

**IN THE DISTRICT COURT
HELD AT AUCKLAND**

CIV-2017-004-2861

UNDER the Harassment Act 1997

BETWEEN JACQUIE TURNER

Applicant

AND KAZUFUMI IKEDA

Respondent

SYNOPSIS OF SUBMISSIONS FOR THE RESPONDENT

17 July 2018

Next Event Date: Hearing on 18 July 2018 at 10.00 am
Judicial Officer: TBA



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SYNOPSIS OF SUBMISSIONS FOR THE RESPONDENT

May it please the Court-

Background

1. Mr Ikeda is the owner of Unit 13H, and Ms Turner is the owner of Unit 14E. Mr Ikeda and Ms Turner are both members of Body Corporate 346799. Both reside in the same Body Corporate, Body Corporate 346799, located at 135 Victoria Street West, Auckland (**the Body Corporate**). Both have been members of the Body Corporate since its inception in 2005.
2. Mr Ikeda is part of an active minority group of owners that have expressed dissent and are concerned with the decisions of the majority of the Body Corporate in terms of the Body Corporate's remediation and its overall management¹. Mr Ikeda has provided letters in support from some of these owners².
3. The Body Corporate was set down as New Zealand's longest leaky building trial, but this dispute has since settled.
4. In summary, Mr Ikeda's correspondence was done with a lawful, or a specific purpose. Mr Ikeda is member of the Body Corporate, and Ms Turner had opened the lines of communication for herself and other members of the Body Corporate by the mere fact that they have volunteered for these positions.
5. Overall, Mr Ikeda is dissatisfied with the overall lack of transparency with the Body Corporate. As shown in his recent application in the Tenancy Tribunal, Mr Ikeda's concerns and suspicions are not unfounded. For reasons that will be made apparent in the course of these submissions, Mr Ikeda sent these emails due to his frustrations, concerns and issues with the Body

¹ Affidavit of Kazufumi Ikeda dated 31 January 2018 paragraph 60, CBD 37.

² Affidavit of Kazufumi Ikeda dated 31 January 2018, Exhibit H, CBD 123.

Corporate due to the lack of responses from the Body Corporate management team.

6. We are here to this point in a frayed relationship, as Mr Ikeda is an owner that has made simple requests to the Body Corporate for the provision of information, as he is legally entitled to do under s 206 of the Unit Titles Act 2010, as the Body Corporate operates as a "mini-democracy" under the Unit Titles Act 2010.

The Harassment Act 1997

7. Section 3 of the Harassment Act 1997 (**the Act**) defines Harassment as a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing any specified act to the other person on at least 2 separate occasions within a period of 12 months.
8. Under s 16(1)(a) to (c) of the Act, Court is required to make a five-stage inquiry:
 - (a) First, to determine whether the respondent has harassed, or is harassing, the applicant;
 - (b) Second, to find whether the behaviour in respect of which the application is made causes the applicant distress, or threatens to do so;
 - (c) Third, to make the mixed objective/subjective assessment of whether that behaviour would cause, or threaten to cause, distress to a reasonable person in the applicant's particular circumstances;
 - (d) Fourth, to decide whether, in all the circumstances, the degree of distress caused or threatened by that behaviour justifies the making of an order; and
 - (e) Fifth, to decide whether the making of an order is necessary to protect the applicant from further harassment.

9. Section 17 of the Act states that a specified act cannot be relied on to establish harassment for the purposes of section 16(1)(a) if the respondent proves that the specified act was done for a lawful purpose.
10. As the learned authors in *The Law of Torts* state, s 17 of the Act is an undefined defence, and may exempt such activities as inquiries by journalists and protestors exercising the right of public protest, provided at least that the conduct is not directed at individual victims³.
11. Counsel has been unable to find similar authority that are directly similar, where there has been civil harassment alleged within members, Committee Members, or to the Chairperson of a Body Corporate.
12. However, on appeal, the High Court found that once lawful purpose has been established, then the Court does not need to embark upon the second to fifth stages of inquiry under s 16 of the Act. Whether any distress was suffered by the applicant as a result of the behaviour complained of and its degree becomes irrelevant⁴.
13. In *Irvine v Edwards*, it was held that if a respondent's behaviour is lawful, then on the face of it harassment does not occur. However, acts lawful in themselves might nonetheless support the making of a restraining order if the way in which those acts were performed or undertaken created harassment⁵.

³ Burrows Finn & Todd, *The Law of Torts*, (6th ed, Thomson Reuters, Wellington, 2013) at 143-144.

