IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-1640
[2016] NZHC 2831

BETWEEN	MARINA RESORT LIMITED Plaintiff
AND	BODY CORPORATE 170989 (IN ADMINISTRATION) Defendant

Hearing: 9 November 2016

Appearances: Mr T Allan for Applicant
Mr B Martelli and Ms A Ayton for Respondent

Judgment: 25 November 2016

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

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

Registrar/Deputy Registrar

Date……

[1] This dispute arises out of a proceeding commenced in 2008 by the respondent against the Auckland Council ("council") and The Fletcher Construction Company Ltd ("Fletcher") for approximately $1.5 million in the Weathertight Homes Tribunal ("WHT"). In 2011, the WHT largely dismissed the claim.[1]

[2] In 2013, the WHT ordered the respondent to pay $894,199.83 in costs to the council and Fletcher.[2] The respondent failed to pay. On 12 May 2014, the respondent was placed into administration.[3]

[3] In July 2016 (and before, in correspondence), the respondent demanded a share of the costs from the applicant, as calculated according to the applicant's utility interest.

[4] The applicant failed to make payment and applied to set the demand aside on the bases that:

(a) the applicant had a counterclaim for the amount in the statutory demand as a result of the respondent's breach of fiduciary duty in conducting the litigation with no authorisation at all or at least, no authorisation to conduct the litigation in bad faith;

(b) no resolution authorising the litigation was ever adopted;

(c) if the respondent had authority to issue the proceeding, it did not include authority to advance the litigation in such a way as to mislead the tribunal or to conduct the proceedings in bad faith;

(d) in either event, the respondent has breached its fiduciary duty as agent to its owners on the grounds set out above

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1 *Clearwater Cove Apartments Body Corporate No. 170989 v Auckland Council* [2011] NZWHT Auckland 39, 18 August 2011.

2 *Clearwater Cove Apartments Body Corporate No. 170989 v Auckland Council* NZWHT Auckland TRI-2008-100-38, 17 December 2013.

3 *Auckland Council v Body Corporate 170989 (Clearwater Cove Apartments)* HC Auckland CIV-2014-404-912, 12 May 2014.

(e) the respondent has failed to provide copies of resolutions etc which it was obliged to do under s 206 of the Unit Titles Act 2010;

(f) the applicant has paid the amount demanded to its solicitors and therefore has the ability to pay the amount demanded.

[5] Other details of the opposition were set out in the notice of opposition but the above are the main grounds on which the applicant applies for an order pursuant to s 290 of the Companies Act 1993.

Background

[6] The background to this case may be stated as follows. The applicant is presently the registered owner of two units in a unit title development, Clearwater Cove Apartments. The body corporate of that unit title development (the respondent) became involved in proceedings before the WHT in 2011. Management of those proceedings was under the control of a committee of three persons. It is common ground that only those who were owners of property were entitled to take part in any committee set up to manage the affairs of the body corporate, including the question of whether litigation should be taken to recover damages for non-weathertight buildings.

[7] The committee sub-delegated the management of the WHT proceedings to one of its members, Mr Ivil. Mr Ivil had a controlling position in a company called West Harbour Holdings Ltd ("WHHL"), which owned property in the development. However, he himself was not an owner or representative of WHHL. It follows that he was not an owner of property in the development, nor was he an authorised representative of an owner. Therefore Mr Ivil was not entitled to be a member of the committee.

[8] The litigation in the WHT failed abysmally. An initial costs award of approximately $1.5 million was made in favour of the defendants to those proceedings, the council and Fletcher. The costs order was large because the WHT concluded that the proceedings had been brought in bad faith and had been improperly conducted.

[9] The proceedings were said to be in bad faith because WHHL had, prior to the proceedings, entered into an agreement to sell properties comprising part of the development to a joint-venture vehicle, the applicant. The applicant paid full market price for the units, which it purchased notwithstanding the existence of weather tightness problems. However settlement of the transaction, including the transfer of the properties to the applicant, was deferred for a period of three years. The reason for that was that the applicant as the purchaser of the units would not be entitled to claim damages in the WHT. It was therefore proposed that the proceedings in the WHT should be taken to conclusion and that any funds that were received as the result of an assumed successful outcome would be made available to the joint-venture partners who had arranged for the applicant to be incorporated.

[10] The respondent subsequently brought an appeal against the costs decision of the WHT.[4] In her decision in that case, Katz J upheld the conclusion of the WHT that the proceedings which the respondent had brought lacked substantial merit. She also concluded that the WHT was not in error when it found that the respondent acted in bad faith.

