

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE

CIV-2019-404-1457

UNDER The Harassment Act 1997

IN THE MATTER of an Appeal from a decision of the District Court

BETWEEN **JACQUIELINE ANNE VERONICA TURNER**

Appellant

AND **KAZUFUMI IKEDA**

Respondent

RESPONDENT'S SUBMISSIONS ON APPEAL

DATED 3 FEBRUARY 2020



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RESPONDENT'S SUBMISSIONS ON APPEAL

May it please the Court:

Introduction

- 1 The appellant and the respondent reside in the same apartment complex that has been subject to leaky building litigation. The appellant is the Chairperson of the apartment's Body Corporate 346799 and the respondent is an owner of a unit in the apartment.

- 2 The respondent had concerns with the operation and administration of the body corporate which he voiced to the appellant as chairperson and also raised with the Tenancy Tribunal:¹
 - a) In June 2016, the respondent's solicitor at the time emailed the Body Corporate for the provision of information and documents that the respondent was entitled to under Unit Titles Act 2010. Specifically, the respondent requested disclosure of information relating to levies charged against his unit. Requests were made on three separate occasions however no response was received, and information was not forthcoming;²

 - b) Due to the lack of information from the Body Corporate, the respondent applied to the Tenancy Tribunal to obtain orders directing the Body Corporate to release these documents. The Tenancy Tribunal granted these orders and the Body Corporate were ordered to provide the respondent with disclosure;³

 - c) Despite the orders obtained, the Body Corporate failed to provide the respondent with all the documents which resulted in Mr Ikeda sending the email dated 17 July 2017;⁴

¹ Refer to Schedule 1 in Closing Submissions for Respondent dated 25 June 2019 [**BOD 334 - 339**]

² See exhibit "F" of Mr Ikeda's first affidavit sworn 31 January 2018 – emails were sent on 3 June 2016, 21 June 2016 and 4 July 2016 [**BOD 120 - 124**].

³ See exhibit "G" of Mr Ikeda's first affidavit sworn 31 January 2018 - orders obtained 1 November 2016 [**BOD-126**].

⁴ See exhibit "B" of Ms Turner's first affidavit sworn 14 November 2017 [**BOD 23**].

- d) After reviewing some of the documents provided, the respondent identified discrepancies with the Body Corporate accounts. Specifically, he was able to identify double payments being made to Maynard Marks and payments totalling \$16,000 being made to Ms Turner's company, Stone Warehouse, from the Body Corporate account.⁵ This resulted in Mr Ikeda sending the email dated 22 July 2017 and 14 August 2017;⁶
- e) The respondent also identified he was incorrectly charged for levies that should not have been struck against his unit. These amounts were not refunded to the respondent until after he made numerous requests for refunds to the Body Corporate.⁷ The appellant accepted that the Body Corporate incorrectly charged the respondent for levies that were not claimable against his unit;
- f) During this time, the respondent ran to become a member of the Body Corporate Committee. On 17 August 2017, Mr Ikeda tied with Ms Weiqun Huang as the 7th committee member.⁸ Ms Huang submitted her resignation to allow Mr Ikeda to sit, however the Body Corporate refused to accept the resignation and Mr Ikeda was excluded from being a member of the Body Corporate Committee;⁹
- g) On 25 October 2017, the respondent filed an application with the Tenancy Tribunal with respect to his exclusion as a member of the Body Corporate Committee in addition to some other issues; and
- h) On 27 June 2018, the Tenancy Tribunal found the respondent was unjustifiably excluded as a member of the Body Corporate

⁵ See exhibit "A" of Mr Ikeda's second affidavit sworn 1 March 2018 – invoices issued by Stone Warehouse and Amsham Investments and 2006 extract from Body Corporate accounts confirming payments totalling \$16,959.80 being made [BOD 216 - 230], see exhibit "B" of Mr Ikeda's second affidavit sworn 1 March 2018 – double payment of Maynard Marks invoice [BOD 231].

⁶ See exhibit "A" of Ms Turner's first affidavit sworn 14 November 2017 [BOD 19] and exhibit "C" of Ms Turner's first affidavit sworn 14 November 2017 [BOD 23].

