IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-4825
[2014] NZHC 244

BETWEEN	MAGELLAN INVESTMENTS LIMITED First Plaintiff
	ROBIN DUNCAN SHEFFIELD AND FLORENCE WINIFRED SHEFFIELD Second Plaintiffs
AND	ST HELIERS BAY CAFE & BISTRO LIMITED First Defendant
	SCOTT DAVID MACDONALD BROWN AND JACKIE LEE GRANT Second Defendants

Hearing: 7 February 2014

Counsel: J Turner for the Plaintiffs
G J Kohler QC for the Defendants

Judgment: 24 February 2014

JUDGMENT OF THOMAS J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 4.00 pm on Monday 24 February 2014

Solicitors: Glaister Ennor, Auckland
J Turner, Auckland
Friedlander & Co Ltd, Auckland
Counsel: G J Kohler QC, Auckland

[1] The first plaintiff, Magellan Investments Ltd (Magellan), is the lessor of a building in St Heliers Bay, Auckland, which is of mixed commercial and residential use.

[2] The first defendant, St Heliers Bay Café and Bistro Ltd (the Café), is the tenant of the retail premises on the ground floor. The Café entered into an Agreement to Lease in June 2010 with Magellan. The second defendants, Scott Brown and Jackie-Lee Grant, are the guarantors of the Lease. The Lease is for a term of 12 years. The permitted use of the premises is as a café/restaurant. Two carparks are included in the Lease.

[3] The second plaintiffs, Robin Sheffield and Florence Sheffield, are the directors of and shareholders in Magellan. They occupy an apartment on the second floor of the building. Their intellectually disabled son occupies another apartment in the building. The third apartment is now vacant.

[4] There are leased offices on the first floor level.

[5] The Café needed to fit out its premises and, pursuant to the Agreement to Lease, required Magellan's approval. Magellan engaged the services of a consulting engineer, Mr Gerhard Furter, to advise on the Café's fit out proposals.

[6] In short, the plaintiffs maintain that, as a result of misrepresentations made to them by the defendants, they approved as part of the fit out of the Café's kitchen a single extraction system which does not adequately deal with the removal of noxious cooking fumes from the Café and odours throughout the whole building constitute a nuisance. The plaintiffs say that the defendants' use of solid fuels with a single duct exhaust system is in contravention of the relevant Building Code standard, AS1668.2.

[7] A statement of claim was filed on 8 November 2013. On 26 November 2013 an amended statement of claim was filed. The defendants have filed defences to both.

[8] The plaintiffs seek an interim injunction restraining the Café from committing what the plaintiffs claim to be acts of tortuous nuisance and breach of contract.

[9] The application also seeks orders relating to the Café's storage of gas cylinders in the carpark and an order that the Café cease operating the restaurant in breach of clauses 10 and 8 of the Food and Hygiene Regulations 1974.

[10] The defendants oppose the application on the basis that the test for an interim injunction is not met, in any event they have already stopped using solid fuels which appear to constitute the main problem and furthermore the dispute between the parties was settled at a mediation which resulted in a deed of settlement executed by Magellan (the Deed). The Deed provided for the retention of "existing cooking methods" and required Magellan to carry out remedial work.

[11] In late October 2013, the Café ceased using solid fuel cooking methods. It was made clear at the hearing that the Café has no intention of resuming the use of solid fuels until the substantive proceedings have concluded and the second defendants are prepared to give an undertaking in that regard. The plaintiffs did not accept that as a temporary solution and wished to proceed with their application.

Amended Statement of Claim

[12] In its amended statement of claim, Magellan pleaded five causes of action:

(a) Misrepresentation under the Contractual Remedies Act 1979. Magellan alleges that the first defendant, through the second defendants, made representations that solid-fuel appliances would not be used for cooking and therefore that a single duct extraction system would comply with AS1668.2. Magellan claims that these representations induced Magellan, first, to enter into the Agreement to Lease and Deed of Lease and to provide consent for the kitchen exhaust system (the Consent) and, secondly, to enter into the Deed following mediation;

(b) Breach of the Fair Trading Act 1986. Magellan pleads that the representations made by the first defendant acting through the second defendants amounted to misleading and deceptive conduct;

(c) Relief under the Contractual Mistakes Act 1977. Magellan claims that the Agreement to Lease, Lease, Consent and Deed were procured by the defendants through a unilateral mistake which was material to Magellan, in circumstances where the existence of that mistake was known to the defendants;

(d) Breach of contract. To the extent that the allegations of breach of the Lease and Agreement to Lease are not subsumed in the preceding causes of action, Magellan pleads that the first defendant and the second defendants as guarantors are liable for breach of contract.