[11] The Judge summarised the position in the following paragraphs of her judgment:

> [79] In conclusion, I have upheld the Tribunal's finding that the [respondent]'s claims in the Tribunal lacked substantial merit…
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> [80] I differ from the Tribunal, however, as to whether the consequence of these findings is that the entire claim should be considered to lacked substantial merit. Ultimately the claim only succeeded in relation to one unit, and even then only to a very limited extent. I have, however, concluded that the claims in relation to two of the 12 units, without the benefit of hindsight, cannot be said to have lacked substantial merit in the sense of being pursued in defiance of common sense.
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> [81] I have also upheld the Tribunal's finding that the [respondent] acted in bad faith and its deliberate failure to discover relevant documentation, despite an express discovery order requiring disclosure of such documents. Discovery of the relevant documents would have been likely to have significantly undermined the [respondent]'s claim.

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[4] *Clearwater Cove Apartments Body Corporate Number 170989 v Auckland Council* [2013] NZHC 2824.

[12] The Judge concluded, amongst other things, that no loss was suffered in regard to the units, contrary to what the claim in the WHT alleged, because WHHL had purchased the units at a substantial discount reflecting the weather tightness problems. Therefore, the part of the claim relating to these units must fail because the respondent, on behalf of WHHL, could not prove any loss and it was contrary to common sense for them to pursue the claims.[5] A claim that the cladding installation by Fletcher was a major cause of damage did not have any sound evidential basis and should not have been pursued.[6]

[13] However, the Judge found that the costs order against the respondent was excessive and ordered the WHT to review the costs order. This resulted in a reduction of the costs award from approximately $1.5 million to $894,199.83.

Issues

[14] The applicant brings this application in reliance on s 290 of the Companies Act which provides:

> **290 Court may set aside a statutory demand**
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> …
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> (4) The Court may grant an application to set aside a statutory demand if it is satisfied that—
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> (a) There is a substantial dispute whether or not the debt is owing or is due; or
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> (b) The company appears to have a counterclaim, set-off, or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off, or cross-demand is less than the prescribed amount; or
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> (c) The demand ought to be set aside on other grounds.

[15] In support of its application to set aside the statutory demand, the applicant raises questions regarding the effect of the resolutions of the committee to embark upon the WHT proceedings. If those resolutions are invalid, does this affect the liability of the applicant to contribute to the costs order which was made by the WHT? It also raises questions about the delegation of prosecution of the WHT

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5 At [28] and [37].
6 At [41].

claim to a committee of the respondent involving Mr Ivil, who was not the owner of a unit and therefore was ineligible for appointment to such a committee.

[16] For the purposes of this judgment, while there is no evidence on the point, I proceed on the basis of an inference that the respondent will not be able to meet the liability in its entirety unless it recovers the proportional share of the liability from its members, including the applicant.

Validity of body corporate actions

[17] The applicant took the view that there was a substantial dispute concerning its liability to contribute to the costs order, arising from the asserted invalidity of the body corporate resolutions which preceded the WHT litigation.

[18] The defence upon which the applicant relies arises from the principle that owners in the position of the applicant are not bound by ultra vires decisions of the body corporate. Thus, the entire WHT litigation was never properly authorised. A committee which purported to make delegated decisions was not one that would be recognised as legitimate under the Unit Titles Act. Its composition did not comply with the requirements of that Act. From that starting point, according to the applicant, followed a series of further nullities and ineffective actions. These include the determination by the committee to bring proceedings in the WHT – again, the applicant's position being that this decision was vitiated by the fact that the committee that made the decision was improperly constituted. As a result of this the next event in the chain of occurrences, namely the making of an order for costs against the body corporate, was ineffective as against the applicant.

[19] I agree that these contentions are both reasonably arguable. They cannot be resolved against the applicant in the context of this proceeding.

[20] The submissions made on behalf of the applicant included the following overview:

> 1. This application concerns a statutory demand dated 29 June 2016 and served on the applicant company 1 July 2016 by the respondent.

2. Owners like the applicant buy into bodies corporate units knowing that they will be liable for levies raised to satisfy *intra vires* obligations incurred by the body corporate. But in this case the applicant says the acts which gave rise to the consequential obligation are *ultra vires* and as a consequence there is no obligation on an owner to underwrite the body corporate's liability.

3. As a consequence the applicant says the respondent does not have any ability to raise a levy for an ultra vires act. In the alternative, the applicant has a set-off for the (correct) amount in the statutory demand that equates to the levy raised to satisfy the consequential obligation.

