IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-1457
[2020] NZHC 149

BETWEEN	JACQUIELINE ANNE VERONICA TURNER Appellant
AND	KAZUFUMI IKEDA Respondent

Hearing: 11 February 2020

Appearances: T Bowler for Appellant
J Leenoh for Respondent

Judgment: 13 February 2020

JUDGMENT OF LANG J
[on appeal against dismissal of application for restraining orders under the Harassment Act 1997]

This judgment was delivered by me on 13 February 2020 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

[1] Ms Turner and Ms Ikeda own units in an apartment complex known as the Victopia Apartments. The complex is a 14 storey tower block containing 203 residential units in central Auckland.

[2] The affairs of the complex are administered by the elected committee of a body corporate incorporated under the Unit Titles Act 2010. At all times material to this proceeding Ms Turner was the Chair of the body corporate committee.

[3] The apartment complex was found to have significant weathertightness issues. For several years the body corporate was involved in litigation against parties it believed were responsible for these. The litigation was ultimately settled, and the complex is now in the process of being repaired.

[4] The remediation process brought Mr Ikeda into conflict with Ms Turner and other members of the body corporate committee. Ms Turner considered that several communications and statements he made to her between 2015 and 2017 amounted to harassment as that term is defined by the Harassment Act 1997 (the Act). She issued a proceeding in the District Court at Auckland seeking orders under the Act restraining Mr Ikeda from engaging in such conduct in the future.

[5] In a decision delivered on 28 June 2019, Judge G M Harrison dismissed Ms Turner's claim.[1] Ms Turner appeals against that decision.

The incidents that Ms Turner relied upon as constituting harassment

[6] Ms Turner alleged that Mr Ikeda engaged in specified acts of harassment by sending her abusive and offensive communications and emails between 2015 and 2017. First, she relied on a note Mr Ikeda left in her post box in 2015 describing her as "the cancer of Victoria". She says this was particularly hurtful because her husband had recently died of cancer.

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1 *Turner v Ikeda* [2019] NZDC 12240.

[7] Ms Turner also contended Mr Ikeda installed a camera on the windowsill of his unit that was directed towards another unit in the complex that she owned and had rented out. She says this unnerved the tenants of the unit and they moved out.

[8] Next, Ms Turner relied on emails Mr Ikeda sent to her on 17 and 22 July 2017 and 14 August 2017.

[9] The passage on which Ms Turner relied in the email dated 17 July 2017 was in the following terms:

> 6. Plaintiffs and Non-plaintiffs
>
> Jacquie Turner and BCA Ltd as the BC Manager have been refusing to release for 12 months since last June the Owners' contact list to me as a current BC 346799 Committee member. This is a clear breach of the Auckland District Court Orders on 1 November 2016 and 9 May 2017. If you still refuse to comply to the Orders, then I would obtain another District Court Orders against you. In the partial Owners' Register which BCA Glenn Kwok released with his signature on 3 May 2017, it only says FD, 8M, 10M and 13H as the Non-plaintiff owners. However, Grimshaw 2013 November 8 High Court document said, 1H, 5J, 13H and 13L as the Non-plaintiff owners. Huge discrepancy. The Plaintiff owners are not only our BC owners. Rather, Non-plaintiff owners are also our BC owners. Jacquie Turner and the BC Manager have been charging a number of both Operational Levies and Remedial / Additional Levies for the $40 million Litigation Claim and for the $4 million Litigation / Legal costs since 2012 even to our Non-plaintiff owners by your "illegal funds transfers" from our BC Trust Operation accounts, "LTMF" and "Contingency fund" to our Remedial account, and by "illegal funds raising" for the Remedial account by your Operational levies. How do you take responsibility to our all Victopia owners? Repair costs allocation especially to our Non-plaintiff owners must be clarified by all owners (Not by Proxies).

[10] The reference in the second sentence of this passage to a breach of the Auckland District Court Orders refers to the fact that Mr Ikeda had obtained orders from the Tenancy Tribunal on 1 November 2016 and 9 May 2017 requiring the body corporate to release copies of financial documents to him. He had first requested these in June and July 2016 but the body corporate had refused or failed to provide him with all of the documents that he sought.