[13] The relief sought by Magellan is:

(a) A permanent injunction to prevent further and continuing breaches of the Lease and Agreement to Lease;

(b) A declaration that Magellan was entitled to cancel the Deed.

(c) A declaration pursuant to s 7(3)(a) of the Contractual Mistakes Act declaring that the Agreement to Lease and Lease are valid and subsisting but granting relief by way of compensation for breaches pursuant to the Act;

(d) Damages for breach of the Lease and Agreement to Lease including solicitor/client costs in accordance with the Agreement to Lease;

(e) Damages pursuant to the Fair Trading Act.

(f) An order pursuant to s 43(2)(a) of the Fair Trading Act that Magellan was entitled to cancel the Deed, or alternatively an order under s 7(3)(b) of the Contractual Mistakes Act cancelling the Deed.

Magellan submits that the Deed is essentially unworkable, because it provides for the retention of "existing cooking methods", including a single axial fan system which is not suitable for solid fuels pursuant to AS 1668.2.

(g) Interest; and

(h) Costs, to the extent that they are not awarded in accordance with the Agreement to Lease.

[14] The fifth cause of action is actionable nuisance and is pleaded by both Magellan and the second plaintiffs. Under this head the plaintiffs seek a permanent injunction and damages in tort (including exemplary damages), interest and costs.

The defence and counter-claim

[15] The defendants deny that their actions constituted a breach of the Lease or Agreement to Lease. They also deny that they ever provided misleading information to the plaintiffs regarding the kitchen fit-out and proposed extraction system. The defendants' position is that the plaintiffs were aware that a deck oven would be installed. The plaintiffs say that a deck oven is the same as a pizza oven and would use solid fuels. The defendants maintain that the ducting and extraction system in the Cafe's kitchen comply with Council regulations, pointing out the Council has taken no action despite being aware of the plaintiffs' allegation of non compliance.

[16] Furthermore, the defendants submit that the affidavit evidence shows the plaintiffs were aware, at least by the time of mediation and signing of the Deed, of the cooking methods used in the Café. The defendants say they remain willing and able to comply with their obligations under the Deed and dispute Magellan's right to cancel the Deed. They plead accord and satisfaction on the ground that the Deed settled fully and finally all outstanding issues between them.

[17] The defendants deny that there is any nuisance, either historic or ongoing. In any case, the defendants argue that in signing the Deed, the plaintiffs consented to

the creation of any nuisance on the basis that Magellan would complete the works agreed to.

[18] In the alternative, the defendants rely on paragraph 8 of the Deed which requires Magellan to indemnify the defendants against any claim against them by any owner or tenant of the building, which would include the second plaintiffs, in respect of odour, noise nuisance or caused by the extraction system.

[19] The defendants counter-claim for specific performance of Magellan's obligations under the Deed.

Interlocutory application

[20] The plaintiffs seek orders that the first defendant:

(a) "Cease operating the restaurant known as the St Heliers Bay Café & Bistro at 387 Tamaki Drive, Auckland in a manner which results in the circulation of noxious cooking fumes and odours throughout the premises owned by the first defendant and occupied, in part, by the second plaintiffs;

(b) Remove forthwith the gas cylinders and restaurant goods and equipment presently stored in the carpark located at 387 Tamaki Drive, Auckland;

(c) Cease operating the restaurant known as the St Heliers Bay Café & Bistro at 387 Tamaki Drive, Auckland in breach of clause 8 and 10 of the Food & Hygiene Regulations 1974;

(d) Pay the costs incidental to this application on a solicitor/client basis."

The Issues

[21] The grant of an interim injunction requires the Court to assess three key factors:[1]

(a) whether there is a serious question to be tried;

(b) the balance of convenience between the parties; and

(c) the overall justice of the case.

[22] There is a higher threshold for the grant of mandatory interim injunction relief as opposed to prohibitory interim injunction relief.[2]

Mandatory orders

[23] The plaintiffs accept that their application is expressed in broad terms. The plaintiffs say that paragraph (a) of the order sought would be satisfied by the defendants undertaking not to revert back to a solid fuel fired kitchen cooking method and undertaking the work set out in Schedule A attached to the submissions of Mr Turner, counsel for the plaintiffs. Schedule A is reproduced as a schedule to this decision.

