates under the Unit Titles Act 2010.

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F: 04 499 0391
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E: info@parkerandassociates.co.nz