[21] The respondent considers that there is evidence of the passage of the necessary resolutions and has produced draft minutes. However I agree with Mr Allan for the applicant that there is evidence supporting both parties' contentions and that the court cannot positively conclude that there was a proper resolution passed.

[22] The second point concerns whether, because Mr Ivil was the party who was in control of WHHL which in turn owned units, Mr Ivil could be regarded as a representative of the owner and therefore eligible for appointment to the committee. I do not accept that that contention is available to the respondent. There is simply no justification for ignoring the corporate structure that was adopted and collapsing the various legal entities into one, as this argument apparently intends.

[23] The concept of "ultra vires" is well recognised in the context of company law where there are disputes as to whether or not a company is bound by a decision or act which is said to lie outside the powers of the company's constitution. It is also a term which is frequently used in judicial review cases to indicate that an act or decision under attack was beyond the powers and competence of the person doing it.

[24] The character of the challenge that is made in the present situation though would seem to reflect considerations of the rules of the body corporate not having been observed when the purported decision/s were made.

[25] There was no discussion in the submissions before me about the distinction between the two possible ways in which the court might come to characterise the

decisions of the body corporate as being "ultra vires". The distinction may well be relevant in the context of this case.

Respondent's position

[26] The analysis which the respondent put forward was based upon judicial review-type concepts. Mr Martelli for the respondent referred to cases such as *A J Burr Ltd v Blenheim Borough Council*.[7] Mr Martelli described the effect of that decision accurately in my view in the following excerpt from his submissions:

> 19. In that case the Blenheim Borough Council had granted consent to A J Burr Ltd to build a butchers shop and small goods factory in a residential area.
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> 20. After the shop and factory had been built, the neighbours complained to the council about the impact of A J Burr Ltd's activities on the amenities of the neighbourhood.
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> 21. The Blenheim Borough Council commenced an action against A J Burr claiming that the consent was invalid. It relied upon two bases for this. The first was that the notice to the public (seeking feedback) contained errors relating to the regulations relied upon in giving notice. The second was that it had not been aware of (and so not borne in mind) a newly enacted section in the Town and Country Planning Act 1954, which it should have done.
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> 22. Cooke J first considered what the consequences of the defects should be. He said [at 4]:
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> > When a decision of an administrative authority is affected by some defect or irregularity and the consequence has to be determined, the tendency now increasingly evident in administrative law is to avoid technical and apparently exact (yet deceptively so) terms such as void, voidable, nullity, ultra vires. Weight is given rather to the seriousness of the error and all the circumstances of the case. Except perhaps in flagrant invalidity, the decision in question is recognised as operative unless set aside. The determination by the Court whether to set the decision aside or not is acknowledged to depend less on clear and absolute rules than on overall evaluation; the discretionary nature of judicial remedies is taken into account.

[27] Mr Martelli then submitted that:

> 23. When considering the seriousness of the breach, his Honour noted that the notice given contained all essential information and made clear to the reader that, should they have an objection, what they could do to make that objection known [at 6]:

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7 *A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA).

> A reasonable reader unversed in the refinements of the legislation would probably make little of the termination, but if he read the notice with any care at all he would note the word 'provisional' as describing the town plan, which would at least suggest that the plan was not yet finalised. Then he would see that he was being given an opportunity to object the proposed use and to state his grounds …

24. Further, his Honour did not consider that, had the Blenheim Borough Council been aware of the newly enacted section of the Act, it would have taken a different course to what it took.

25. In view of this, the errors both in respect of the notice and the newly enacted section of the Act were minor.

26. Cooke J declined to set aside the decision to issue the consent [at 6]:

> The council's consent has been acted on long ago and there is no suggestion against the company's good faith in that matter. Placing the defect towards the venial end of the spectrum, I would hold that the inaccuracies in the wording of the notice were not enough to nullify the council's consent; that there was substantial compliance with s 38A; that the consent should not be set aside; and that the use established by the company with consent was accordingly lawful.

[28] Mr Martelli submitted that this decision was reflective of the general approach that courts take when they are asked to declare decisions of a company to be invalid. Vitiating circumstances such as the failure to follow statutory rules will not automatically result in the decision or action being set aside. Consideration is given to background circumstances and only then will the court decide whether or not to exercise its discretion.