⁷ See Mr Ikeda's first affidavit sworn 31 January 2018 at paragraph 15 [BOD 36].

⁸ See exhibit "E" of Mr Ikeda's first affidavit sworn 31 January 2018 – paragraph 7 [BOD 109].

⁹ Ibid at paragraph 25 [BOD 119] and see exhibit "IKE-3" of Mr Ikeda's affidavit in reply sworn 6 June 2019 – paragraph 13 to 20 [BOD 294 - 295].

Committee and that "...some of the actions by BCA leading up to the AGM and in terms of the actual vote counting created an unfair and potentially undemocratic environment."¹⁰

- 3 The appellant filed an application for restraining orders against the respondent shortly after the respondent's application to the Tenancy Tribunal was filed.
- 4 On 28 June 2019, Judge Harrison declined to grant a restraining order against the respondent and found:
 - a) "Ms Turner did not claim to fear her safety as a consequence of any of the alleged acts. That has to be assessed not only by Ms Turner's reaction to the alleged acts but also what a reasonable person in her situation might experience, and as chairperson of the Body Corporate, and determined to remain so, she must be prepared to deal with criticism from members."¹¹
 - b) "I am completely satisfied that Mr Ikeda's actions, and his emails in particular, were lawfully justified by reason of his ownership of a unit within the body corporate."¹²
- 5 The appellant has filed an application to appeal Judge Harrison's decision. The appellant has not appealed on the facts and the facts as they currently stand are accepted in full. The appellant bears the onus of persuading the Court that Judge Harrison's decision was incorrect.
- 6 The respondent submits Judge Harrison was justified in finding for the respondent and that his judgment was correct. The respondent therefore submits the District Court judgment should not be overturned.

¹⁰ Exhibit "IKE-3" of Mr Ikeda's Affidavit in Reply sworn 6 June 2019 at paragraph [103] [BOD 307].

¹¹ *Turner v Ikeda* [2019] NZDC 12240 at [27] [BOD 360].

¹² *Ibid* at [30] [BOD361].

Lawful Purpose – Section 17 of the Harassment Act 1997

7 Section 17 of the Harassment Act 1997 provides “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.”

8 In *Munro v Collection House (NZ) Ltd*, Justice Toogood set out a five step approach to determine whether a restraining order should be granted under section 16 of the Harassment Act 1997. Justice Toogood provided:¹³

Section 16(1) is specifically made subject to section 17 which provides that, if the specified act upon which the applicant seeks to rely was done for a lawful purpose, the act cannot amount to harassment for the purposes of section 16(1)(a)...once lawful purpose was established...the Court would not need to embark upon the second to fifth stages of inquiry. Whether any distress was suffered by the applicant as a result of, the behaviour complained of and, if so, to what degree, become irrelevant.

9 Lawful purpose must first be examined to determine whether further analysis is required under Justice Toogood’s five step approach.

10 The respondent submits that Judge Harrison was correct in determining the respondent’s actions were lawfully justified by reason of his ownership of a unit within the body corporate.

11 The respondent as an owner of a unit title has rights relating to the body corporate pursuant to section 79 of the Unit Titles Act 2010.¹⁴ He has a legal right to attend annual general meetings and has a legal right to voice his concerns about the management

12 The appellant, as the Chairperson of Body Corporate 346799, assumes responsibilities to unit owners pursuant to Regulation 11 of the Unit Titles Regulation 2011.¹⁵ This includes a duty and obligation to respond

¹³ *Munro v Collection House (NZ) Ltd* HC Auckland CIV-2010-404-8473, 10 June 2011 at [36] – [38].

¹⁴ Section 79, Unit Titles Act 2010.

