

# DAMAGE, DESTRUCTION, DISTRESS: SHARED OWNERSHIP DEBACLES

JEREMY FINN, BEN FRANCE-HUDSON, ELIZABETH TOOMEY\*

## ABSTRACT

*Shared ownership models of land use are part and parcel of our modern environment. In order to build high density, vibrant cities it is important to appreciate the types of problems that can occur where there is shared ownership on a single title of land. This article explores some of these problems, beginning with cross leases. After outlining the history, principles and essential characteristics of cross leases the article suggests that many of these problems could have been avoided if proposals made by the Law Commission in 1999 had been adopted. The article then analyses the Unit Titles Act 2010, aspects of which are working well, despite public concern about its effectiveness. However, there are a number of situations, especially in relation to insurance entitlements, where the Act does not apply, such as liability in negligence where damage has occurred to commercial or multiple use buildings and the role of contributory negligence. In situations of mixed commercial and residential use, problems arise as a result of definitional issues across a range of legislation, such as the Earthquake Commission Act 1993 and the Weathertight Homes Resolution Services Act 2006. Without careful consideration, the unintended consequences of these issues may well create impediments to building more vibrant cities. Finally, the article notes that central to any vibrant city will be the well-being of its residents. Both the cross lease and unit title models pose challenges in this sphere and careful thought should be given to balancing both the affordability and environmental benefits of higher density living with the need for all ages and types of people to be able to live together with easy access to services and open space.*

## I. INTRODUCTION

This paper addresses some of the problems that occur where there is shared ownership on a single title of land – in New Zealand such models comprise

\* Jeremy Finn, Professor, University of Canterbury, Christchurch; Dr Ben France-Hudson, Lecturer, University of Otago, Dunedin; Elizabeth Toomey, Professor, University of Canterbury, Christchurch.

cross leases, unit titles and retirement homes.<sup>1</sup> Problems with the cross lease model were exacerbated after the Canterbury earthquakes and these may have been completely avoided if the warnings from the Law Commission had been heeded in 1999. When a building subject to the Unit Titles Act 2010 is damaged or destroyed, but the plan is not cancelled, s 74 of that Act allows for a scheme to be settled to enable reinstatement. This provides a pragmatic tool for resolving disputes about how to conduct a remediation project clearly but when there is no agreement to reinstate, acute difficulties occur. Multiple use buildings have also posed problems for the Earthquake Commission (EQC) regime, particularly in dealing with determining the limits of “residential” use. The same problem has arisen in relation to the statutory regime under the Weathertight Resolution Services Act 2006 for “leaky” buildings and it seems apparent liability of builders and local bodies can arise whether or not the building is for commercial purposes, residential purpose, or both. Contributory negligence can be added to this mix.

## II. CROSS LEASES

The cross lease scheme was developed in the 1960s as a means of exploiting a loophole in the rules restricting subdivision of land. It provided separate titles to two or more flats in one building on one section without there being a subdivision of the land within the meaning of the Municipal Corporations Act 1954 (MCA 1954) or the Land Subdivision in Counties Act 1946. Thus homeowners were able to “own” their own flats. In 1971, as a result of further amendments being made to the MCA 1954 and the Counties Amendment Act 1961 (CAA 1961), it became possible for separate buildings on the same section to be cross leased, for example a conventional flat (being part of a building), a semi-detached town house, a free-standing town house or a conventional house. Nonetheless, the word “flat” continues to be used to describe any kind of cross leased dwelling. While the introduction of the Local Government Act 1964 (that replaced both the MCA 1954 and the CAA 1961) made little difference to cross leases (they still did not constitute a subdivision of land), a dramatic shift occurred when the Resource Management Act 1991 (RMA 1991) was passed. The grant of a cross lease is now a “subdivision of land”<sup>2</sup>

- 1 The authors (together with Professor Jacinta Ruru of the Faculty of Law, University of Otago) are involved in a project funded by the Building Research Levy through the New Zealand Building Research Association New Zealand (BRANZ) and the New Zealand Law Foundation. The project, “Repairs, Renovation, Restoration, Demolition or Replacement of Multi-Dwelling Units on a Single Title”, addresses these issues and investigates, on a world-wide scale, whether there are better models for shared ownership of land that New Zealand could adopt.
- 2 Resource Management Act 1991, s 218(1)(a)(iv).

and a subdivision consent must be obtained for a cross lease development in accordance with the provisions of that Act.<sup>3</sup> Nonetheless:<sup>4</sup>

[c]ross lease titles ... continue to be used for some smaller urban housing projects because they remain cheaper and more convenient for the property developer. Following the coming into force of the UTA 2010,<sup>5</sup> they may continue to be used, again for smaller developments, to avoid the costs and complexities, even for the developer, inherent in that Act. However, the cross lease scheme becomes unwieldy as larger numbers of flats are involved; unit titles are normally used for larger developments.

#### *A. The characteristics of a cross lease*

The mechanics of the cross lease scheme were devised by using a combination of two provisions in the Land Transfer Act 1952:

- s 66 which enables the issue of a title in respect of leasehold interests; and
- s 72 under which tenants in common are entitled to a separate title.

Thus, under a cross lease development, the owners<sup>6</sup> of each of the flats are registered proprietors of the land (usually a fee simple estate, but occasionally a leasehold estate) as tenants in common in undivided shares, and all the tenants in common grant a lease of each flat to its owner, usually for a term of 999 years. Thus, each owner is both a lessor and a lessee. Originally, the purchaser of a cross lease property received two titles (as per ss 66 and 72 of the Land Transfer Act 1952), but subsequently there evolved the practice of issuing one title for both estates, commonly known as a composite title.

The individual lessees acquire the right to the exclusive possession of their particular flats. The part of the land that is not cross leased (that is, does not have a flat built on the land) remains in the possession of the owners as tenants in common as either common areas or restricted user areas attaching to a particular flat.

The problems that exist under this model of ownership for a multi-dwelling unit on a single title were quick to surface and remain today despite a somewhat determined effort by the Law Commission in 1999 to instigate a

<sup>3</sup> Resource Management Act 1991, Part 10 (Subdivision and reclamations).

<sup>4</sup> D McMorland and T Gibbons, *McMorland and Gibbons on Unit Titles and Cross Leases* (Lexis Nexis NZ Limited, 2013) at 4.1.

<sup>5</sup> Unit Titles Act 2010.

<sup>6</sup> The noun "owner" is used loosely in this part of the article. A cross lease owner is both a lessor and a lessee - see comment of the Law Commission below at n 8.

managed system to phase them out. The following comment, made in 1994, is apposite:<sup>7</sup>

The great disservice which local authorities have done to the general public for a large number of years by refusing to allow fee simple subdivisions ... and forcing the use of the cross lease mechanism is only now beginning to surface in litigation. However, the flow has begun, the problems are constantly arising, and they will continue to do so for a long time in the future.