[24] Despite the wording of the orders sought and the suggested approach set out in Schedule A, Mr Turner suggests that the injunction is essentially prohibitive rather than mandatory and that the application should be considered in that light.

[25] The defendants submit that the application is for mandatory orders and that no amount of semantics can change that. I accept that is the reality of the application. Although the wording itself seeks an order that the Café "cease operating", essentially it requires the Café to undertake works of an uncertain or

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1 *American Cyanamid v Ethican Limited* [1975] AC 396 (HL); *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA).

2 *Acernus Aero Limited v Vincent Aviation Limited* [2012] NZHC 295; *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR7.53.23]; *Locabail International Finance Ltd v Agroexport* [1986] 1 All ER 901 (CA.)

permanent nature before being able to operate the premises for the permitted use under the Lease.

[26] The Courts are reluctant to grant injunctions which cannot be expressed in clear and unambiguous language so that a defendant knows what is required.[3] The defence submits that the terms of the injunction sought are hopelessly wide, lacking specificity and without providing a mechanism for an objective assessment as to whether the terms of the injunction have been complied with.

The evidence

[27] Affidavit evidence in support and opposition has been filed.

[28] Affidavits in support of the plaintiffs' application were filed by:

(a) Robin Sheffield: director and shareholder of Magellan;[4]

(b) Gerhard Furter: mechanical consulting engineer;[5]

(c) Martyn Hamilton: property manager and real estate agent;

(d) Wayne Goodley: director of Herrmann International NZ Limited;

(e) Neil Purdie: mechanical engineer.

[29] The defendants' evidence consisted of affidavits filed by:

(a) Jackie-Lee Grant: company director and shareholder of Hipgroup Limited;[6]

(b) Stephen Hogg: mechanical engineer;

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3 *Redlands Bricks Ltd v Morris* [1970] AC 652 (HL) at 666 and *Wilson v Davies* HC Rotorua CIV 2006-463-921, 12 June 2007 at [11].

4 Mr Sheffield filed three affidavits in total, his second and third affidavits being in reply to the first and second affidavits of Jackie-Lee Grant.

5 Mr Furter filed four affidavits, his second and third affidavits being in reply to Ian McKernan's affidavit and Jackie-Lee Grant's second affidavit respectively.

6 Ms Grant filed two affidavits.

(c) Ian McKernan: technician engineer and joint director of Fanzone Air Systems Limited.

Cooking methods

[30] Magellan alleges that, in May and October 2010, the defendants made representation to Magellan that the Café kitchen would include a gas-fired chargrill and not include a pizza oven. In reliance on this advice, Magellan installed a single exhaust vertical riser.

[31] Following the Consent given by Magellan in October 2012, the Café installed a single extraction system. A significant amount of the expert evidence and counsel's submissions was focused on the issue of whether a dual extract system was required in the restaurant because the Café used both gas and solid fuels for cooking.

[32] Mr Furter gave evidence by way of some four affidavits. I accept the defendants' submission as to his evidence, that is, he cannot be considered an independent expert, given his involvement with the extraction system from the outset. He designed Magellan's riser duct to which the Café's kitchen extraction system is attached. He approved the extraction system design for the purposes of the Consent. He was the person primarily responsible for the agreed scope of remedial works annexed to and specified in the Deed and it was he who advised Magellan that it was not possible to design a system which complied with the Deed.

[33] The plaintiffs' independent expert, Mr Neil Purdie, gave affidavit evidence primarily concerning the cooking odours and extraction system. It seems he did not visit the restaurant. The problem identified by him was that the odours inside and outside the building:

> …comprise smoke and cooking odours which are not treated by the kitchen exhaust system nor are adequately captured by the kitchen extract systems. The chargrill and pizza oven, if using solid fuel, create pungent odours which are very sensitive to the human nose. The general kitchen exhaust is considered an obnoxious discharge.

[34] His evidence was that the temporary removal by the defendants of solid fuel would reduce the odour problem but it would return with the reuse of solid fuels.

[35] He identified at paragraph 11 of his affidavit, six reasons why the current extract system did not comply with the Building Act. He was concerned that the single extraction system specified in the Deed did not comply with the Building Code because multiple systems would be required for solid and gas fuel appliances. He concluded his evidence by saying that:

> 35. The tenant's desire to use solid fuel chargrill and wood in the pizza oven will require a separate extract system and exhaust for the pizza oven and the chargrill. Enhanced treatment of the exhausts will be required as the filtration has been shown to be insufficient to treat odours.
>
> 36. The current tenant extract system does not comply with the Building Code, is a fire risk and is not fit for purpose.
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> 37. The resolution of the kitchen extract system performance requires a total revisiting of the kitchen extract system design and installation. This will require either reverting back to gas cooking appliances permanently in accordance with the Agreement to Lease or the landlord making significant concessions to the tenant in respect of proving additional riser space through the building. This may not be possible due to potential clashes with existing services. It is also in my opinion not a situation which the landlord should be expected to have to address having regard to the terms of the consent documentation originally provided by the restaurant.