¹⁵ Clause 11, Unit Titles Regulations 2011.

to the concerns raised by unit owners. The appellant confirmed this duty in her biography to unit owners by stating, “It should be made clear that the Chairperson has a duty of care to this building and its owners and occupants which means one is basically on call 24/7 in cases of emergency...Able to attend immediately should there be a problem.”¹⁶

- 13 During the course of the hearing, the appellant identified that the orders she was seeking from the Court was for the respondent to stop sending her emails.¹⁷ The content of the emails complained of however related to the body corporate and its operations.¹⁸

- 14 Judge Kerr in *Irvine v Edwards* in interpreting section 17 of the Harassment Act 1997 found that:¹⁹

I interpret that section to mean that if a respondent’s behaviour is lawful then on the face of it, harassment does not occur, but it would seem to me that acts lawful in themselves may nonetheless support the making of a restraining order if the way in which those acts are performed or undertaken creates harassment. Although what I have said might seem paradoxical, the deliberate undertaking of lawful activity for the purpose of harassing someone else provided the other elements required to be established are established, ought not to prevent the making of a restraining order.

- 15 Justice Cooke in *C v L* endorsed this approach and added:²⁰

If an act complained of involves a legal right to communicate – such a statutory or contractual entitlement – s 17 potentially applies. But in my view whether a person is pursuing a “lawful purpose” is not limited to acts that are expressly authorised as a matter of law (by a statute or otherwise). It may also encompass steps that can be regarded as legitimate to take. It is the purpose of the relevant act, and whether that purpose is lawful that is the focus. The reference to that purpose being “lawful” seems to me to encompass purposes that are legitimate. This involves a consideration of the nature of circumstances of the communications

¹⁶ Exhibit “IKE-2” of Mr Ikeda’s Affidavit in Reply sworn 6 June 2019 [BOD 290].

¹⁷ See line 25, Notes of Evidence taken before Judge Harrison at [BOD 408]

¹⁸ See emails dated 17 July 2017 at [BOD 19], dated 22 July 2017 at [BOD 23], dated 8 March 2018 [BOD 274], dated 14 August 2017 [BOD 280].

¹⁹ *Irvine v Edwards* [1999] DCR 171 at 5.

²⁰ *C v L* [2019] NZHC 485 at [52].

- 16 The respondent submits that the purpose and the nature and circumstances of the respondent's communications with the appellant were lawful. All communications related to the body corporate and its operation and administration. There was no deliberate undertaking of lawful activity for the purpose of harassing the appellant.
- 17 The respondent as a unit owner has a legal right to communicate with the appellant as Chairperson of the body corporate. The respondent's communications to the appellant were all in her capacity as Chairperson of the Body Corporate. This is evident from the fact that all email correspondence was addressed to, not only to Ms Turner, but also the Body Corporate Committee Members and Body Corporate Administration.
- 18 Mr MacDonald, who was called on behalf of the appellant confirmed that if any unit holder in the body corporate wished to raise an issue with their concern about the operation of the Body Corporate that it would be appropriate to raise these concerns with the appellant who was the overall person in control.²¹
- 19 As Judge Harrison identified:²²

It is abundantly clear from the evidence that if Ms Turner had not been chairperson of the body corporate, she would not have received emails from Mr Ikeda. She wanted all emails directed only to Body Corporate Administration Limited being the body corporate secretary. However, as chairperson Ms Turner assumes responsibilities which are generally set out in reg 11 of the Unit Titles Regulations 2011. It is, of course, Mr Ikeda's right to question the actions of the chairperson and body corporate committee in regards to levies against unit holders, costs and expenses incurred, and so forth.

- 20 In *C v L*, Justice Cooke found that the communications in question did not involve legitimate purposes because they were threatening and verbally abusive. The Judge found that:²³

²¹ See line 5 and 15, Notes of Evidence taken before Judge Harrison at [BOD 417]

²² *Turner v Ikeda* [2019] NZDC 12240 at [8] – [9] [BOD 357]

²³ *C v L* [2019] NZHC 485 at [57].

The requirement to establish a “lawful purpose” involves consideration of the nature and quality of the communication in order to ascertain its purpose. That is so whether or not there is an express legal right to communicate. For example, if the communication from the debt collection agency in Munro went beyond legitimate demands for debts to be paid and involved communications that involved improper threats or were otherwise intimidatory, then such communication could be held to be not for a lawful purpose.