### *B. The 1999 Law Commission Report*

In its 1999 Report,<sup>8</sup> the Law Commission identified the basic problem with the cross lease system as “public lack of awareness that there are problems”.<sup>9</sup> It noted aptly:<sup>10</sup>

Most cross lease owners, it may be suspected, think of themselves as owning their flats plus so much of the surrounding land as they may occupy to the exclusion of other cross lease owners (whether such exclusion rests on courtesy or custom or the rather sounder basis of a restrictive covenant). They may have been told by the kindly real estate agent ... that they would be “as good as” owners. But of course they are in fact neither owners nor as good as owners ... Common sense suggests, however, that with the passing of time and as buildings age or uses permitted in particular neighbourhoods change, the essentially unsatisfactory nature of this form of tenure will become more and more apparent.

Indeed, while the advantages of this model exist mainly for the developer of the land, there are many disadvantages for the flat owners. Those disadvantages include:<sup>11</sup> lack of ownership of the flats (the lessees’ rights depend upon the terms of the cross lease); the lessee’s share in the estate in fee simple can be defeated; the rights of the lessee are different from those of an owner; the lessee’s rights of user of the restricted area might be controlled and limited by the terms of the lease; disputes are much more likely to arise because the lessees live in close proximity to one another and because of the complex nature of their rights inter se; the developer often prepares and

7 D McMorland (1994) 6 Butterworths Conveyancing Bulletin 253 at 254.

8 NZLC R 59 “Shared Ownership of Land” 1999.

9 At [8].

10 Above.

11 This list is taken from McMorland and Gibbons, above n 4, at 4.18 where a more detailed description of the problems can be found.

registers the cross leases so a purchaser buying in often does so on a “take it or leave it” basis; and insurance.<sup>12</sup>

The Law Commission expressed considerable concern about the physical or economic life of a flat which undoubtedly would be far shorter than 999 years:<sup>13</sup>

Different buildings on the same lot may have different life expectancies. This will usually be so where a new “infill” housing is built on the same lot as an existing older dwelling. There is no machinery for resolving differences as to whether or not a cross lease scheme should be terminated, this being often the only sensible solution if one flat has reached the end of its economic life. A single cross lease owner would be able to prevent this.

The Law Commission made three suggestions:

(i) *Phasing out.*

The Law Commission suggested the immediate prohibition of new cross lease schemes. There was widespread support for this initiative.<sup>14</sup>

(ii) *Voluntary conversion of cross lease schemes to subdivisions.*

Not surprisingly, there were no objections to this proposal.

(iii) *Mandatory conversion of cross lease schemes to unit title schemes or subdivisions.*

This third suggestion attracted considerable criticism.

One argument advanced by those who opposed this suggestion was that there was indeed an advantage for those holding under cross lease schemes – the ability to regulate the behaviour of neighbours living in close proximity. The Law Commission responded:<sup>15</sup>

This contention seems over-sophisticated. We very much doubt whether the overwhelming majority of those acquiring cross leases look at the matter this way. If this is wrong and it is genuinely important to a cross lease owner that the leases comprising a particular scheme forbid (say) more than one budgerigar per flat, it is always possible to provide for that prohibition by means of a restrictive covenant ...

12 Insurance issues are discussed below.

13 NZLC R 59, above n 8, at [12].

14 See, for instance, the Real Estate Institute of New Zealand, the Auckland City Council, the Property & Land Economy Institute of New Zealand Incorporated, the New Zealand Institute of Surveyors and Local Government New Zealand. Housing New Zealand supported a ten year “phasing out” period.

15 NZLC R 59, above n 8, at [16].

The Law Commission noted that a much more common argument was the cost of the conversion, particularly as it may affect older people with modest means.

The Commission proposed a softer alternative – that mandatory conversion be achieved indirectly by a prohibition after the mandatory conversion date of the registration of any dealing affecting a cross lease other than a transmission or vesting order. Therefore, on the registration of any dealing other than a transmission or vesting order, cross lease owners would be required to convert their cross lease scheme to a subdivision or a unit title scheme.

Unfortunately, while some of the Law Commission's suggestions for unit titles were considered in the modelling of the Unit Titles Act 2010, none of its suggestions for dealing with the fraught cross lease housing model was adopted. Sixteen years later, problems with the model continue and have been exacerbated by the added complexities of repair and reinstatement, not to mention insurance woes, after the Canterbury earthquakes:<sup>16</sup>

No legislative action has yet been taken though thousands of such situations exist throughout New Zealand affecting in many cases the most valuable asset of the lessee, his or her home.

In 2011, a joint working group comprising Land Information New Zealand (LINZ), the New Zealand Law Society, the Auckland District Law Society and the New Zealand Bankers Association noted particularly two continuing problems: the construction of further improvements resulting in title requisitions and redocumentation of title on sale; and the increased litigation relating to consents of other cross lease owners to construction of improvements. It reiterated the need for action:<sup>17</sup>

Accordingly, conveyancing to meet the future needs of cross lease title owners will require an examination of cross leases with a view to their possible replacement or facilitating a simple transition to another form of title.

### *C. How to determine a cross lease development*

Without any legislative action to phase out this model of multi-dwelling units on a single title, there are only three ways to determine such a development:

<sup>16</sup> McMorland and Gibbons, above n 4, at 4.18.

<sup>17</sup> *Conveyancing 2020: The Future Conveyancing/Land Development Environment – Strategic Priorities and Initiatives* (December 2011) (Land Information New Zealand, New Zealand Law Society, Auckland District Law Society Inc, New Zealand Banking Association) at 4.3 (comment from Auckland District Law Society).

(i) Unanimous agreements from cross lease parties or initiative by a developer  
 If there is unanimous agreement by all parties in a cross lease development to determine it, then the parties can surrender the cross leases and create a new title structure.<sup>18</sup> If the transition is to a fee simple structure, requirements of the Resource Management Act 1991 or the relevant territorial authority may create difficulties and expense.<sup>19</sup>

Moreover, the growing trend for developers to undertake fee simple subdivision around individual units (some of which may share party walls) due to individual titles being more attractive to prospective purchasers attracted the following comment from a planner:<sup>20</sup>

It is bound to create long term issues for rights of access to maintain/repair elements of the building. It foolishly eradicates the need for any formal maintenance plan that would keep the buildings looking tidy in years to come, and creates an issue for ongoing maintenance of shared services in the long term, such as onsite stormwater detention tanks etc, which have a limited life span.

(ii) Court order

If there is disagreement between cross lease parties, those parties wishing to convert the development into a fee simple title structure can apply to the Court under s 339(1) of the Property Law Act 2007 for an order for the “division of the property in kind among the co-owners”. The Court may, if appropriate, order that, subject to resource consent, the land be subdivided into separate fee simple titles.<sup>21</sup> The Court has no jurisdiction to make an order for conversion to a unit title. Any such conversion is dealt with under the Unit Titles Act 2010.

(iii) Unit Titles Act 2010

A cross lease development may be converted into a unit title development under ss 191 – 200 of the Unit Titles Act 2010 but this method has attracted the following comment:<sup>22</sup>

However, the Act’s “one size fits all” approach and heavy emphasis on governance and increased administration and associated costs makes it continually unlikely that owners in cross lease schemes, which are generally smaller, sometimes only two properties in an in-fill situation, will convert to unit titles.

