IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2008-470-772

UNDER	UNIT TITLES ACT 1972
BETWEEN	WENDY JANET FRASER AND PETER ALLEN LEWIS First Applicant
AND	IAN LUKE DUSTIN Second Applicant
AND	BODY CORPORATE S63621 First Respondent
AND	BRUCE SIDNEY INGRAM AND OTHERS Second Respondents

Hearing: 1 and 2 July 2009

Counsel: J McTavish Butler and H Dymond-Cate for Applicants
G Brittain for Respondents

Judgment: 10 September 2009

JUDGMENT OF HEATH J

This judgment was delivered by me on 10 September 2009 at 2.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Grimshaw & Co, PO Box 6646, Auckland
Holland Beckett, Private Bag 12011, Tauranga
Counsel:
J McTavish Butler, PO Box 74507, Market Road, Auckland
G Brittain, PO Box 13 473, Tauranga

Contents

Introduction [1]
Outline of relevant facts [10]
A staged unit title development [32]
Analysis
(a) Introductory comments [61]
(b) Rule 1(f) and (h) of the Body Corporate's rules [69]
(c) The s 48 application [82]
Result [101]

Introduction

[1] Pacific Shores is a staged unit title development situated on Papamoa Beach Road, near Mt Maunganui. Its body corporate is known as Body Corporate S63621 (the Body Corporate). The development comprises 24 strata titles.

[2] Ms Fraser and Mr Lewis (a solicitor) own Unit 10, as trustees for a trust associated with Ms Fraser. That unit has been diagnosed with severe water ingress that has resulted in the rotting of various areas. Extensive work is required to repair the dwelling.

[3] In February 2008, Ms Fraser and Mr Lewis executed a conditional agreement to sell their unit to Mr Miln. Mr Miln did not intend to rectify the damage. He wanted to demolish the damaged unit and to build another in its place.

[4] Rule 1(f) of the Body Corporate's rules prevents a proprietor of a unit within the development from making any "additions or structural alterations to the unit without the consent" of the Body Corporate. Rule 1(f) is set out at para [69] below. Rule 1(h) provides that the Body Corporate must approve (in broad terms) any intended construction work on a future development unit, though consent must not be unreasonably withheld if a dwellinghouse is being erected and particular conditions are met. Rule 1(h) is set out at para [74] below.

[5] Ms Fraser approached the Body Corporate to get consent to Mr Miln's proposal. Consent was refused. Neighbouring proprietors have (understandable) concerns that a new dwelling, constructed outside the existing building footprint,

might adversely affect views from their homes. If so, that could also impact on the value of the surrounding dwellings.

[6] Following the Body Corporate's decision, Mr Miln withdrew his offer to buy Unit 10.

[7] In order to resolve the impasse, Ms Fraser and Mr Lewis issued proceedings. They seek an order under s 48 of the Unit Titles Act 1972 (the principal Act), set out at para [82] below. The application seeks the Court's approval for a scheme (the terms of which are set out in Schedule A to this judgment) designed to permit reinstatement or replacement of any dwellings. The application is opposed by the Body Corporate and many of the individual proprietors. Although both Ms Fraser and Mr Lewis apply jointly in respect of Unit 10, I shall refer only to Ms Fraser when dealing with that application.

[8] Initially, there were three plaintiffs. Mr Dustin (in respect of Unit 13) seeks to have the same scheme approved, for his benefit. Ms James (Unit 9) discontinued her claim, with no order as to costs, shortly before trial.

[9] I treat Ms Fraser's application as the primary claim. All issues can be determined adequately by reference to it. Two substantive questions arise for determination:

a) Is the Body Corporate's approval required for Ms Fraser to undertake remedial or reinstatement work of her choice, to remedy the problems caused to Unit 10 by water ingress?

b) If the answer to that question is "yes", should a scheme in the form proposed be settled, to enable work of the type contemplated by Ms Fraser to be undertaken, in any event?

Outline of relevant facts

[10] A scheme plan was submitted in support of an application to the Tauranga District Council to obtain planning consent for the Pacific Shores complex. That plan was dated 13 November 1990 and referred to the "developer's building envelope". Consent for a development of 24 units was granted by the Council, in December 1990. Over the next couple of years, the developer marketed the properties for sale.