[29] Consistent with that approach, reference was also made to the difficult question of what happens when parties rely upon decisions which, at the time of reliance, they have no reason to believe are invalidly taken, but which are later set aside. In particular, reference was made to the decision of the England and Wales High Court in *White v South Derbyshire District Council*.[8]

[30] In the *White* decision, the South Derbyshire District Council transferred a licence to operate a caravan park to the new owners of the caravan park. Unfortunately, under the Caravan Sites and Control of Development Act 1960, the South Derbyshire District Council could only grant a licence if appropriate planning consent was in place. At the time the original licence was granted, the land had no

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8 *White v South Derbyshire District Council* [2012] EWHC 3495 (Admin).

planning consent. Although planning consent was subsequently granted, the owners failed to apply for a new licence.

[31] As a result, the South Derbyshire District Council decided to charge the owners with "permitting land to be used for the purpose of a caravan site without being the holder of a site licence" contrary to the Act.

[32] It was common ground that the decision to issue the existing licence was defective. Singh J, delivering the judgment for the court, was required to consider whether, because the decision was ultra vires, it was void. In reaching his decision, his Honour was alive to "the conundrum which arises from the basic principle of English public law that an ultra vires act is void and therefore to be treated as a nullity" when "[n]evertheless, that act may have been relied upon by innocent third parties in the meantime".[9]

[33] Singh J reviewed the recent decisions on point including the case of *Boddington v British Transport Police*[10] in which Lord Steyn referred to the following comments by Dr Forsyth in "The Metaphysic of Nullity, Invalidity, Conceptual Reasoning and the Rule of Law":[11]

> [It] has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act. And it is determined by analysis of the law against the background of the familiar proposition that an unlawful act is void.

[34] Singh J noted that that analysis had subsequently been included in Wade and Forsyth's leading textbook on administrative law:[12]

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9 At [25].

10 *Boddington v British Transport Police* [1999] 2 AC 143 (HL).

11 Christopher Forsyth "'The Metaphysic of Nullity' — Invalidity, Conceptual Reasoning and the Rule of Law" in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Oxford University Press, Oxford, 1998).

12 HWR Wade and CF Forsyth *Administrative Law* (10th ed, Oxford University Press, Oxford, 2009) at 253.

> The truth is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be 'a nullity' and 'void', but these terms have no absolute sense: their meaning is relative, depending upon the court's willingness to grant relief in any particular situation … the problems of nullity are soluble by the formulation of principles and by their logical application, not by abandoning the field to free discretion.

Discussion

[35] The question that arises in this case involves whether the members of the respondent are required to pay a levy to meet the costs liability of the body corporate, which will not be paid unless all of the proprietors contribute.

[36] The power to require payments by levy is one that is conferred on bodies corporate by statute.

[37] The body corporate is a separate legal entity having its own existence.[13] However, it would seem to be a unique type of legal entity. It has representative and collective functions in relation to the individual owners.

[38] The Unit Titles Act states that the purpose of the Act is to provide a legal framework for the ownership and management of land and associated buildings by communities of individual owners.[14] Particular objectives include creating bodies corporate which comprise all owners in the development to operate and manage unit title investments[15] and the establishment of a flexible and responsive regime for the governance of unit title developments.[16]

[39] The body corporate essentially serves the interests of no one but the owners. It serves the interests of all of the owners, although of course they may not all be unanimous as to what the best approach to any particular issue is, in which case majority decisions bind. However, the point is that the body corporate is not required to mediate between the interests of the owners on the one hand and other persons or legal entities, on the other. That is not to say that the body corporate does

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13 *Velich v Body Corporate 164980* (2005) 5 NZ ConvC 194,138 and refer to Thomas Gibbons, "The Nature of a Body Corporate" [2016] NZLJ 371.

14 Unit Titles Act 2010, s 3.

15 Section (3)(b).

16 Section (3)(c).

not have to deal with third parties. But it is not required to promote their interests beyond meeting any obligations imposed by the law to those parties. The fact that the body corporate can act on behalf of the owners means that it may acquire liabilities which in substance are substitutes for individual liability between the third party and each of the owners. To that extent that the body corporate is representative of the owners.

[40] Judgment for costs was entered against the respondent on the application of Fletcher and the council. There is no doubt that such a liability, although in the first instance a liability of the respondent, can be recovered proportionately from each individual member.

[41] Because the body corporate rather than the constituent owners was the party before the WHT, it is the only party which could now have a theoretical right to seek the reversal of the judgment for costs. Not only has the respondent not taken that step, but there is no likelihood that that will actually occur now that the respondent is in administration.

[42] So long as Fletcher and the council hold the costs award, there is an obligation on the part of the respondent to pay it. All that Fletcher and the council need to show is the existence of the order. In enforcing their claim, they would not have to demonstrate that the proceedings out of which the costs order arose had been properly authorised by the unit holders. I do not understand that the administrator could dispute the validity of the costs order based upon the alleged non-consent of a unit holder/s to the proceedings being brought in the first place.