[36] Mr McKernan was the defendants' expert who had been involved in the issue for some time, and in particular was present at the mediation which resulted in the Deed. Mr McKernan's initial report noted that the kitchen extract system did not comply with AS1668.2. His affidavit evidence seems to suggest that an acceptable solution would be possible using single extraction for both cooking methods.

[37] Mr Hogg was the independent expert engaged by the defendants. He had visited the Café and his conclusion was that the current extraction system was adequate and that the riser duct system installed by and belonging to Magellan was always destined to leak and was the primary cause of the odour problem.

[38] There was, it seems, a very real problem of putrid odours emanating from the Café's extraction system. That problem has satisfactorily been dealt with by the Café ceasing to use solid fuels. Mr Purdie's evidence that changing to gas fuels would

ameliorate the odour problem is confirmed by Mr Furter's evidence that, when the defendants stopped using solid fuels:[7]

> I noted an improvement in the nature of the odours in that the foul putrid nature of them had disappeared: instead, they were now conventional cooking odours which are generally less offensive.

Carpark

[39] The plaintiffs claim that the Café is in breach of the Lease by storing unsecured gas cylinders in the carpark. The defence to this is, first, that the Lease does not preclude the cylinders being stored in the carpark and in any event they are attached to the wall of the building not in the carpark itself. Secondly, that the landlord's powers under the Lease are restricted to requiring "reasonable" matters relating to use of the carparks (clause 36.3 of the Lease) and that storage of gas cylinders is appropriate.

[40] The defendants rely on the Deed whereby Magellan agreed to construct a storage unit for use by the Café. Magellan, having cancelled the Deed, has not carried out this work. The defendants say that the cylinders are essential to the Café and must be outside.

Food and Hygiene regulations

[41] The plaintiffs' complaint in this regard is not to be pursued provided the Café continues its use of a unit three doors down from its premises for the provision of facilities for the staff in accordance with the Food and Hygiene Regulations. The Café has rented the unit on a monthly tenancy and the defendants say they have no intention of terminating that lease but are dependent on the landlord.

Serious Question to be tried

Mistake/misrepresentation/breach of the Fair Trading Act

[42] The plaintiffs claim misrepresentation, mistake and breach of the Fair Trading Act in respect of the Agreement to Lease, Lease, the Consent and the Deed.

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[7] Bundle of Documents at 328.

The defence position is that the plaintiffs' case originally was based on misrepresentation on the grounds that the defendants led the plaintiffs to believe that the cooking method used would be gas only. Mr Furter acknowledged by his affidavit evidence that he did know of the mixed use by January 2013 and certainly by the time of the mediation and Deed in March 2013. Mr Kohler submits that the plaintiffs' claim alleging breach of the Fair Trading Act, mistake and misrepresentation all rely on that same allegation which the affidavits have, in his submission, shown cannot be sustained.

[43] It was apparent at the hearing that the plaintiffs have changed their position somewhat. It is now contended that the misrepresentation or mistake relevant to the Deed related to a misunderstanding as to whether the "Smog-Hog" system could be used at the Café, so that both gas and solid fuels could be used with a single extraction system. Neither the original nor amended statement of claim made reference to this. The first mention of it appears in Mr Furter's third affidavit.[8]

> Following the execution of the deed of settlement, I investigated the use of a "Smog-Hog" system, which Mr McKernan understood had been approved by Auckland Council for use at the Wildlife Restaurant in Princes Wharf on the Auckland Waterfront and which involved the use of a single extract system with solid and gas fuels. However, it turned out that Mr McKernan was incorrect in his understanding as the Wildfire restaurant in fact had two separate extract systems, one for gas appliances and one for solid fuel appliances. After I had ascertained the correct position, I advised Mr McKernan of this (refer to Exhibit "A" annexed to this affidavit, which is an e-mail from the designer of the Wildfire extract systems dated 20 June 2013). Mr McKernan did not accept this was the case and insisted on seeing the Wildfire drawings as proof of the two separate systems. These were forwarded to him. I refer to the e-mail dated 25 June 2013 which is Exhibit "C" to Mr McKernan's affidavit.