[11] Ms Turner also relied on the following passage from Mr Ikeda's email dated 22 July 2017:

> Again, I have just found another "counterfeit documents" / "forgery of public documents" which you had provided to me earlier. Also, your earlier reports

> on the BC Trust Operational LTMF account and Contingency Fund account's calculations since 2005 in terms of the received interests and the expense do not make sense at all. I will submit all of these Evidences to my Court Litigation against you.

[12] Next, Ms Turner relied on the following passage in an email sent by Mr Ikeda on 14 August 2017:[2]

> As a current BC Committee member, I will vote NO CONFIDENSE to you. You have NO RIGHT to be our Chairperson and Committee member. You must Resign now. You have been doing more harm than good to all Victopia Owners for 13 years since 2005, including the recent Fraud $40 million Water Leaky Apartments High Court Litigation Claim on our Owners' $4 million Litigation expenses.
>
> Definition of "Thief": the person who cannot distinguish own money from others' money. Paying any irrelevant invoices from out BC Levies and Funds and never disclose real payees, this was already a breach of the Act, so Corruption. Paying your hire Daniel Torensen's invoices from our BC Levies and Funds and never tell such to the owners, this was a Crime.
>
> Are you having "as usual Rehearsal" for the AGM with your "Victopia Team Members"? Your only friend sucked former BMs Glenda and Noel Miller always attend our AGM on your 1 Proxy to assist your on-going Corruption. Very silly. The same Committee member will object "Auditing"? Very silly. The idiots never learn until they go to Jail and Hell. I have never experienced in my life the Villians like you (Money is everything. They will do anything for Money. Own Money making on other innocent Victopia owners' expenses. Money, Money, Money).

[13] Finally, Ms Turner alleges that, at a general meeting of unit owners held on 17 August 2017, Mr Ikeda told her on two occasions that she needed to "watch out".

Relevant principles

[14] The Act defines the term "harassment" as follows:

> **3 Meaning of "harassment"**
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> (1) For the purposes of this Act, a person harasses another person if he or she engages in 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.
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> (2) To avoid any doubt,—

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[2] Ms Turner did not rely on this email in her original affidavit filed in support of her application for a restraining order. She referred to it for the first time in an "updating affidavit" that she swore on 18 July 2018.

(a) The specified acts required for the purposes of subsection (1) may be the same type of specified act on each separate occasion, or different types of specified acts:

(b) The specified acts need not be done to the same person on each separate occasion, as long as the pattern of behaviour is directed against the same person.

(3) For the purposes of this Act, a person also harasses another person if—

(a) he or she engages in a pattern of behaviour that is directed against that other person; and

(b) that pattern of behaviour includes doing any specified act to the other person that is one continuing act carried out over any period.

[15] It follows from s 3(1) that a person can only be found to have harassed another person under the Act where he or she engages in a pattern of behaviour that includes doing any "specified act" on at least two occasions within a 12 month period. Section 4 of the Act provides the following definition of "specified act" for the purposes of s 3:

4 Meaning of "specified act"

(1) For the purposes of this Act, a

specified act, in relation to a person, means any of the following acts:

(a) Watching, loitering near, or preventing or hindering access to or from, that person's place of residence, business, employment, or any other place that the person frequents for any purpose:

(b) Following, stopping, or accosting that person:

(c) Entering, or interfering with, property in that person's possession:

(d) Making contact with that person (whether by telephone, correspondence,[electronic communication,]or in any other way):

(e) Giving offensive material to that person, or leaving it where it will be found by, given to, or brought to the attention of, that person:

(ea) giving offensive material to a person by placing the material in any electronic media where it is likely that it will be seen by, or brought to the attention of, that person:

(f) Acting in any other way—

(i) That causes that person ("person A") to fear for his or her safety; and

(ii) That would cause a reasonable person in person A's particular circumstances to fear for his or her safety.

(Emphasis added)

(2) To avoid any doubt, subsection (1)(f) includes the situation where—

(a) A person acts in a particular way; and

(b) The act is done in relation to a person ("person B") in circumstances in which the act is to be regarded, in accordance with section 5(b) , as done to another person ("person A"); and

(c) Acting in that way—

(i) Causes person A to fear for his or her safety; and

(ii) Would cause a reasonable person in person A's particular circumstances to fear for his or her safety,—

whether or not acting in that way causes or is likely to cause person B to fear for person B's safety.

(3) Subsection (2) does not limit the generality of subsection (1)(f).