[11] A proposed unit development plan was deposited on 3 November 1992. In the period between November 1992 and April 1997, the developer undertook further marketing and updated specifications for the construction of buildings. Between November 1992 and September 1999, amendments were made to the default rules set out in the Schedule 2 to the principal Act. I refer to relevant amendments later.

[12] Mr Holland, a director of the developer (Kiwicoast Developments Ltd), was the person primarily responsible for the creation of the unit title complex. Mr Holland had been involved in unit title developments for many years and wanted to undertake a development of that type at Pacific Shores, other than through a conventional subdivision. Mr Holland, in an affidavit sworn on behalf of the Body Corporate, explained his reasons for that approach, as follows:

> a. The body corporate could retain ownership of the area of approximately 4000 m^2 immediately adjacent to the prescribed reserves fronting the mean high watermark, which would otherwise have been required by Council as public reserve as per other nearby examples. Kiwicoast Developments Ltd then developed this area for recreation, for exclusive use by the body corporate members.
>
> b. The body corporate rules were specifically designed to control the quality of the homes built. I wanted to see a common theme for the housing, with an international flavour. I had in mind the Mediterranean look, which was popular in the early 1990s, with some variation. My concept was that all homes should predominantly have stucco cladding painted a pastel colour, with a concrete tile roof of the same profile, being Monier "alabama".
>
> c. I wanted to ensure that as many homes as possible had viewshafts of the ocean. To achieve that, I wanted to dictate the location of the building platforms.

d. I was concerned that there be adequate separation of the buildings to protect privacy, and also so that the development did not appear to be too dense.

[13] Mr Holland prepared the proposed unit title plan, as well as other promotional plans and brochures. He was responsible for selecting the house sites, doing so on the basis of "designed and precisely agreed topography, … carefully [laying] out a scheme so that the three rows of houses closest to the beach had maximum viewshafts to the ocean".

[14] Mr Holland described a drawing known as J1303C-A as an example of the basic scheme of the development. Mr Holland describes that plan as his "first plan for resource consent purposes". He deposed:

> 7. *Plan J1303C-A defined the building location for each unit, by reference to the building envelope.* This was critical to the submission for planning consent, because the land was in the rural zone, and there were no underlying prescriptive rules relating to yards, maximum heights and daylighting.
>
> 8. *Without the building envelopes prescribed on plan J1303C/A, it might have been possible for a registered proprietor to build right up to or close to the boundary of their unit.* For example, the registered proprietors of Unit 9 could have built right up to all of the boundaries of their unit. The consequences for the views of those behind are obvious. To ensure that did not happen, I prescribed the building envelopes.
>
> 9. The upper height limits of the units were approximately 8 metres above finished ground level. This equated to the then Tauranga County Council maximum height in their operative district plan for a residential zone. The lower height limits were generally 1 to 2 metres below finished ground level. This was to enable a two-storey home to be built, and to ensure that each registered proprietor owned the services below ground. Therefore, *upper and lower height limits of the units varied with the topography, and were registered in the first unit titles plan for all to adhere to.* (my emphasis)

[15] Mr Holland produced an example of a brochure that he had prepared for marketing purposes. He said that one of the "major marketing points" was the need for each dwelling to "be subject to building covenants, envelopes and height restrictions, to maximise views". Mr Holland deposed that he repeatedly made that point at early meetings of the Body Corporate, when he was either its chairman or secretary.

[16] To give effect to these intentions, a number of amendments were made to the Body Corporate's rules, between November 1992 and September 1999, to add to the default rules set out in Schedule 2. Those relevant to the present dispute are set out at para [74] below.

[17] Ms Fraser and Mr Lewis acquired Unit 10 in November 2000. The Certificate of Title for Unit 10 (SA51C/33) reveals that it was registered in their names on 22 November 2000. Subject only to an encumbrance in favour of the Tauranga District Council, registered on 19 July 1991, Ms Fraser and Mr Lewis acquired a stratum estate in freehold in respect of that unit. There is no evidence that the Tauranga District Council encumbrance affects height or location requirements for individual dwellings.