[44] Mr Furter does not give any evidence that Mr McKernan made any representations about that system. There is no specific reference to it in the Deed.

[45] Given that the plaintiffs are seeking an injunction which is mandatory in nature, some certainty in respect of the basis of the claim would be expected. At first blush, reliance on this position for a claim under the Fair Trading Act would seem questionable.

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[8] Bundle of Documents at 739

[46] The defence accepts the plaintiffs may potentially have an argument under the Contractual Mistakes Act but, in Mr Kohler's submission, the plaintiffs cannot meet the test in the Act. Mr Kohler points out that Mr Furter was to be the designer of the system pursuant to the Deed.

[47] Even if the defendants are correct in their submissions on misrepresentation and mistake concerning the Deed, Mr Kohler accepts that there may be a live issue regarding those allegations in connection with the Agreement for Lease, Lease and Consent.

The Deed

[48] Mr Turner submits that what he terms the "illegality" of the extraction system proposed in the Deed is grounds to set it aside.[9] He says that the Deed required the Café to be able to continue its existing cooking methods and that a single extraction system would not enable it to do so. The plaintiffs interpret AS1668.2 as precluding a combined extraction system.

[49] The defence position is that AS1668.2 does not say what the plaintiffs contend. The defence then refers to the evidence of Mr McKernan to the effect that non-compliance with AS1669.2 is not fatal. He says in his affidavit at paragraph 18:

> The Building Code recognises a number of ways in which compliance can be achieved. It provides for acceptable solutions and alternative solutions. Acceptable solutions are prescriptive solutions which, if applied, are deemed to be acceptable. Alternative solutions allow for site specific individual design and construction.

[50] In any event, Mr Kohler submits that a non-compliant system is hardly an illegality in accordance with the authorities referred to in *Chitty on Contracts*.

[51] There was considerable debate between counsel as to the effect of Magellan's purported cancellation of the Deed. Mr Turner submits that the effect of the cancellation pursuant to s 8.(3) of the Contractual Remedies Act is that, so far as a

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9 HG Beale (ed) *Chitty on Contracts* (31st ed, Sweet and Maxwell, London, 2012) at 1-135 (Tab 1 of defendants' authorities).

contract remains unperformed, no party is obliged or entitled to perform it further. He refers to the case of *Simanke v Liu*.[10]

[52] The defence stance is that cancellation of the Deed is ineffective and the status quo is that the Deed remains on foot. On that basis, the defendants are entitled to seek specific performance of it and that is sought in the defendants' statement of defence and counterclaim. Mr Kohler also raises the issue of whether the Act applies to a deed.

[53] While both counsel spent some time on these issues, I am not persuaded they significantly affect the decision on the application. What is relevant is that the grounds relied on by the plaintiffs for cancellation of the Deed are somewhat unclear given the matters referred to in paragraph [43].

Nuisance

[54] Certain odours can lead to an actionable nuisance. In the defendants' submission it is relevant that the plaintiffs leased the property to the defendants for use as a restaurant. They have not elected to pursue remedies pursuant to the Lease because, says the defence, they want to maintain the income stream from the rental but without the realities of use of the premises as a restaurant. The defence refers to the *Lyttelton Times* case as analogous.[11] In that case the Privy Council discussed the doctrine of non-derogation from grant where premises had been leased for use as a printing house, including printing plant and machinery, and the landlords occupied upper floors for use as bedrooms for their hotel. The landlords sought an injunction and damages in respect of the noise and vibration caused by the printing business.

[55] The Privy Council noted that, while the plaintiffs might have the intention of having reasonably quiet bedrooms, the defendant's intention was that they should be able to print:[12]

> One cannot bisect the intention and enforce one half of it when the effect of so doing would be to frustrate the other half.

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10 *Simanki v Liu* (1994) 2 NZ ConvC 191,888 (HC).
11 *Lyttelton Times Company Ltd v Warners Ltd* [1907] AC 476 (PC).
12 At 482.

[56] While the defence relies on this case, claiming the second plaintiffs are estopped from claiming in nuisance, I note the Privy Council went on to say:[13]

> If it could be shewn that the defendant company or its servants had erected the building or established or worked the machinery and plant improperly, no doubt there would have been a cause of action.

[57] The second plaintiffs would seek, no doubt, to submit that the proviso identified by the Privy Council is of application to this case. In any event they are not the landlords and therefore their position can be distinguished from that of the unsuccessful party in the *Lyttelton Times* case.