18 See *Kevdu Properties Ltd v Ko* (2007) 8 NZCPR 23 in which the Court enforced such an agreement.

19 D McMorland and T Gibbons, *McMorland and Gibbons on Unit Titles and Cross Leases*, above n 4, at 4.17.

20 Result of on-line survey that was undertaken as part of the project described above in n1.

21 See, for instance, *MacKenzie v Smythe* [2012] NZHC 1113.

22 McMorland and Gibbons, above n 4, at 4.18.

### *D. Insurance*

This paper borrows from an extremely useful, and clearly still highly relevant, discussion on the importance of insurance for cross lease developments that was given at an Auckland District Law Society seminar in 1991.<sup>23</sup> While this discussion looked at both cross leases and unit titles, due to changes in the Unit Titles Act 2010, these problems are now cross lease specific.

Complications and risks with respect to insurance arise from two problem areas.

The first arises from the owners' interdependence:<sup>24</sup>

The cross lease units, because of their close relationship, construction and use of common facilities have particular problems which are not associated with or are not as serious for owners of individual dwellings. Examples of such problems are:

Structural damage being caused to one unit because of fire in an adjoining unit – the value of one unit being lowered because one or more of the other units in the building are burnt out and not reinstated.

Your client's lack of control over events in other units in the block which may cause damage to their unit, i.e. taps left on causing floods and unattended heaters causing fires.

Multiplicity of parties in the case of reinstatement after damage – other owners and their mortgagees and insurers all can become involved.

In a sense your client's title depends on four walls, a roof and a floor. All of these can be destroyed so that your client's title becomes practically useless: lines on a piece of paper but little else.

The second complication involves the mortgagee:<sup>25</sup>

If your client owns an individual dwelling the problem of insurance concerns only the mortgagor and the mortgagee. In the case of a mortgage over a unit the *other* unit owners, their mortgagees and insurers become involved. They will

23 P Merfield "Insurance on Cross-leases and Unit Titles" Auckland District Law Society Seminar *Conveyancing Pot Pourri* (No 2) 1991.

24 At 1.1.3.

25 At 1.3.2.



want to insure that if a unit is damaged then it is reinstated as soon as possible.

The commentator noted the implied provision in the then Property Law Act 1952 concerning the application of insurance monies. The current provision is found in Schedule 2 of the Property Law Act 2007. If any buildings or improvements on mortgaged land are destroyed or damaged, the mortgagee, at its option, can apply the proceeds either in or towards:<sup>26</sup>

- (a) rebuilding or repairing the buildings and improvements; or
- (b) payment of the principal amount, interest and other amounts secured by the mortgage even though such monies are not due to be repaid.

Therein arises a potential conflict between the interests of the mortgagor, the mortgagee and the other owners in the development.

*E. Prescient comments in Canterbury's post-earthquake environment*

In the early findings of our on-line survey, two respondents returned the following comments that aptly reflect the concerns voiced 17 years ago.

1. Case study: owners/insurers:<sup>27</sup>

Our clients entered into a shared property scheme for rebuild of the five dwellings on a cross lease title. Three different insurers were involved. Four owners and their insurers very quickly agreed on matters but one owner created difficulties by requesting over \$200,000.00 of betterment to which her insurer would not agree. This owner then engaged an “insurance advocate” to negotiate a cash settlement. The insurers told our clients that they would not go ahead with the rebuild of the remaining four properties because it was not practical. It was an “all or nothing” situation where either all owners were rebuilt under the scheme or they all cash settled. If they had all cash settled the practicalities of the site would have required them to arrange a joint rebuild anyway, so our clients were understandably keen to remain in the scheme. The problem dragged on for over a year until the insurers put a deadline on the situation. The only option at that point was for the hold out owner to opt back into the

26 Property Law Act 2007, Schedule 2, Part 1 “Covenants, conditions and powers implied in mortgages over land”, at cl 3 “Application of insurance money”.

27 Result of on-line survey that was undertaken as part of the project described above in n1.

scheme and agree to its terms. Following a meeting between representatives from the insurance companies, their lawyer and each of the owners and their representatives, the fifth owner did opt back in and the rebuild is due to start in April [2016].

## 2. Comment from a mortgagor:<sup>28</sup>

The major issue was the insurer cash settling directly with some customers despite having the bank noted as an interested party. This left us with a seriously devalued security.

It seems clear that one reform we will advocate in our final Report is a recommendation that the findings of the 1999 Law Commission Report be revisited and acted upon.

### III. UNIT TITLES

#### *A. Schemes for Repair under s 74 of the Unit Titles Act 2010*

In New Zealand, unit title developments are a common method of owning residential, commercial and mixed commercial and residential property. However, the practical question of how repairs can be achieved, particularly where damage has occurred across both common property and principal units, can pose serious difficulties. Damage, and, in particular, damage caused by water or earthquakes, does not respect legal concepts such as common property or the private property of a particular unit. Often, it not only makes more economic sense for repairs to several parts of a building to be done to the same standard and at the same time, but it will also be necessary for those carrying out repairs to have access to both common and private property.

Fortunately, s 74 of the Unit Titles Act 2010 provides for the High Court to settle a scheme for reinstatement where a building (or other improvement comprised in any unit or on the base land) is damaged or destroyed, but the unit plan is not cancelled.<sup>29</sup> Although a scheme under s 74<sup>30</sup> has been referred to as a “remedy of last resort”,<sup>31</sup> since 2007 it has become a popular avenue for those involved with a unit title development to facilitate repairs where

28 Result of on-line survey that was undertaken as part of the project described above in n1.

29 Unit Titles Act 2010, s 74.

30 Formerly s 48 of the Unit Titles Act 1972.

31 *Fraser v Body Corporate S63621* (2009) 10 NZCPR 674 at [97].

unit title owners have reached an impasse. It is now viewed as the standard mechanism for resolving disputes.<sup>32</sup>

However, a review of the case law since the leading decision<sup>33</sup> was delivered in 2011 suggests that a significant majority of cases are uncontroversial, involving no respondent but requiring a hearing before a High Court judge. These cases (none of which actually resulted in a scheme being declined) indicate that s 74 is working well. However, the requirement for a full hearing before the High Court seems unnecessary. For matters which are essentially uncontested, this requirement adds to delay and costs, not only because of the need to wait for a hearing date, but also because of the costs associated with an in-person appearance by counsel. Moreover, it adds to the work of the High Court in ways that might usefully be avoided. As a result, this paper suggests that the jurisdiction of Associate Judges of the High Court should be expanded to include the ability to consider s 74 schemes at first instance. If the matter is straightforward, an Associate Judge should have the power to settle the scheme. However, if the matter is complex the ability to set it down for a defended hearing before the High Court should be retained.<sup>34</sup>

That s 74 applications should be heard by an Associate Judge at first instance can be illustrated by reference to the cases which have been decided since the leading decision in *Tisch v Body Corporate 318596*.<sup>35</sup> *Tisch* itself outlined a relatively straightforward three-step process for determining whether a scheme should be settled.<sup>36</sup> Firstly, the court must be satisfied that the building has been damaged or destroyed. Secondly, if so satisfied, the court must decide whether a scheme is appropriate in the circumstances. Finally, if a scheme is considered appropriate, the court must decide what the terms of the scheme should be. There are a further five factors which must be considered in relation to this final step.<sup>37</sup>

32 *McMorland and Gibbons above* n4 at 3.33.