- 21 Although the respondent’s communications may have come across as being “irksome”²⁴ the respondent’s actions were not deliberately undertaken for the purpose of harassing.
- 22 The nature and circumstances of the respondent’s communications were his concerns with the operation and administration of the Body Corporate. These concerns were justified by the findings of the Tenancy Tribunal that “...many of the votes counted at the AGM for the committee were defective and in breach of the UTA 2010 and UTR 2011 in a variety of ways...some of the actions by BCA leading up to the AGM and in terms of the actual vote counting created an unfair and potentially undemocratic environment.”²⁵
- 23 Affidavit evidence from the respondent’s interpreter also confirmed the Body Corporate’s unfavourable treatment of the respondent “I have witnessed a complete lack of willingness by the Body Corporate administration team to listen and talk to Mr Ikeda about his situation and his concerns about the Body Corporate.”²⁶
- 24 Judge Harrison after examining the concerns raised by the respondent also found that, the respondent’s “actions, and his emails in particular, were lawfully justified by reason of his ownership of a unit within the body corporate. While his emails might be irksome, they appear to have been justified in a number of respects.”²⁷

²⁴ *Turner v Ikeda* [2019] NZDC 12240 at [19] – [9] [BOD 359]

²⁵ Exhibit “IKE-3” of Mr Ikeda’s Affidavit in Reply sworn 6 June 2019 at paragraph [103] [BOD 307].

²⁶ See affidavit of Rodney John Hellyer sworn 20 February 2018 at paragraph 8 [BOD 200].

²⁷ *Turner v Ikeda* [2019] NZDC 12240 at [30] [BOD 361]

25 Judge Harrison was entitled to reach this conclusion based on the evidence and accordingly, the respondent submits Judge Harrison's decision should remain undisturbed.

Power to Make Restraining Orders – Section 16 of the Harassment Act 1997

26 If the Court considers the respondent's communications with the appellant were not for a lawful purpose, the respondent submits that Judge Harrison's finding that the appellant failed to satisfy the requirements of section 16 of the Harassment Act 1997, must be upheld.

27 Justice Toogood's five step approach in *Munro* requires the following inquiries to be made:²⁸

- a) To determine whether the respondent has harassed or is harassing the applicant;
- b) To find whether the behaviour in respect of which the application is made causes the applicant distress;
- c) 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) 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) To decide whether the making of an order is necessary to protect the applicant from further harassment.

28 During the course of the hearing, the appellant accepted that she had very limited interaction with the respondent and that she only saw the respondent at Body Corporate meetings.²⁹ The appellant advised the

²⁸ *Munro v Collection House (NZ) Ltd* HC Auckland CIV-2010-404-8473, 10 June 2011 at [32].

²⁹ See line 15, Notes of Evidence taken before Judge Harrison at **[BOD 408]**

Court that her main concern was with the email correspondence the respondent had been sending to her.³⁰

29 However, the appellant cannot have been distressed from the emails because:

a) The appellant admitted that she did not read or review the emails that the respondent sent;³¹ and

b) The appellant conceded that the emails from the respondent should be ignored.³²

30 The appellant complains of actions that occurred from 2015 however the appellant delayed filing her restraining order application until December 2017 nearly three years after the event³³ and continuously sought adjournments of the hearing. This behaviour indicates that the appellant cannot have been distressed from the respondent's actions.

31 Significantly, the appellant filed her application for a restraining order three weeks after the respondent filed an application against the appellant and the body corporate for unjustifiably removing the respondent as a member of the body corporate committee on 25 October 2017.

32 It is difficult to find the appellant was distressed and feared for her safety for the purposes of sections 4 and 16 of the Harassment Act 1997 when the appellant delayed filing her application and further attempted to delay the hearing of the application.

33 In any event, a reasonable person in similar circumstances would not feel distress because a reasonable person in the shoes of the appellant, being the Chairperson of a body corporate, would not be distressed at

³⁰ See line 5 and 10 at [BOD 372] line 52, Notes of Evidence taken before Judge Harrison at [BOD 399]

³¹ See line 15, Notes of Evidence taken before Judge Harrison at [BOD 379]

³² See line 5, Notes of Evidence taken before Judge Harrison at [BOD 379]

³³ *Turner v Ikeda* [2019] NZDC 12240 at [17] [BOD 358]

receiving criticism from a disgruntled unit owner. Further weight or consideration should not be given to the appellant's personal circumstances as the test is an objective one.