[43] Even if the applicant could show that it has a bona fide claim to judicial review of the entry of the costs order in the WHT, it is likely that on discretionary grounds, in my view, that such an application would be declined. That would be so because it would have been open to the applicant, had it been genuine in its opposition to the WHT proceedings, to take steps either under Part Four of the Unit Titles Act or by other means such as seeking an order by way of injunctive relief, to prevent the interests associated with Mr Ivil from taking proceedings in the name of

the respondent. In that regard, I cannot accept as a serious possibility that the applicant did not know that the WHT proceedings were in the offing.

[44] In the foregoing circumstances, it would seem unlikely that the council and Fletcher , which apparently knew nothing about the conflict which the applicant now raises, would be deprived of their order for costs. Had this dispute arisen in the context of company law, the Council and Fletcher would have been able to assume that the company's internal requirements had been complied with and that the company's officers were acting lawfully.[17] It would not have been open to the applicant as a member of the company or guarantor of its liabilities to oppose enforcement of the debt by way of a statutory demand by asserting that the constitution of the company had not been complied with. While the case was not put before me on the basis that the company law rules had any application of this case, the policy that underlies those rules would seem to be applicable to the position of a body corporate which seeks to recover a contribution from one of its members so that it can pay a legitimate debt to a third party.

[45] So far as passing the liability under the costs order on to the members, it needs to be borne in mind that a body corporate is representative of its members. If it has a liability, it would not seem to be consistent with the objects of the Unit Titles Act for the body corporate to attempt to resist that liability and thereby defeat the claim of the third party on the grounds that one or more members of the body corporate decline to make a contribution because there is a dispute with the other members constituting the body corporate. It is not clear to me why such an outcome is necessary to protect the interests of the applicant as a body corporate member by preferring its interest to those of the third parties who had no choice in the matter of whether they should participate in the proceedings before the WHT. The question arises, in my view, why those third parties should sustain a loss in order to safeguard the interests of the applicant. The applicant after all has the ability to raise a dispute under Part 4 which entitles the appropriate decision maker[18] to "hear and determine all disputes arising between persons of the kind listed…".[19] That plainly extends to

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17 *Royal British Bank v Turquand* 119 ER 886, and section 18 Companies Act 1993

18 As that term is defined in s 5 of the Unit Titles Act.

19 Section 171.

the right to adjust the position between the applicant and other body corporate members and the applicant and the body corporate itself, including the correctness or otherwise of a levy claim.

[46] Another way of viewing the issue that arises in this case is to adopt the approach that it is important not to confuse the representative function which the body corporate has when dealing with outside parties, on the one hand, and the adjusting of rights between the members who make up the body corporate, on the other.

[47] As s 290 of the Companies Act makes clear, what the applicant has to show when bringing an originating application to set aside a statutory demand is that there is a genuine and substantial dispute as to the existence of the debt and that it would be unfair to allow that dispute to be resolved by the Companies Court rather than by action commenced in the usual way.[20]

[48] It is my view, as I have attempted to explain, that it is not open to the applicant to decline to meet a levy based upon the WHT costs order unless it can first obtain a judgment setting aside that costs order. I consider it unlikely that such an order would be made for the reasons I have given.

[49] Alternatively, even if the question is one of giving the applicant an opportunity to get relief from the purported irregularities surrounding the decision to bring proceedings in the WHT, my view would be that there is little prospect of success by that route. The applicant had the right to invoke the disputes provisions available to it under Part 4 of the Unit Titles Act. It has not attempted to do that. In any case, such a claim would be against one or more of the other owners and would not be a claim against the respondent. What it cannot do, in my view, is simply refuse to pay the levy arising from the liability that the body corporate incurred as a result of undertakings steps on behalf of the owners.

[50] My conclusion is that the applicant does not have a substantial defence to the debt that was the subject of the statutory demand. Consistent with the approach set

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[20] *Taxi Trucks v Nicholson* [1989] 2 NZLR 297 (CA).

out above, I do not accept either that the applicant has any cross claim set-off or counterclaim available to it against the respondent.

Orders

[51] The application for an order setting aside the statutory demand is dismissed. The parties should consult on the question of costs and if they are unable to agree they are to file memoranda on the question of costs not exceeding seven pages on each side. They should include a précis of the position as to whether if costs are to be ordered against the applicant, and augmented costs order is justified having regard to the failure of the applicant to comply with timetable directions and the direction to provide a bundle.

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J.P. Doogue
Associate Judge