33 *Tisch v Body Corporate 318596* [2011] NZCA 420, [2011] 3 NZLR 679.

34 Interestingly, notwithstanding the apparent popularity of this section, there was an early debate in the literature regarding whether the provision could be used in this way. Rod Thomas argued that the courts have no jurisdiction to make such orders under either the 1972 or the 2010 Acts (Rod Thomas “Schemes Following Destruction or Damage Under the New Zealand Unit Titles Regime” (2011) 17 NZBLQ 371). Thomas Gibbons disagreed, arguing that the approach taken by the courts has been proper, appropriate and supported by pragmatism (Thomas Gibbons “Season of the Tisch: A Response to Rod Thomas (Schemes under the Unit Title Regime)” (2012) 18 NZBLQ 147.) With the benefit of hindsight, it is now clear that Gibbons’ position is the correct one. Since the decision in *Tisch*, the High Court has had no hesitation in engaging with these applications and no argument along the lines of that suggested by Thomas appears to have been run, let alone accepted by the courts.

35 *Tisch v Body Corporate 318596* [2011] NZCA 420, [2011] 3 NZLR 679.

36 At [35].

37 These include considering: what support there is for the scheme (a scheme with broad support is to be preferred); whether the scheme is appropriately detailed; the fact that the work should normally be done to the same standard and at the same time; and whether the terms of the scheme depart from the scheme of the Act or from the body corporate rules. If so, these departures should be no more than is reasonably necessary to achieve what is fair between unit owners in the circumstances.

Since the decision in *Tisch* there have been approximately 26 cases dealing with s 74 (or its predecessor). Of these cases, 19 of them appear to have been utterly non-controversial. Indeed, of these 19 cases, only one case recorded an appearance for a respondent (and one case involved 108 respondents). That sole appearance was to advise that that particular respondent no longer objected to the scheme. Moreover, the bulk of these cases are relatively short (often just three or four pages of judgment), there is often no recorded opposition to the settlement of the scheme, and they simply involve the judge noting that he or she is satisfied that the requirements laid down in *Tisch* have been met. The general impression provided by these cases is that s 74 works well, is often non-controversial and requires no detailed consideration by the High Court.

Indeed, it appears that s 74 works so well in the majority of cases that it is not clear why it is necessary to apply to the High Court at all. Surely, there must be an equally robust mechanism that does not involve cluttering up an already busy court with essentially non-contested matters. Gibbons notes that cases only “reach the courts when matters are in dispute”<sup>38</sup> and, in his view, s 74 provides a crucial mechanism for unit title developments to avoid grid-lock issues caused by individual unit owners who “hold out” against decisions that would benefit others. However, a review of the cases indicates that matters need not be “in dispute” in a strict sense for an application under s 74 to be triggered.

In a number of cases, the application to settle a scheme was driven by the failure of some (even one) unit title owner to engage with the process. There was essentially no argument or formal opposition and there was no particular “dispute”. Thus, while it is possible for all unit owners to reach a consensus on a remediation approach (which obviates the need to apply under s 74), this requires the active consent of every unit title holder. Where even one unit owner does not participate or provide consent, settlement of a scheme will be necessary. For example, in one recent case Katz J noted:<sup>39</sup>

[t]he Body Corporate has used its best endeavours, over several years, to try and get agreement as to an agreed plan of remediation. It has been unable to do so, however, due to a lack of engagement on the part of some of the unit owners.

In another case, it was noted that the application was necessary because not all unit owners had formally co-operated with the formation of the scheme, even though a unanimous resolution had been passed at an extraordinary general meeting.<sup>40</sup>

Moreover, other cases demonstrate that disputes can be of a very minor nature. For example, in *Body Corporate 361945 v Westpac New Zealand Ltd*,<sup>41</sup>

38 Thomas Gibbons “Season of the Tisch: A Response to Rod Thomas (Schemes under the Unit Title Regime)” (2012) 18 NZBLQ 147 at 157.

39 *Body Corporate S897766 v Brocorp Properties Ltd* [2015] NZHC 2891 at [30].

40 *Body Corporate 312431 v Auckland Council* [2015] NZHC 961.

41 *Body Corporate 361945 v Westpac New Zealand Ltd* [2014] NZHC 1336.

although there was no appearance for the respondent there was a division between unit owners as to the mode of cost apportionment under the scheme. However, the difference between the two positions was (in the context of a \$4.5 million remediation) modest, generally being less than \$2,000 and, for 54 unit owners, less than \$1,000.

What these cases suggest is that there is a need to change the way the majority of applications under s 74 are dealt with. Currently, an application under s 74 must be made to the High Court by way of originating application,<sup>42</sup> which is designed to provide a relatively speedy and inexpensive mechanism for a miscellany of applications which need to be made to the Court under specific statutory provisions.<sup>43</sup> Although a hearing date must be allocated at the time of filing the application,<sup>44</sup> there does not appear to be any power for the High Court to determine the matter on the papers. Moreover, determination of the application by an Associate Judge of the High Court is not possible because it is not within their statutory jurisdiction.<sup>45</sup> This can be contrasted to applications for summary judgment, which sometimes require similar decision making processes to s 74 applications, over which Associate Judges do have jurisdiction. Consequently, even if an essentially uncontested matter could be dealt with on the papers, it is still necessary for it to be dealt with by a High Court judge. This seems unnecessary where the application to settle a scheme under s 74 has no opposition and has been driven by either a very minor dispute or by a more general failure by unit title owners to engage in the process.<sup>46</sup>

A sensible solution to this would be to expand the jurisdiction of Associate Judges so that they have the power to settle a scheme under s 74 where it is appropriate to do so. Given the bulk of these cases are essentially uncontested (and are straight forward) this would provide both for the matter to be dealt with in an expedited and cost efficient manner,<sup>47</sup> but also to ease the workload of High Court judges.

This is not to say that all s 74 schemes could be dealt with in this way. Several of the cases reviewed raised substantive issues that were appropriately

42 High Court Rules, r 19.2(za).

43 *Manchester Securities Ltd v Body Corporate 172108* [2015] NZCA 29 at [15].

44 High Court Rules, r 19.10.

45 See Senior Courts Act 2016, s 20.

46 Interestingly, the cost of bringing the application in this way is \$540 (High Court Fees Regulations 2013, Schedule Fees Payable in Respect of Proceedings in Court, Item 3) (bearing in mind that if there is no respondent there is no scheduling or hearing fee) (High Court Fees Regulations 2013, reg 5). This can be contrasted with the dispute resolution provision of the Unit Titles Act 2010 itself, which indicates that in many instances disputes should go to the Tenancy Tribunal. The cost of this procedure is a fee of \$850 for minor matters, but \$3,300 for all other disputes. This suggests that the dispute resolution provisions of the Act need reassessment more generally. See: Elizabeth Toomey, Jeremy Finn and Ben France-Hudson "Repairs, Renovation, Restoration, Demolition or Replacement of Multi-Dwelling Units on a Single Title: BRANZ Research Project" [2016] NZLJ 208-212.