- 34 The appellant has re-emphasised the specified acts already reviewed in the lower Court however these acts fail to satisfy the requirement to cause a reasonable person in similar circumstances to feel distress:³⁴
- a) Email dated 17 July 2017 relating to illegal funds transfers and raising: the email was sent to the appellant in her capacity as chairperson of the body corporate alongside other committee members. The appellant cannot have been distressed because she did not view the contents of the email,³⁵ furthermore the content of the email was for a lawful purpose;
 - b) Email dated 7 June 2018 relating to trespass: the appellant has not explained how she was distressed from the email and further in any event fear as to loss of reputation or privacy cannot constitute fear for safety for the purposes of the Harassment Act 1997 and must constitute fear for physical and mental well-being or safety;³⁶
 - c) Email dated 14 August 2017 relating to corruption: the appellant has not explained how she was distressed from the email. The email sets out justifiable concerns that the respondent had relating to the operation of the body corporate and was for a legitimate purpose; and
 - d) "Watch out" during AGM: the appellant accepted during the hearing that the alleged comment could have been directed at the entire body corporate,³⁷ furthermore the respondent has denied

³⁴ Refer to Appendix 1 in Closing Submissions for Respondent dated 25 June 2019 **[BOD 322 - 333]**

³⁵ See line 10, Notes of Evidence taken before Judge Harrison at **[BOD 379]**

³⁶ *NR v District Court at Auckland* [2016] NZCA 429 at [29] and *NR v District Court at Auckland* [2014] NZHC 1767 at [51] to [53].

³⁷ *Turner v Ikeda* [2019] NZDC 12240 at [20] **[BOD 359]**

this occurring and has produced two affidavits from two independent witnesses to confirm this.³⁸

35 The Court of Appeal in *NR v District Court at Auckland* identified that to grant a restraining order consideration had to be given to the following factors:³⁹

...the Act requires the pattern of behaviour causing the applicant distress in circumstances where the reasonable person would likewise feel distress. Further, there is a requirement to ensure the level of distress merits interfering with the defendant's rights of free movement and speech, and that the order is necessary to protect the applicant in the future.

36 The respondent should not be restrained from communicating with the appellant when all communications are limited to body corporate matters. Like all other owners, the respondent has a legal right and legitimate purpose in communication with the appellant as chairperson of the body corporate.

37 The appellant has continued on in the role of Body Corporate Chairperson despite alleging she is distressed as a result of the respondent's actions. The appellant wishes to continue assuming the role of Body Corporate Chairperson but seeks to restrain communications from the respondent, which interferes with Mr Ikeda's rights as a unit owner.

38 The level of distress complained of by the appellant does not justify the granting of a restraining order because it will interfere with the respondent's rights of free movement and speech and is not in any way necessary to protect the appellant.

39 Given the above, Judge Harrison was entitled to find:⁴⁰

³⁸ Affidavit of Thuy Thu Vu dated 22 February 2018 at [7] **[BOD 186]** and Affidavit of Anna Fisher dated 26 February 2018 at [3] **[BOD 202]**.

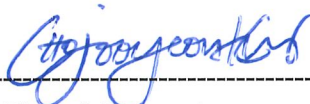
³⁹ *NR v District Court of Auckland* [2016] NZCA 429 at [35].

⁴⁰ *Turner v Ikeda* [2019] NZDC 12240 at [26] – [27] **[BOD 360 - 361]**

...I am not satisfied that any of the alleged acts of harassment amounted to acts that achieve the necessary standard, of causing distress. Ms Turner did not claim to fear for her safety as a consequence of any of the alleged acts but also what a reasonable person in her situation might experience, and as chairperson of the Body Corporate, and determined to remain so , she must be prepared to deal with criticism from members.

40 Based on the evidence presented the respondent submits it was correct for Judge Harrison to find that there was a lack of evidence to show a degree of distress that justified the exercise of his discretion to grant a restraining order under section 16 of the Harassment Act 1997.

Dated this 3rd day of February 2020



Z Chen / J Leenoh
Solicitor on the record for the Respondent