[58] Magellan is also alleging nuisance but the defendants' estoppel submissions are directed towards the second plaintiffs. Unlike Magellan, they were not a party to the Deed so the defendants cannot plead accord and satisfaction in relation to them.

Conclusion

The evidence clearly establishes that there is a serious question to be tried regarding the nuisance associated with the extraction system, if both solid fuels and gas are used in cooking. There are issues surrounding misrepresentations allegedly made by the defendants, mistake, the effect of the Deed and its purported cancellation.

Balance of convenience

[59] The plaintiffs submit that the balance of convenience lies with the application being granted. Mr Turner in his submissions says that the works outlined in Schedule A should take two to three weeks only. It would be a temporary inconvenience to the Café to close for that period and closure for such a period is not unknown in the restaurant trade, he says. The only evidence as to the amount of time required for the works is contained in the affidavit of Mr Sheffield, who is not an expert witness. Mr Furter's evidence refers to the time period which would have been required for the work to be carried out under the Deed.

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[13] At 482

[60] The history of the relationship between the parties demonstrates the dangers of relying on any such assessment. Cooking odours have been an issue since the restaurant opened in December 2012 yet some 13 months later the parties' experts cannot agree either on the cause of the problem or how it should be rectified. I can have no confidence therefore that the assessment submitted by the plaintiffs is a realistic one. Further, the works would effectively be permanent in nature.

Preservation of the status quo

[61] The weight of the plaintiffs' evidence is directed at the problems associated with the use of both gas and solid fuels for cooking. Solid fuels are no longer used. That will be the case until conclusion of the substantive hearing. The status quo therefore is that solid fuel is not used in cooking. While Mr Purdie for the plaintiffs suggested other work will be required, the real thrust of his evidence is that it is the dual system which is at the heart of the problem. The defendants' expert says that that is not the problem in any event and that the problem lies with the ducting system installed by the plaintiffs.

[62] The plaintiffs submit that damages would not be an adequate remedy because the commercial value of the building will be destroyed, referring to the evidence of an estate agent and one of the tenants. I note however, that the estate agent does not address the position since the use of solid fuels ceased. He states that in the last three or four months there has been virtually no enquiry into the premises by prospective tenants but does not address whether the odour itself has reduced since the defendants stopped using solid fuels in October. The evidence of the tenant, Mr Goodley, is that there has been some improvement in the situation.

[63] It would seem therefore that any damage to the building's reputation has already been done. For that reason I conclude that damages would be an adequate remedy.

[64] The defendants refer to the impact on employees should the injunction be granted. It is clear that the Café would need to cease operating for a period of time and, as noted, that period of time is uncertain.

Storage area

[65] Magellan, having cancelled the Deed, will not comply with its obligations thereunder, and that includes the provision of a storage area for use by the Café. That has implications regarding use of the carpark. There is some suggestion that the gas canisters stored in the carpark area are not all secured, although the defendants say this issue was raised in the plaintiffs' response and therefore they were unable to answer it. In any event, the Café needs to comply with the relevant legislation and regulations about proper storage of such items. That being the case and in light of the other issues surrounding this case, I decline to exercise my discretion and grant an injunction on that basis alone. The same comment applies to the injunction sought in respect of compliance with the hygiene regulations.

Overall justice of the case

[66] The weight of the evidence is directed at the problems associated with extraction of odours associated with the use of solid fuels in cooking. The defendants have ceased using that system and will not resume its use until conclusion of the substantive proceedings. I cannot be satisfied, given the wide, uncertain and effectively permanent nature of the orders sought and the inability of the parties and experts to reach consensus on an acceptable solution to date, that a solution can be achieved in the time period suggested by the plaintiffs. In those circumstances, I am not prepared to jeopardise the defendants' business and the livelihood of employees by granting the application.

[67] I am satisfied that the fairness and justice of the case favours the refusal of the application.

[68] The plaintiffs say their wish is for the Café to continue operating and to be successful. It is unfortunate indeed that matters have come to this point. It seems surprising that experts have been unable to resolve the position between them. It is to be hoped that fresh eyes, perhaps untainted by the past and the obvious souring of the relationship not only between the parties but between experts, can resolve these issues.

Decision

[69] For the reasons given, the application is refused. If the parties are unable to agree on costs the defendants are to file a memorandum within 28 days of this decision with the plaintiffs to reply seven days thereafter.

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Thomas J