47 It should be noted that there is no fee for filing an interlocutory application for summary judgment: High Court Fees Regulations 2013, Schedule Fees Payable in Respect of Proceedings in Court, Item 8.

within the remit of a defended hearing in the High Court. Generally, these cases can be broken down by theme and are illustrative of the need for the High Court to retain some involvement (rather than adopting an alternative dispute mechanism such as arbitration).

Surprisingly, no case considers whether or not a scheme should be adopted. However, a number of cases consider the question of the appropriate form of the scheme.<sup>48</sup> An excellent example is *St Johns College Trust Board v Body Corporate No 197230*.<sup>49</sup> The complex had been damaged by water ingress and was made up of what were once four multi-storey buildings on separate properties, each having its own freehold title. It now comprised 110 units plus common property. The units had a mix of uses. Some were part of the original structures, others were new additions. The effect of the complex's structure was that, under the Unit Titles Act 1972 (which was the legislation governing the dispute), some people responsible for contributing to body corporate levies would have to contribute toward the repair costs of exterior cladding of units and other common areas located in a different building from the one they owned and from which they would receive little or no benefit. The cost of repairs was approximately \$4 million. The High Court, faced with a choice between four different schemes, refused to approve a number of schemes which had been proposed to change the respective burdens from the position under the Act. Duffy J did not consider it would be in the best interest of the unit owners as a whole to do so. Rather she approved a scheme that was consistent with and followed the purpose of the 1972 Act most closely.<sup>50</sup> The Court of Appeal agreed.

Conversely, in *LV Trust Holdings Ltd v Body Corporate 114424*,<sup>51</sup> a 17-level residential tower required repair as a result of building defects that resulted in leaking. The unit holders, by majority, resolved to carry out the work required to fix the defects (amounting to about \$5.4 million) and this work was done. The applicants owned a single unit in the development. They applied to the High Court for approval of a scheme under s 74. The body corporate was a respondent, and also presented its own scheme for approval. The key difference between the two schemes was the allocation of costs. The applicants owned the largest unit (it was over two floors) and, if the charges were to be assessed as proposed by the body corporate (supported by the majority of unit owners), they would pay considerably more than anyone else; by approximately \$80,000. Under their proposed scheme they would still pay more, but not by quite so much. Asher J, referring to the factors outlined in *Tisch*, concluded that the fact the applicants were in a minority of one was far

48 A further example can be seen in *Law v Tan Corporate Trustee Ltd* [2013] 1 NZLR 651.

49 *St Johns College Trust Board v Body Corporate No 197230* [2013] NZCA 35, (2013) 14 NZCPR 56.

50 *St Johns College Trust Board v Body Corporate No 197230* [2012] NZHC 827.

51 *LV Trust Holdings Ltd v Body Corporate 114424* (2012) 14 NZCPR 344. This decision was unsuccessfully appealed by the Body Corporate (see *Body Corporate 114424 v LV Trust Holdings Ltd* [2014] NZCA 21, (2014) 7 NZ ConvC 96-008, (2014) 15 NZCPR 375. The Court of Appeal approved every aspect of Asher J's reasoning).

from conclusive; majority support may do no more than reflect unfairness.<sup>52</sup> In his view, the extra payment by the applicants was not a fair levy in light of the benefits achieved. To charge an owner more simply because they had an additional floor (on which no relevant work was done) was unfair, and he settled the applicant's scheme.

A further type of case arises where a scheme has been settled, but there are arguments regarding decisions made under it.<sup>53</sup> For example, in *Body Corporate 198245 v Wong*,<sup>54</sup> the High Court had settled a scheme to remediate a leaky complex involving 18 residential apartments and seven ground level retail units, which empowered the body corporate to raise levies. However, some of the retail unit holders refused to pay relevant levies on the basis that their unit required far less by way of remediation. They also argued, among other things, that elements of the building had been wrongly included as common property and should have been classified as private property. The body corporate sought recovery of the unpaid levies. The retail unit holders lost the argument on the basis that each owner had bought into the building as a whole and should be taken to have bought knowing the division between common and private property and what their responsibilities would be. Moreover, the scheme, which had already been settled, specifically acknowledged the arbitrariness of aspects of the divide between private and common property and had been approved on that basis. For the court to revisit these issues would undermine the basis of the scheme as it had been settled.

Other cases consider what should happen when a unit owner cannot pay. In *Body Corporate 201036 v Westpac*,<sup>55</sup> a scheme had been settled under s 74. A levy had been raised, and all but five unit owners had paid. The body corporate sought relief under s 74(7) (which allows the High Court to make any orders that it considers expedient or necessary) in respect of the defaulting owners. In essence, the body corporate wanted to be able to seize the defaulting owners' ownership interest in satisfaction of their indebtedness. The central issue was whether the body corporate could use the scheme under s 74 as a vehicle for debt collection. The High Court decided that it could not be used in this way, with Thomas J concluding that using s 74(7) to obtain judgment against a defaulting unit owner would be to conflate the usual procedures. While this might be "expedient" it was not an appropriate use of s 74.<sup>56</sup> The law has a process for debt collection and there is nothing in the Unit Titles Act 2010 to suggest that that process does not apply to bodies corporate. Moreover, as it stood, a forced sale would almost certainly not satisfy the debt owed to the body corporate, nor would it provide sufficient to discharge a mortgagee's interest. However, if the repairs were undertaken using the body corporate's power to borrow money for that purpose in the

52 *LV Trust Holdings Ltd v Body Corporate 114424* (2012) 14 NZCPR 344 at [61].

53 A further example can be seen in *Body Corporate 173457 v Despy* [2012] NZHC 1589.

54 *Body Corporate 198245 v Wong* (2012) 14 NZCPR 203.

55 *Body Corporate 201036 v Westpac* [2015] NZHC 1524.

56 At [45].

interim, the value of the units would increase, allowing the unit owners to borrow further on their properties in order to discharge their debt to the body corporate. The orders sought were essentially procedural shortcuts and were draconian in nature.<sup>57</sup> They were declined.

Overall, a review of the cases decided under s 74 since 2011 suggests that the provision is working well. Proposed schemes are frequently settled by the High Court and in the majority of cases there is little, if any objection. This suggests that it may not be necessary for every case to be given due attention by a High Court judge. Nonetheless, there are cases where the quantum involved (often millions of dollars of repair work) and the substantive issues involved mean that it is an appropriate matter for the High Court to consider. A practical solution is to empower Associate Judges to consider applications under s 74 in the first instance. If appropriate the judge can settle a scheme. If complex issues that require a hearing are raised, the matter could be set down for consideration by a High Court judge. This would be a much more efficient approach that would potentially speed up resolution for the unit title owners, but also remove relatively simple matters to an appropriate forum.

### *B. When Unit Titles Act Processes Break Down: Dealing with the Fallout*

While s 74 appears to be working well in many situations, the section is not always applicable. There are a number of cases that demonstrate the range of problems that can arise.