[18] Mr Holland gave evidence about the circumstances in which r 1(h) was introduced, to deal with "building covenants, envelopes and height restrictions". He said:

> 14. After the stage unit plan deposited, the second schedule rules were amended to introduce a new rule 1(h) to deal with the construction of houses. A copy of the rule change, B117563, is attached as "DH7". Rules 1(h)(iii) and (viii) referred to two plans, J1529-01B and J1529-03A. I cannot locate copies of these plans, but I believe them to be substantially the same as plan J1529-01C, which is attached as "DH8". Plan reference J1303 was for original resource consent purposes. Plan reference J1529 was for preliminary unit title plans, and plan reference J1900 was for plans lodged with LINZ.

Although Mr Holland refers to plans J1529-01B and J1529-03A as the plans to which reference is made in r 1(h)(iii) and (viii), that evidence does not correspond to the form of those sub-rules when the rules were amended, for the last time, in September 1999. The final form of those sub-rules (set out at para [74] below] refer to plans J1529-01C and J2624. Those plans have been produced in evidence and were both deposited as part of the staged development.

[19] Mr Holland also explained how various building restrictions were discussed at early meetings of the Body Corporate. He deposed:

16. In summary, the building restrictions were discussed during the early meetings of the body corporate, which I can clearly remember. At these meetings, I explained that:

    a. The two-storey component of the building was to be located within the building envelopes on the plans;

    b. If part of the building was of one storey, for example a garage, then this might be located outside the envelope at the discretion of the body corporate if it did not unduly restrict the neighbours' views; and

    c. An open deck might be located outside the envelope, so long as it did not interfere with the viewshaft, both to the ocean and obliquely, which meant it would usually be a north-facing deck.

17. As far as I was aware, all of these three requirements have been adhered to in the completed buildings to date.

[20] Mr Holland's evidence is that he was not involved in the change of plan reference for the fifteenth stage of the unit plan. That is the second of the two plans to which r 1(h)(iii) and (viii) refer, J2624. Mr Holland said:

24. I am now aware that rule 1(h)(viii) of the second schedule was amended in 1999, to change the plan reference to the 15th stage unit plan. That amendment was not discussed with me at the time. When I prepared the 15th stage unit plan, it was solely for the purpose of rule 1(h)(viii), I would have brought to the attention of the body corporate the purpose of the building envelope on plan J1529-01/C as referred to in the body corporate rules up to 1999.

…

26. Under the current Tauranga District Plan, the registered proprietors could build right up to or close to the boundary. Under the current Tauranga District plan, it is the definition of "site" that is critical for both overshadowing and yard requirements. "Site" is specifically defined to exclude a principal unit on a unit plan. Therefore, the overshadowing and yard requirements would only apply to the peripheral boundaries of the Pacific Shores complex. The building envelopes on plans J1303A and J1529-01/C remain a critical consideration when the body corporate is asked to give consent to a building proposal, especially for the two rows of dwellings closest to the beach.

[21] Mr Holland's evidence, on that topic, is confirmed by Mr Spain, a member of the committee of the Body Corporate from 2001 until 26 July 2008. He deposed:

4. The body corporate rules had been most recently amended in 1997 (sic). A copy of rule change B394087 is attached as “GS2”. Rules 1(h)(iii) and (viii) were amended to update the reference to the most recent plan, which was then J2624. A copy of that plan is exhibit “DH10” attached to the affidavit of David Holland. Plan J2624 did not include the original building envelopes referred to in David Holland’s affidavit. As I understand the position, the change of the reference to J2624, and the consequential omission of the building envelopes, was done unintentionally.

[22] At the time that Ms Fraser and Mr Lewis purchased Unit 10 in November 2000, they would have had access to the two plans to which r 1(h)(iii) and (viii) (in its 1999 iteration) referred. While there is no reference, in J2624, to the building envelope there is a reference, in J1529-01C to “dwelling building envelope”. Although the drawing known as J2624 is more detailed and contains exterior measurements on the boundary of each unit, J1529-01C still shows the shape (but not necessarily the size) and (general) location of particular dwellings, on each unit area, in a reasonably clear manner. J2624 also contains information assigning “unit entitlements” to 17 of the units depicted on that plan.