[16] Section 9 of the Act permits any person who is being, or has been, harassed by another person to apply to the Court for a restraining order against that person. Section 16 of the Act prescribes the grounds the applicant must establish before the Court can make such an order:

16 Power to make restraining order

(1) Subject to section 17 , the Court may make a restraining order if it is satisfied that—

(a) The respondent has harassed, or is harassing, the applicant; and

(b) The following requirements are met:

(i) The behaviour in respect of which the application is made causes the applicant distress, or threatens to cause the applicant distress; and

(ii) That behaviour would cause distress, or would threaten to cause distress, to a reasonable person in the applicant's particular circumstances; and

(iii) In all the circumstances, the degree of distress caused or threatened by that behaviour justifies the making of an order; and

(b) The making of an order is necessary to protect the applicant from further harassment.

[17] As will be evident, s 16 is subject to s 17. Section 17 prohibits a specified act from being relied on to establish harassment for the purposes of s 16 where the respondent proves the act in question "was done for a lawful purpose". As Toogood J observed in *Munro v Collection House (NZ) Ltd*:[3]

> …Section 16(1) is specifically made subject to s 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 s 16(1)(a). The application for a restraining order would fail on that basis, whatever distress had been caused.

[18] It is not necessary for the act in question to be expressly authorised by statute or in some other way. It will be sufficient if, viewed objectively and in context, the act in question can be regarded as legitimate. As Cooke J observed in *C v L*:[4]

> [52] 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 purposes" 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.

[19] An act that may outwardly appear to be for an innocent or legitimate purpose may nevertheless be unlawful by virtue of the manner or circumstances in which it is carried out. This reflects one of the objects of the Act, which is to provide greater protection to victims of harassment by recognising that conduct which may seem innocent or trivial may nevertheless amount to harassment when viewed in context.[5]

[20] The following observations by Cooke J in *C v L* provide a useful illustration of when this may occur:

> [55] I accept that it would be possible to view a communication to a dog owner about their dog as being for the lawful purpose of requesting that owner comply with their legal duties given the impact on that person. As I said

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3 *Munro v Collection House (NZ) Ltd* HC Auckland CIV-2010-404-8473, 10 June 2011 at [36].
4 *C v L* [2019] NZHC 485 at [52].
5 Harassment Act 1997, s 6(1)(a).

earlier, I do not think the defence is limited to circumstances where a person has an express legal right to engage in the communication.

[56] But the analysis involves further considerations. The District Court Judge adopted the view of Judge R L Kerr in *Irvine v Edwards* that acts that are lawful in themselves may become not lawful because the way they are performed or undertaken creates a harassment. Applying that approach the Judge held that C's behaviour was intimidatory and not driven by any unlawful purpose.

[57] I agree with this analysis. 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. Similarly, communication by an affected person with the dog owner may not be for a lawful purpose because of the way it is undertaken.

[58] C's communications here did not involve legitimate purposes. They were threatening and verbally abusive. They included implicit threats that companies with which L was associated might be contacted if she did not do something about her dogs, texts that were sent to her in the early hours of the morning, and verbal abuse. The general quality of them went beyond what can be seen as the pursuit of a lawful purpose, such as the request for the dog owner to meet prescribed legal responsibilities. They were not, in my view, communication for a lawful purpose.

(footnotes omitted)

The Judge's decision

[21] The Judge's reasoning is contained in the following paragraphs of his decision:[6]

[15] Some of the alleged acts relied upon by Ms Turner are absurd.

[16] One allegation was that a camera was "situated on his window sill that was directed towards one of my apartments." I cannot see how such an allegation could amount to an act of harassment when Ms Turner's unit is located on level 14 of the building whereas Mr Ikeda's unit is on level 13.

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[18] Ms Turner also complained of various emails sent by Mr Ikeda to her and but for one such email, all of them were copied to the body corporate secretary, members of the committee and the unit owners.

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6 *Turner v Ikeda*, above n 1.