One such recent case is *OM Hardware Ltd v Body Corporate 303662*.<sup>58</sup> Here a building in the Christchurch centre city contained a mix of ground-floor commercial units and upper-level residential units. The building operated through a body corporate under the Unit Titles Act. The building was badly damaged by earthquakes, and demolition became necessary. The body corporate then claimed on its insurance policy. There was a major disagreement between the residential unit owners and the commercial unit owners because, when the initial allocation of ownership interests was carried out, it reflected the floor areas of the units, not their actual values. This was contrary to the Unit Titles Act, and was soon recognised as incorrect. However, no alternative allocation had been agreed. The residential unit owners successfully sought to have the insurance proceeds distributed on a retrospective assessment drawing on expert valuers' advice, rather than on the incorrect initial scheme. It was critical that expert valuation based on sound data was available and, although there had been some change in relative values between the commercial and residential units over the years, the different valuations were remarkably similar.

57 At [71].

58 *OM Hardware Ltd v Body Corporate 303662* [2015] NZHC 190.



A different result occurred in *Dominion Finance Group Ltd (in Rec and Liq) v Body Corporate 382902* (“Gallery apartments”),<sup>59</sup> where an apartment building was badly damaged in the Canterbury earthquakes and later had to be demolished. Again, there was a dispute as to the accuracy of the allocation of ownership interests, and disgruntled unit owners sought a retrospective revaluation. However, in this case the Court refused to order such an exercise because there were no good comparators to allow a reliable figure to be reached. The challenged allocation therefore stood.

Both cases may serve as cautionary tales which emphasise the need for bodies corporate and their members to ensure the Unit Titles Act is complied with fully, and that changing circumstances are reflected in changes to any allocation of interests and values. Of course, it may be more simple to emphasise the need for documents to be up-to-date than to procure agreement among the unit owners.

### *C. A cautionary tale of an early settlement and a dodgy expert witness*

Much ink has been spilt, by academics and judges alike, in advocating the desirability of the parties reaching early settlement of disputes. There is a cautionary tale from the Canterbury earthquakes which illustrates the potential pitfalls of eagerness to reach such a settlement.

The recent decision of the Court of Appeal in *Prattley Enterprises Ltd v Vero Insurance NZ*<sup>60</sup> ventilated two issues of interest. The first concerned an unsuccessful application for relief under the Contractual Mistakes Act 1977 brought by an insured under a policy of insurance which had been in force on a building in central Christchurch which was damaged in the September 2010 earthquake and further and fatally damaged in 2011. The appellant building owner reached a settlement with Vero Insurance and, as part of that settlement, agreed to abandon all further claims arising out of the insurance policy. However, the appellants later contended that both parties had been mistaken as to the proper method of assessing the quantum of loss and, therefore, sought to set aside the settlement on the basis of common mistake. This failed for a number of reasons, including an inability to prove any actual mistake or any significant disparity in value, as well as an allocation of the risk of mistake to the building owner. (Thus the owners failed on every single head of the three elements required to be established for relief under the Act).<sup>61</sup> Given the emphasis placed by the court on the high threshold needed to upset a settlement agreement on any grounds, it is clear that a rush to early

59 *Dominion Finance Group Ltd (in Rec and Liq) v Body Corporate 382902* (“Gallery apartments”) [2012] NZHC 3325, (2012) 7 NZ ConvC 96-003, (2012) 14 NZCPR 252.

60 *Prattley Enterprises Ltd v Vero Insurance NZ* [2016] NZCA 67. Since this article was submitted to the Canterbury Law Review the Supreme Court has heard and dismissed an appeal against the Court of Appeal decision: *Prattley Enterprises Ltd v Vero Insurance Ltd* [2016] NZSC 158.

61 See s 6(1) Contractual Mistakes Act 1977.

settlement may be unwise if later events or legal developments indicate errors in assessing the benefits of the settlement.

The other point of real interest is that the case reveals some of the problems with “advisers” and “experts” who may be expected to flock to the scene of any significant disaster in the hopes of securing a share of the insurance or settlement monies available to victims of the disaster. One of the reasons that the building owner in the *Prattley* case sought to set aside the settlement agreement was the appearance on the scene of an overseas “expert” who advocated a novel method of calculating depreciation on the building under which the owners would have been entitled to more than 10 times the sum for which they had actually settled. What is inexplicable is that this “expert” first acted as an advocate for the building owners, then entered into a litigation-funding arrangement with them for the action to set aside the settlement agreement, before finally appearing in the witness box as an alleged independent expert witness. The Court of Appeal was singularly unimpressed by this multiplicity of roles. Unfortunately, this is not the only case in Christchurch where litigants appear to have relied on advice from unreliable sources to advance unsustainable claims.

#### *D. Negligence, Local Bodies and Commercial/Multiple use Buildings in New Zealand*

In some cases, particularly the “leaky building syndrome” cases which have kept the New Zealand courts busy in recent years, property owners have sought to recoup their losses by suing the architects, builders and contractors who designed and constructed the building(s) in question, and the local body which had oversight of the construction and certification process. It can be expected that, in at least some future disasters, property owners, or their insurers, will also cast about for potential targets of litigation.

The leaky building litigation has led the courts to some clear statements of principle. Local bodies owe a duty of care to current and prospective owners of residential buildings to ensure that proper checks are done to ensure the buildings are properly designed and constructed.<sup>62</sup> Builders of such residential buildings also owe a duty of care to future owners of the building to ensure design and construction are performed with due care.<sup>63</sup>

When attention is turned to commercial buildings, or to mixed commercial and residential buildings, the position is somewhat less certain. In the *Spencer on Byron* case,<sup>64</sup> the Supreme Court held that there was no reason to differentiate between residential and commercial buildings when imposing a

62 *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2011] 2 NZLR 289 [2010] NZSC 158.

63 *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 and *Young v Tomlinson* [1979] 2 NZLR 441.

64 *Body Corporate 207624 & Ors v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297.

duty of care on local bodies. However, it is less clear that the duty owed by builders to subsequent owners of residential buildings has a counterpart in relation to commercial buildings. In dealing with an appeal on a strikeout application, the Court of Appeal in *Blain v Evan Jones Construction Limited*<sup>65</sup> considered that there was still some uncertainty as to the relevant law and the question of the existence and nature of any duty owed by a builder to the subsequent owner of a commercial building should be resolved at trial rather than on a strikeout application.<sup>66</sup>

Some High Court cases have favoured extending builders' liability. In 2014 Woolford J took the view that the reasoning underlying the leading cases was:<sup>67</sup>

... supportive of a duty of care being owed in respect of all buildings regardless whether they are used as residences or for commercial purposes.

On that basis there was no need to differentiate between claims made by owners of commercial units within a building and other members of the body corporate who owned residential units.<sup>68</sup>

Another Judge has used a more assertive form of words, with Venning J saying that, in the *Spencer on Byron* case, the Supreme Court had "confirmed there is no distinction between commercial buildings and other non-residential premises" in relation to the duty owed by a builder to owners and subsequent owners of the building.<sup>69</sup>

The position must thus be seen as unsettled but, at the very least, owners of commercial properties, or multiple use properties, now have a very substantial chance of being able to seek damages from either, or both, the builder and the local body should it be found that a building was negligently designed or constructed or its progress negligently vetted.