[23] In October 2006, Ms Fraser received a report that water ingress had occurred. She commissioned plans and specifications to re-clad the building. Work on re-cladding began in October 2007.

[24] In November 2007, Mr Miln approached Ms Fraser with a proposed to buy the unit. After she had obtained a copy of the scale plans submitted on the original planning consent application, Ms Fraser sent an email to the secretary of the Body Corporate querying the extent of the “building envelope”. At that stage, Ms Fraser requested the Body Corporate’s consent to the proposal to demolish the existing dwelling and rebuild.

[25] After further correspondence and discussions, the Body Corporate committee resolved that a firm proposal for redevelopment should be submitted before a final decision was made.

[26] In February 2008, the conditional agreement to buy Unit 10 was entered into between Ms Fraser and Mr Lewis (as vendors) and Mr Miln (as purchaser). The agreement was conditional on written consent to the proposed dwelling being

obtained from the Body Corporate. This condition was inserted solely for the benefit of Mr Miln.

[27] Both before and after the contract, the committee obtained legal opinions from the Body Corporate's solicitors; the first was on 19 December 2007, while the second is dated 26 February 2008. In the first, the solicitor opined that the "building envelope" to which the original scheme plan for resource consent referred had no legal effect. In the latter, he reached the conclusion that r 1(f) of the rules did not apply to the proposed redevelopment.

[28] After the second opinion was obtained, the secretary of the Body Corporate convened an extraordinary general meeting of the Body Corporate to consider Ms Fraser's proposal. Before that meeting was held, one of the owners (Mr McLachlan, a retired commercial solicitor) prepared his own opinion, concluding that r 1(f) did apply. That opinion was circulated on 6 March 2008.

[29] Two extraordinary general meetings were held. The first, on 8 April 2008, was inconclusive. The second, held on 28 May 2008, resulted in a proposal being presented by Ms Fraser's solicitor. The minutes of the meeting record:

> **10. ITEM 6 – from EGM 8th April 2008 (Adjourned)**
>
> **Resolved** The Body Corporate declined the proposal of Wendy Fraser's purchaser because the proposed building is significantly outside of the existing building envelope.
>
> Abstained – Ian Dustin (clarification of what a "unit" is – Unit Titles Act). Fred and Ces Barrett Proxy – Against Wendy Fraser
>
> Tony Schramm [an owner] stated Wendy should be given clear direction as to what information the body corporate required to reassess the proposed redevelopment.
>
> **Resolved**: Wendy Fraser be invited to submit a detailed proposal incorporating bulk and location detail with full elevations, construction details and materials. That such proposal clearly identifies the details of the extent of the building whenever it exceeds the existing 3D footprint of the existing building. Whenever the new building exceeds the existing 3D footprint of the existing building Wendy Fraser must first get the consent of all affected parties and if such consent is not given, Body Corporate Consent not be given to the proposal.
>
> Frances Schramm stated that the committee write to Wendy Fraser advising of the decisions reached at this meeting. Secretary to do so.

NOTE: AT THIS MEETING (prior to Tony Schramm's presentation) THE PROPOSAL FOR A HIGH COURT DECLARATION TO BE OBTAINED WAS PUT TO MEMBERS. THE SUGGESTION WAS DECLINED BY THE MAJORITY AS IT WAS FELT THAT THE BODY CORPORATE RULES DID NOT NEED CLARIFICATION.