⁴ *Munro v Collection House (NZ) Ltd HC Auckland CIV-2010-404-8473*, 10 June 2011 at [38]. Mr Munro had a credit card that had accumulated a significant amount of debt over the years. There were several letters from Collection House (NZ) Ltd (**Collection House**), ordering the payment in which Mr Munroe ignored till Mr Munroe swore an affidavit of debt dispute. Mr Mallard of Collection House ignored this affidavit and Mr Munro swore an Affidavit of notice of non-response and default judgment. Mr Munro brought a claim against Collection House for Harassment.

⁵ *Irvine v Edwards* [1999] DCR 171.

14. In *Xu v Mayes*, it was held that although the manner in which a lawful act is carried out may support a restraining order, a respondent must be free to carry out activities as normal, which in this case should include communicating with the Body Corporate's management team⁶. At [65], the Court also referred to *Beadle v Allen*⁷.

Mr Ikeda's history with the Body Corporate

15. Mr Ikeda is very concerned about the state of the Body Corporate's affairs, and in particular its:
- (a) Management; and
 - (b) Financial affairs.

Initial Tenancy Tribunal proceedings

16. In 2016 Mr Ikeda had issues with the way in which levies were raised in the Body Corporate. As the Body Corporate was in the process of litigation, he was particularly mindful of levies being charged against him that should not have been charged against him. He sought legal advice on how to best retrieve information from the Body Corporate, as there were no answers to his queries. Even as Mr Ikeda engaged solicitors, the answers were not forthcoming⁸.
17. By way of his solicitors, Mr Ikeda requested information and an explanation of:
- (a) Additional levies charged to Mr Ikeda; and
 - (b) Financial statements.
18. Due to the lack of response from the Body Corporate, this forced Mr Ikeda's hand, and he filed an application in the Tenancy

⁶ *Xu v Mayes* [2014] NZHC 349 at [62].

⁷ *Beadle v Allen* [2000] NZFLR 639 (HC) at [75].

⁸ Affidavit of Kazufumi Ikeda dated 31 January 2018, paragraphs 10 to 18, CBD 29 – 30.

Tribunal that sought the release of financial information from 2011 to 2016 from the Body Corporate's Manger, Body Corporate Administration Limited (**BCA**).

19. Mr Ikeda was successful in his application, and on 1 November 2016, the Tenancy Tribunal ordered the Body Corporate to release to Mr Ikeda:
 - (a) Body Corporate Committee meeting minutes from 2011 to 2016;
 - (b) All available legal and consultants invoices from Grimshaw & Co, Maynard Marks Property Consultants Limited, Babbage Consultants Ltd, Aecom Limited and Buddle Findlay, along with all other experts engaged by the Body Corporate; and
 - (c) Any annual statements of account form May 2011 that Mr Ikeda does not have.

Recent Tenancy Tribunal proceedings

20. More recently, Mr Ikeda has also been successful in his more recent application against the Body Corporate where he sought his re-instatement in the Body Corporate Committee.
21. On 27 June 2018, the Tenancy Tribunal found, inter alia⁹:
 - (a) There is an unfair and misleading manner in which proxy votes are obtained by the building manager, Mr Graeme McDonald;
 - (b) Many of the votes counted at the 17 August 2017 AGM were defective, and in breach of the Unit Titles Act 2010 and the Unit Titles Regulations 2011 and in particular, at

⁹ *Ikeda v Body Corporate 346799* Application 9004521, 27 June 2018.

least 10 owners who were disqualified from voting were allowed to vote at the 17 August 2017 AGM;

(c) Some of the actions by BCA leading up to the 17 August 2017 AGM created an unfair and potentially undemocratic environment;

22. In its conclusion, the Tenancy Tribunal found that Mr Ikeda should have been included as the 7th member of the Body Corporate Committee on 17 August 2017.

23. Given the Tenancy Tribunal's findings above, Mr Ikeda's fears and concerns about the Body Corporate are not unfounded, hence his correspondence with the Body Corporate.

Communications with the Body Corporate Administration Team

24. Mr Ikeda's email correspondence are not solely addressed to Ms Turner. Mr Ikeda has also copied in other members of the Body Corporate Administration team, such as:

(a) Mr Graeme McDonald, the Building Manager;

(b) The Body Corporate Manager, Body Corporate Limited and its staff, including:

(i) Paula Beaton;

(ii) Glenn Kwok; and

(iii) Jayshree Moodley.