> [19] I do not accept that these emails amounted to acts of harassment. It is clear that Ms Turner regarded them as irksome and indeed she said she did not read some of them but they did not distress her to the point that she feared for her safety. Some of them suggested illegal or fraudulent activity by Ms Turner and/or the committee, but in the context of the litigation in which the Body Corporate was involved and the remediation work being undertaken they were not intended to harass to the point of causing distress.
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> [20] Other alleged specified acts related to a comment allegedly made by Mr Ikeda at a body corporate meeting when he is alleged to have uttered the words "watch out". If such a comment was made, Ms Turner accepted that it could have been directed at the entire body corporate and could have meant that she, as chairperson and/or the committee, would be exposed for improper or inaccurate administration. In that regard, Mr Ikeda was concerned that Ms Turner, as chairperson, had undertaken work for the body corporate through her company, Stone Warehouse Limited, which on the face of it indicated a potential conflict of interest.
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> [21] I do not find that there was an actual conflict but it was surely open to Mr Ikeda to challenge that arrangement.
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> …
>
> [27] Ms Turner did not claim to fear for 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.

Grounds of appeal

[22] Mr Bowler acknowledged that Mr Ikeda was entitled to communicate with Ms Turner about matters affecting the body corporate because he was a unit owner and she was the Chair of the body corporate committee. He argued, however, that the Judge failed to consider whether the manner in which Mr Ikeda communicated with her meant that his actions no longer had a lawful purpose. Rather, they were designed to intimidate and frighten Ms Turner and thereby to persuade her to resign as Chair of the committee. He said that Mr Ikeda effectively engaged in an orchestrated campaign designed to humiliate Ms Turner and cause her significant distress. Mr Bowler also submitted that the Judge erred in failing to give weight to the fact that Ms Turner was particularly vulnerable to the comments Mr Ikeda made about her because she was 75 years of age and recovering from both surgery and the loss of her husband.

Decision

[23] The primary issue for determination both in the District Court and on appeal is whether Ms Turner could prove Mr Ikeda had engaged in a pattern of behaviour that included at least two of the acts specified in s 4 within a 12 month period. Ms Turner contends the acts on which she relies fall within s 4(1)(f) because they made her fear for her safety and they would also make any reasonable person in her circumstances fear for her safety.

The note in the post box

[24] Mr Ikeda accepted he made the comment about Ms Turner being "the cancer of Victoria" in a note he delivered to Ms Turner's post box in 2015 but denied he intended it to refer to Ms Turner's husband.

[25] The Judge observed that the fact that Ms Turner did not take any action about this matter until 2018 indicated she was not distressed about it in 2015.[7] As Ms Leenoh points out for Mr Ikeda, however, the fact that this incident occurred in 2015 prevented it from amounting to a "specified act" for the purposes of the Act in any event. All the other acts on which Ms Turner relied occurred more than 12 months later.

The camera allegation

[26] When dealing with this issue the Judge appears to have been of the view that the claim was absurd because Mr Ikeda's apartment was on a lower level than Ms Turner's tenanted apartment.[8] As a result, it would not have been physically possible for Mr Ikeda to train a camera on Ms Turner's apartment. Mr Bowler challenges this reasoning because both apartments are on the 13th floor.

[27] Regardless of this factual error I agree with the Judge's conclusion that the camera allegation is improbable at best. The plans of the complex that were produced at the hearing demonstrate that the two apartments are on different sides of the building. Mr Ikeda's apartment and balcony face one street whilst Ms Turner's

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7 *Turner v Ikeda,* above n 1, at [17].
8 At [15]-[16].

tenanted apartment faces another. Given that fact I do not see how a camera installed on Mr Ikeda's balcony or window sill could have been directed towards Ms Turner's apartment. This allegation therefore fails on its facts.

The emails

[28] I propose to deal with the emails collectively because they essentially raise the same issue.

[29] As Mr Bowler rightly pointed out, the emails need to be viewed objectively and in context. The context in the present case includes the fact that Ms Turner was the chair of a body corporate committee that was required to manage and resolve the weathertightness issues afflicting the Victopia complex. This was always likely to be a difficult task because the complex was large, and the litigation and repair process were consequentially protracted and very expensive. The tensions that such an undertaking inevitably produce can easily lead to significant disputes arising between unit owners and the body corporate committee.

[30] Furthermore, the body corporate committee is elected by the unit owners and remains answerable to them for the manner in which it undertakes the remediation of the complex. This reflects the fact that the affairs of a body corporate are managed using a democratic and quasi-political process. The committee of a body corporate that remediates any complex such as this is responsible for significant expenditure that will ultimately be recovered from unit owners. Although individual unit owners vest responsibility for carrying out the remedial work in the committee, they are not required to accept the committee's actions without question. They remain free to voice their displeasure when they consider the committee's performance has fallen below what they perceive to be the required standard.