[30] At a meeting of the committee held on 26 June 2008, the following resolutions were passed:

> **10. GENERAL BUSINESS**
>
> …
>
> **Record of committee's Decision regarding House 10**
>
> Ian Dustin brought up the issue that the body corporate committee did not have a meeting following the EGM and officially give its decision to decline Wendy's proposal.
>
> Iain Stewart stated that his recollection was that following the voting of the BC the committee did meet at that time (a discussion and agreement was reached by those committee members seated at the front of the meeting) and reached its decision (by majority – "against" – Ian Dustin). This was agreed by all present at this evening's meeting except for Ian Dustin.
>
> **Resolved:** The Committee agreed to record its decision made at the EGM dated Wednesday 28th May 2008 as directed by the body corporate to decline the proposal of Wendy Fraser's purchaser because the proposed building is significantly outside of the existing building envelope.
>
> Noted: Ian Dustin (Against)
>
> Note: Ian Dustin commented that he was unable to vote "with" the majority of the committee on decisions with respect to the legal position relating to House 10. This was because he believes that the Committee is acting illegally against all Legal opinion that it has received including that opinion it received from Simon Collett on Feb. 26 2008. Furthermore the Committee is not being active in addressing the points brought up by Wendy's Barrister.
>
> Ian Dustin brought a copy of the Unit Titles Amendment Act 1979 for the edification of the Committee and pointed members to the following:
>
> "Notwithstanding anything in section 15 of the principal Act, the body corporate shall have no duties in respect of any future development unit comprising part of the development".
>
> NOTE: Ian Dustin requested the above wording in red be included in the Minutes on 27th June 2008 via email to the Secretary.

[31] After she received that resolution, Ms Fraser's contract to sell Unit 10 to Mr Miln was cancelled. This proceeding was filed on 12 September 2008.

A staged unit title development

[32] There are material differences between a subdivision effected under the principal Act and a staged development, such as Pacific Shores. A staged development is undertaken pursuant to the specific terms of the Unit Titles Amendment Act 1979 (the 1979 Amendment).

[33] The principal Act deals with three distinct topics: (a) units owned by individual proprietors, (b) common property owned by all unit proprietors as tenants in common and (c) the use and management of both individual units and common property. The 1979 Amendment is more complex and the language used in it is quite dense.

[34] I discussed the scheme and purpose of the principal Act in *World Vision of New Zealand Trust Board v Seal* [2004] 1 NZLR 673 (HC), at paras [21]-[52], and *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC), at paras [83]-[102]. I summarise my conclusions:

a) Part 1 of the principal Act establishes freehold and leasehold interests in principal and accessory units, by way of strata estates.

b) A fundamental theme of the principal Act is the distinction between individual units (for which each registered proprietor takes responsibility) and common property (the domain of the body corporate). Individual registered proprietors can deal only with individual property, whereas "common property" is owned by *all* proprietors and must be managed by the body corporate for the common good.

c) The body corporate is the legal entity through which efficient management of common property is undertaken. A body corporate is created by s 12 of the principal Act. On deposit of a unit plan, the registered proprietor becomes the body corporate. Thereafter, the

proprietors for the time being of all the units comprised in the unit plan make up, collectively, the body corporate.

d) The rules by which all proprietors are bound together as a body corporate are set out in the Schedule 2 to the principal Act. Those are default rules which apply in the absence of a unanimous resolution to the contrary.

e) The rules create a democratic framework by which the proprietors can manage the property comprised in the unit plan. Individual owners are responsible for their own unit entitlements. The collective body of proprietors have jurisdiction over common property, as well as the power to consent (or not) to proposals by individuals to make additions or structural changes to particular buildings or improvements. The justification for the latter power is the need for other proprietors to be consulted and heard on any changes of that nature that might impact adversely on their economic or aesthetic interests.

f) The rules of the body corporate are binding on it, all proprietors and any other person in actual occupation of a unit. They enure for the benefit of the body corporate and each proprietor.

[35] A body corporate's duties are set out in s 15(1) of the principal Act. In summary, they are:

a) To carry out any duties imposed by the rules.

b) To insure and keep insured all buildings and other improvements on the land, to replacement value against specified hazards and risks.

c) To effect such other insurance as may be required by law or may be considered expedient.

d) To apply any insurance moneys received (subject to ss45, 46, 47 and 48 of the principal Act) to any building or improvements in rebuilding and reinstating the property.

e) To pay insurance premiums.

f) To keep common property in a state of good repair.

g) To comply with any requisition given by a competent local authority or public body in relation to the land and buildings.

h) To control, manage and administer the common property and to do all things reasonably necessary to enforce the rules.

i) To do all things reasonably necessary to enforce any lease or licence under which the land is held.

j) To do all things reasonably necessary for the enforcement of any contract of insurance entered into by it.