(c) Members of the Body Corporate Committee (of which Ms Turner is a part of), which include, amongst other people:

(i) Darius Koper;

(ii) Ina Lawrence; and

(iii) Yana Hay.

25. Mr Ikeda hardly receives a substantial response to his queries.

26. What Mr Ikeda does with his correspondence is at the very least, make known his suspicions with the Body Corporate's management.

Mr Ikeda's correspondence

27. Mr Ikeda's emails are aimed squarely at the Body Corporate's matters.
28. Mr Ikeda has no interest in Ms Turner's personal affairs, save where they may affect the Body Corporate.
29. As mentioned above, Mr Ikeda is part of a minority group that has expressed dissatisfaction with the way in the which it has been run.

Ms Turner's communications with the Body Corporate

30. Ms Turner is the current Body Corporate Chairperson until the next AGM on 1 August 2018¹⁰. The minutes do not record any other special powers on her title as Chairperson.
31. The Unit Titles Regulations state that a Chairperson's duties include any other duties relating to the administration of the body corporate that the body corporate has decided by ordinary resolution to confer on the chairperson¹¹.
32. Ms Turner has however appeared to have put herself in a position where she uses the title of Body Corporate chairperson to directly communicate with the other unit owners about any issues with the Body Corporate¹².
33. Ms Turner simply does not want to answer Mr Ikeda's questions about the Body Corporate's affairs. Mr Ikeda had sought this

¹⁰ Affidavit of Kazufumi Ikeda dated 31 January 2018 exhibit E, CBD 100.

¹¹ Unit Titles Regulations 2011, r 11(m).

¹² Affidavit of Thuy Thu Vu dated 22 February 2018 paragraph 5 and exhibit B, CBD 210; Affidavit of Jacque Turner dated 14 November 2017 exhibit A, CBD 016.

from others listed in paragraph 24 above, but answers to his questions were not forthcoming, or were only partly answered.

The present case

34. The cases in *Irvine* and *Xu* do not fit in with the facts of the present case.
35. In *Irvine*, the acts complained of and found included:
- (a) A watching by Mr Edwards of the Irvine Property;
 - (b) Mr Edwards being verbally abusive against Mr Irvine in person.
36. In *Xu*, the acts found included:
- (a) Two threats to kill;
 - (b) A punch from Mr Xu;
 - (c) Mr Xu following Mr Mayes.
37. There are no personal matters in Mr Ikeda's emails against Ms Turner. There are no threats to harm Ms Turner by Mr Ikeda.
38. Mr Ikeda's statement that he said "watch out" to her is denied. Other parties are in support of Mr Ikeda's denial that he said "watch out" to Ms Turner¹³.
39. Ms Turner has not otherwise put forward other evidence that she has received threats of harm from Mr Ikeda.

Difficulties if Restraining order is made

40. Mr Ikeda and Ms Turner are members of the same Body Corporate.

¹³ Affidavit of Kazufumi Ikeda dated 31 January 2018 paragraph 40, CBD 33; Affidavit of Anna Katrina Fisher dated 26 February 2018 paragraph 3, CBD 222; Affidavit of Thuy Thu Vu dated 22 February 2018 paragraph 7, CBD 208.

41. Mr Ikeda does not interact with Ms Turner in any other way except for Body Corporate Matters and is not interested in any other details of Ms Turner's life¹⁴.
42. Further, it has since been more than 6 months since this application was filed.
43. Mr Ikeda and Ms Turner have lived in the same building since 2005. They do not interact with each other in any other way except for Mr Ikeda's correspondence which relate to the Body Corporate's affairs which and meetings during the Body Corporate AGMs or EGMs.
44. Mr Ikeda and Ms Turner will inevitably meet at the Body Corporate's AGM or EGM, and a restraining order will be impractical if it ordered. If a restraining order is made, it will frustrate the Body Corporate's ability to operate in a democratic environment.
45. Mr Ikeda is simply frustrated with the way the Body Corporate's affairs are being run and does not receive an answer.
46. Counsel submits that if a restraining order is made, it will stifle the way in which the Body Corporate^s operates, especially given that:
 - (a) Mr Ikeda is an active voice of the minority in dissent; and
 - (b) Ms Turner has placed herself in a position where she addresses the owners.

¹⁴ Affidavit of Kazufumi Ikeda dated 31 January 2018 paragraph 54, CBD 36.

Dated this 17th day of July 2018 at Auckland.

J E G San Diego
Counsel for the Respondent