[31] In the present case Mr Ikeda made most of the comments Ms Turner relied on in detailed and lengthy emails that raised numerous issues broadly relating to the remediation process. Furthermore, the first two emails were addressed to several persons and not just to Ms Turner. The comments Mr Ikeda made in those emails were therefore not directed solely to her.

[32] Like the Judge, I have no doubt that Mr Ikeda was entitled to raise these issues in his capacity both as a unit owner and a member of the committee. He may not have expressed his concerns in temperate terms, and his comments may arguably also have been defamatory in nature. When the emails are viewed as a whole and in context, however, I do not accept Mr Bowler's submission that Mr Ikeda's primary purpose in sending the emails was to intimidate and cause stress to Ms Turner. He was clearly angry and frustrated at the manner in which the body corporate committee had conducted or overseen numerous aspects of the remediation process. His primary purpose was to ensure the committee knew what he thought of their performance.

[33] Nor do I accept that the language Mr Ikeda used changed the essential purpose for which he sent the emails so that it became unlawful or illegitimate. His language was undoubtedly strong and colourful. It was directed, however, to the manner in which Ms Turner and her fellow committee members had conducted the affairs of the body corporate and, in particular, the remediation process. It did not reflect a desire to cause Ms Turner to fear for her safety, and I do not consider it would have caused a reasonable person in her position to fear for her safety. In this context it is notable that neither of the other persons to whom Mr Ikeda sent the first two emails saw fit to take any action.

[34] Furthermore, those who decide to stand for election to an entity such as a body corporate committee know they are thereby committing themselves to a democratic process. This inevitably includes the risk they may face criticism from unit owners for decisions in which they participate. The Chair of any such body is often the first person to be criticised because he or she will usually be the spokesperson for the committee. If Ms Turner believed her personal circumstances left her particularly vulnerable to such criticism she should not have agreed to accept appointment as Chair of the committee in the first place.

The comments made at the general meeting on 17 August 2017

[35] In her first affidavit filed in support of her application Ms Turner said Mr Ikeda said on two occasions at the meeting on 17 August 2017 that she needed to "watch

out". She also called evidence from a witness who said he heard Mr Ikeda tell Ms Turner that he would "get" Ms Turner as he was being asked to leave that meeting.

[36] Mr Ikeda denied he made any comment during the meeting on 17 August 2017 to the effect that Ms Turner or any other person should "watch out". He also called evidence from two other persons who were present at the meeting and did not hear Mr Ikeda make the comment. These included a Japanese interpreter who had accompanied Mr Ikeda to the meeting to help him understand what was being said at the meeting.

[37] The Judge did not make any factual finding as to whether Mr Ikeda made the comment in question but he said Ms Turner had conceded that, if the comment had been made, it could have been directed to the entire committee as a warning that they might be exposed for improper or inaccurate administration.[9] The Judge also pointed out that Mr Ikeda had raised a concern that Ms Turner's company had charged fees to the body corporate for work undertaken by it and this could result in a conflict of interest so far as she was concerned.[10]

[38] I have not been able to locate the concession by Ms Turner to which the Judge referred but, even if Mr Ikeda did threaten Ms Turner in the manner she contended, this would form the only specified act Ms Turner was able to prove. In the absence of another specified act within a 12 month period she could not establish harassment for the purposes of the Act. It follows that there was no jurisdiction for the Judge to make a restraining order.

[39] Even if jurisdiction had existed, however, I very much doubt that it would have been appropriate to make a restraining order in the present case. The Court may only make a restraining order where that is necessary to protect the applicant from further harassment.[11] With the possible exception of the camera incident the events on which Ms Turner relied all occurred in July and August 2017. The Judge did not hear the case until June 2019. If Ms Turner still remained fearful for her safety in 2019 she

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9 At [20], set out above at [15]
10 At [20].
11 Harassment Act 1997, s 16(1)(c).

could have provided evidence to explain why that was so. She elected not to do so. In the absence of such evidence I do not see how the Court could have found it necessary to make an order to protect her in the future.

Result

[40] The appeal is dismissed.

Costs

[41] My preliminary view is that Mr Ikeda is entitled to costs on a category 2B basis together with disbursements as fixed by the Registrar. If either party takes a different view counsel may file concise memoranda and I will determine costs on the papers.

Lang J

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