### *E. The Contributory Negligence Issue*

Some issues have arisen in various cases as to the position of owners of units who had purchased the unit with actual or constructive knowledge of defects in the building. In one 2014 case, the Judge found an apartment owner to be contributorily negligent when they purchased their property after receipt of a comprehensive report indicating almost all the respects in which the building was defective. Damages were reduced by 75 per cent.<sup>70</sup> However, the Judge was content to allow other owners who had purchased units in

65 *Blain v Evan Jones Construction Limited* [2013] NZCA 680.

66 At [33].

67 *Body Corporate 321655 v Albert Park Holdings Ltd (formerly Clearwater Construction Ltd) (in liq)* [2014] NZHC 2478 at [13].

68 At [18].

69 *Minister for Education & Ors v WQT Ltd* [2014] NZHC 2198 at [8].

70 *Body Corporate 326421 v Auckland Council* [2015] NZHC 862 at [305]–[310].

the building, knowing of the potential defects, to rely on assignments of the rights of the previous owner when seeking damages.<sup>71</sup> Damages recoverable by such assignee-plaintiffs did not include any general damages for distress and inconvenience.<sup>72</sup>

However, care is needed in setting up any scheme involving the assignment of such tortious claims. An unusual obstacle to litigation was encountered in the *Fleetwood Apartments* case.<sup>73</sup> Here the Council had settled the claims of owners of units in the multi-dwelling unit on the basis of a payment to those owners and assignments to the Council of the owners' claims against two other defendants, the builder and the architect. The agreement provided that the assignor owners would receive the first \$200,000 recovered from those defendants and the council the next \$1.5 million plus its legal costs on a solicitor and client basis. Any further monies recovered would be paid to the unit owners. Fogarty J held that the assignment was invalid as being contrary to public policy by undermining the law of maintenance and champerty and meddling with the trial process.<sup>74</sup>

Much turned on the unusual financial elements in that case. The position is clearly different if the assignment is simply of the owner's rights, as a new owner who has taken an assignment of the previous owner's claim against the local body is likely to be seen as primarily acquiring a property right rather than an interest in litigation.<sup>75</sup>

#### *F. The Residential/Commercial Building Conundrum – EQC, Tort and Weathertight Homes*

The Earthquake Commission Act 1993 extends cover to all residential buildings which are the subject of a fire insurance policy.<sup>76</sup> The definition of residential buildings in s 2 of the Act states (in part):

Residential building means—

- (a) Any building, or part of a building, or other structure (whether or not fixed to land or to another building, part, or structure) in New Zealand which comprises or includes one or more dwellings, if the area of the dwelling or dwellings constitutes 50 percent or more of the total area of the building, part, or structure:

71 *Body Corporate 326421 v Auckland Council* [2015] NZHC 862.

72 At [278].

73 *Body Corporate 160361 (Fleetwood Apartments) v BC 2004 Ltd* [2014] NZHC 1514; [2014] 3 NZLR 758.

74 At [150].

75 *Body Corporate 326421 v Auckland City Council*, above n 70 at [283].

76 Earthquake Commission Act 1993, s 18.

In turn, a “dwelling” is defined:

Dwelling means, subject to any regulations made under this Act, any self-contained premises which are the home or holiday home, or are capable of being and are intended by the owner of the premises to be the home or holiday home, of one or more persons.

This simple formula for determining whether a building is, or is not, a residential building stands in contrast to other parts of the definition section, which give very precise figures as to the distance from the house for which damaged land or drains or pipes attracts EQC cover. While it may be surprising that such a simplistic criterion is used, it must be said that it appears to have been effective in preventing disputes and litigation.

It is clear that designers of new buildings and, perhaps particularly, developers seeking to remodel existing commercial or industrial buildings to a mix of uses, must be very aware of this limitation. Certainly, it is a serious disincentive to creating any multiple-use buildings which involve a minority amount of residential use. That may not be optimum in seeking to build more vibrant cities.

The definition also raises the question of whether the provision of commercial accommodation should be seen as part of a residential use or a commercial one, and thus excluded from the EQC coverage. It appears that, in Canterbury, EQC has generally taken the view that buildings which have a mix of short-stay apartments and owner-occupied apartments are to be classed as residential buildings. This may perhaps be a flow-on from the decision in *Morley v EQC*,<sup>77</sup> which held that boarding-houses came within this statutory definition because each boarding house was “an entire self-contained building and as such was self-contained premises being shared as a home by a number of individuals”,<sup>78</sup> even though the individual residents shared communal kitchens and bathrooms. The Judge noted that it was common ground between the parties that rented accommodation was a “residential building” as opposed to a commercial property, even though the landlord had a commercial purpose in letting out the premises.<sup>79</sup> Given that decision, it is perhaps not surprising that no later cases made any significant differentiation between apartments or flats rented on long-term tenancies and those let on very short terms of a week or two or even a few days.

It is not clear why one form of commercial accommodation provision should be privileged over others in terms of EQC cover. Nor are the distinctions drawn by the EQC legislation maintained in other contexts.

<sup>77</sup> *Morley v EQC* [2013] NZHC 230.

<sup>78</sup> At [50].

<sup>79</sup> At [49].

In the tort litigation over the liability of local bodies, the ruling in the *Spencer on Byron* case also meant that rental accommodation was not distinguished from commercial property. In that case, almost all the units in the defective building were under management as hotel rooms.<sup>80</sup> It may be interesting to see how such short-stay rental properties are to be treated if the courts maintain the stance that negligent builders may be liable to subsequent owners of residential properties but not to owners of commercial properties.

The definitional issues have arisen in relation to the Weathertight Homes Resolution Services Act 2006. That Act allows owners of “dwellinghouses” affected by “leaky home syndrome” or “weathertightness issues” arising from faulty design and/or construction to have their cases dealt with relatively speedily through the Weathertightness Tribunal, at the cost of having to abandon their tort claims against the relevant local body and accept a lower sum but gaining the benefit of a government contribution to the remedial payments.

The critical parts of the definition of “dwellinghouse” in s 8 of the Act are:

dwellinghouse—

(a) means a building, or an apartment, flat, or unit within a building, that is intended to have as its principal use occupation as a private residence; and

...

(d) does not include a hospital, hostel, hotel, motel, rest home, or other institution

That definition has given rise to some discussion in both the Courts and the Weathertightness Tribunal. The Tribunal had to consider eligibility in *Re The Anchorage*,<sup>81</sup> where the building comprised a number of apartments which had been designed as private residences but had never been used as such. Instead, the apartments had been rented out generally on a short-stay basis. The Tribunal, however, gave primacy to the intended purpose of the owners to use the flats at some later time as a permanent or holiday home, rather than the actual use to which the units had been put.<sup>82</sup> In *Body Corporate 85978 v Wellington CC*,<sup>83</sup> the Court was dealing with a building in which there were 100 residential units and a café. Twenty-one of the units were leased to the Quest hotel chain and used as hotel rooms. The Tribunal considered these units fell outside the statutory scheme but in the High Court a “bright line” test of the purpose at the time of construction was applied. Convenience, it appears, trumps reality.

80 There were 248 hotel rooms and six residential flats: *Body Corporate 207624 & Ors v North Shore City Council*, above n 64, at [2].

81 *Re The Anchorage* [2012] NZWHT Auckland 33.

82 At [12] and [19].

83 *Body Corporate 85978 v Wellington CC* [2013] NZHC 2582.

A rather different challenge came in *Townscape Akoranga Ltd v Auckland Council*,<sup>84</sup> where the issue arose, in the context of judicial review proceedings, whether student accommodation in the form of student flats was to be treated as a series of “dwellinghouses”. Heath J considered the statutory definition at length, holding that the use of the term “private dwellinghouse” imported a test of privacy:<sup>85</sup>

The exceptions to the term “dwellinghouse” are the antithesis of a residence that has the usual characteristics of privacy inherent in it. Generally speaking, hospitals, hostels, hotels, motels, and rest-homes are not used principally as a private residence.

The student residences were, he considered, akin to serviced apartments rather than hotels, hostels and the other enumerated exclusions, and were therefore “private dwellinghouses”.

The inclusion of such accommodation as dwellinghouses is, perhaps, close to the line on a reading of the statute alone. However, it seems less contestable if units in a building which are managed as hotel rooms are “dwellinghouses” and thus covered by the weathertightness scheme. Certainly the owners of such commercially-exploited units are free to seek remedies in tort against the local body and, perhaps, the builder. Questions may still be raised about the appropriateness of EQC cover.

#### IV. THE IMPORTANCE OF “WELL-BEING” HOUSING MODELS

A theme running through this project is to study the importance of “well-being” housing models. As society is forced by housing constraints to live in more confined environments, we are investigating models in which a tighter community can live harmoniously. The cross lease model with its dual ownership structure attracts significant discord. Arguments arise about structural additions that have been done without a co-owner’s consent,<sup>86</sup> failure of co-owners to consent to alterations,<sup>87</sup> removal of dwellings,<sup>88</sup> entitlements over the common property (usually the driveway)<sup>89</sup> or over restricted user areas<sup>90</sup> and the like. The unit title model of ownership presents its own discrete problems including: basic administrative problems regarding

84 *Townscape Akoranga Ltd v Auckland Council* [2013] NZHC 2367.

85 At [52].

86 See, for instance, *Hogg v Edwards* HC Rotorua CP142/86; *Song v Chai* HC Auckland CIV-2011-404-422, 30 June 2011; *Smallfield v Brown* (1992) 2 NZ ConvC 19,110.

87 See, for instance, *Walsh v Studd* HC Auckland CIV-2002-404-2030, 2 July 2003.

88 See, for instance, *Williams v Cammock* HC Hamilton CP48/99, 4 August 1999; *Smallfield v Brown*, above n 86.

89 See, for instance, *Lipp v Chaney* [2012] NZHC 1761.

90 See, for instance, *Enjoin Twenty Four Ltd v Van Tilborg* (1991) 1 NZ ConvC 190,989; *Bain v Finlayson* HC Auckland CP 1153/92, 13 October 1992; *Sang v Lewis* [1994] DCR 373.

the structure of bodies corporate, their powers, and their oversight and regulation; disputes regarding the form of any required remediation, repair or rebuild and the allocation of associated costs; disputes about the allocation of ownership interests and the consequences where unforeseen events lead to calls for retrospective amendment; and the allocation of responsibility in tort and the impact of contributory negligence.

There are a number of studies concerning the relationship between a housing environment and well-being. City planners considering the replacement of high-density housing should take the opportunity to improve the actual physical rebuilding of a community.

In an Australian and New Zealand Health Impact Assessment Report,<sup>91</sup> alongside positive aspects of high density housing (which must also be taken into account in any re-design), such as increased affordability of housing, improved access to service and co-ordination for disadvantaged groups, lowered number of cars per household and increased personal safety around roads, walkways and cycleways, negative health impacts included:

- lack of play areas for children;
- risk of safety for children from windows and balconies;
- creation of inequity gradients in forming “ghettos”;
- increased alcohol-related harm;
- loss of amenity depending on design;
- increased cost of living and intensification; and
- increased pollution exposure.

While the Report identified many recommendations that targeted the impacts of a broader built urban environment, there were only a few recurring recommendation themes that focused specifically on housing density. From these more limited sources, the Report collated a very valuable “wish-list” for any city rebuilding high density housing:

- provision be made for people that cover a range of ages: for example, children for their “free will movement”<sup>92</sup> with open play spaces;<sup>93</sup>
- seeking strategies to ensure the delivery of diverse housing types for the elderly, disabled and singles;

91 Harris, Harris-Roxas et al, 2007, *Australian and New Zealand Health Impact Assessment Report*. This research was conducted between 2005 and 2010 following research from web sources such as HIA Connect, Health Impact Assessment Gateway, World Health Organisation, International Health Impact Consortium, and International Association for Impact Assessment. [Please note citations in footnotes 91-99 are retained in the style of the Report].

92 R Quigley and J Ball (2007). Wellbeing Assessment of the Draft Far North District Kerikeri-Waipapa Structure Plan, Quigley and Watts Pty Ltd. Public Health Specialists.

93 R Jaine (2008) Health Impact Assessment of the Regional Policy Statement Regional Forms and Energy Draft Provisions. Prepared for the Regional Public Health.



- access opportunities for recreation and open space;<sup>94</sup>
- restricting urban sprawl by monitoring land release and seek land development sites close to the town centre;<sup>95</sup>
- active transport options and increased physical activity;<sup>96</sup>
- cycleways and walkways;<sup>97</sup>
- local retail and services;<sup>98</sup> and
- appropriate development and building standards to improve safety for children and residents.<sup>99</sup>

## V. CONCLUSION

Shared ownership models of land use are part and parcel of our modern environment. They come with their own suite of problems, some of which remained latent until Canterbury suffered a series of very damaging earthquakes. While other problems have existed for a long time, the courts still struggle with sensible solutions. There is much public angst over the effectiveness of our current Unit Titles Act 2010. While s 74 of the Act appears to be working well in many situations, the section is not always applicable and this leads to complex issues, perhaps the most contentious being insurance entitlement. Who to sue when things go wrong, the role of EQC, and whether an owner should take some blame for a problem are often part of a litigator's brief. Most of the current problems with cross leases would never have occurred if the Law Commission's phasing-out suggestion had been implemented 17 years ago.

94 Quigley and Ball, above n 92.

95 GSAHS, G.S.A.H.S.P.H. (2007). Bungendore Health Impact Assessment Progress Report on outcomes, Greater Southern Area Health Service population Health.

96 Quigley and Ball, above n 92.

97 Quigley and Ball, above n 92.

98 K Tennant, C Newman, et al (2010) Health Impact Assessment Summary Report: Parramatta City Council's Draft Local Environment Plan, Sydney Western Area Health Service: Centre for Population Health.

99 J Ozanne-Smith, J Guy et al. (2008) The relationship between slips, trips and falls and the design and construction of buildings. Monash University Accident Research Centre.