A body corporate has all powers reasonably necessary to enable it to carry out the duties imposed upon it by the principal Act and its rules: s 16 of the principal Act.

[36] Section 4 of the principal Act deals with subdivision of land through deposit of a "unit plan". On deposit of the plan, a stratum title (in freehold or leasehold) is created in respect of each unit: s 4(2).

[37] Notwithstanding anything in Part 1 of the principal Act (in which s 4 appears), the 1979 Amendment allows a person to subdivide a parcel of land and to effect the subdivision in two or more stages: s 3(1). The first step is the deposit of a proposed unit development plan, which depicts the outline of the subdivisional arrangements and identifies the future development units. It is permissible to use a later stage unit plan to make provision for only one "principal unit", along with one or more future development units: s 3(2). The idea is that, as each stage plan is

deposited, at least one unit is reclassified from a future development unit into a principal unit.

[38] The term “unit” is not defined by the 1979 Amendment. Its definition must be taken from s 2 of the principal Act:

> **2 Interpretation**
>
> In this Act, unless the context otherwise requires,—
>
> Unit, in relation to any land, means a part of the land consisting of a space of any shape situated below, on, or above the surface of the land, or partly in one such situation and partly in another or others, all the dimensions of which are limited, and that is designed for separate ownership:

[39] The term “principal unit” is defined by s 2 of the principal Act as follows:

> **2 Interpretation**
>
> In this Act, unless the context otherwise requires,—
>
> Principal unit means a unit that is designed for use (whether in conjunction with any accessory unit or not) as a place of residence or business or otherwise, and that is shown on a unit plan as a principal unit:

[40] Although there are none within Pacific Shores, the term “accessory unit” is defined by s 2 of the principal Act:

> **2 Interpretation**
>
> In this Act, unless the context otherwise requires,—
>
> Accessory unit means a unit that is designed for use with any principal unit (whether as a garden, garage, car parking space, storage space, swimming pool, laundry, stairway, passage, or other like purpose) and that is shown on a unit plan as an accessory unit:

[41] So, for the purposes of the principal Act, a “principal unit” and an “accessory unit” are sub-sets of a “unit”. In the context of a staged development, however, those concepts must be considered in the context of the “future development unit”.

[42] The term “future development unit” is defined by s 2 of the 1979 Amendment:

2 Interpretation

In this Act, unless the context otherwise requires,—

Future development unit, in relation to a subdivision of land into units in stages, means a unit that is proposed to be developed or subdivided into one or more units (with or without common property) at a later stage of the development, and that is shown on a stage unit plan as a future development unit:

[43] The nature of a future development unit was considered by Miller J, in *Cassels v Body Corporate No 86975* (2007) 5 NZ ConvC 194,466 (HC). After discussing s 9 of the 1979 Amendment, the Judge continued:

> [37] … The legislation … envisages that a future development unit may not have been completed to the extent that its boundaries can be physically measured; it may be nothing more than a designated shape. (I recognise that in so concluding I am aligning myself with what the editors of *Brookers Land Law* call (at 3.2.01) the polyhedronists.) I have already mentioned that the proprietor is not a member of the body corporate; that means he cannot exercise most rights associated with unit entitlements (as to which, see s.6 of the principal Act), that the body corporate need provide none of the services that it would otherwise be compelled to provide under s.15 of the principal Act, including insurance, and that the proprietor is not liable to pay levies for such services.

[44] Earlier, the "polyhedron" approach to the definition of "unit" had been articulated by the Court of Appeal, in *Disher v Farnworth* [1993] 3 NZLR 390 (CA) at 393. McKay J, for the Court, said:

> "Unit" is thus a space of which all the dimensions are limited. It is not, as is an ordinary Land Transfer Act 1952 title, defined only by reference to land surface boundaries. Its dimensions in the vertical plane must also be limited. The Act thus enables separate ownership of the different floors of a multi-storey building. Where, as in this case, the units are side by side and not superimposed one above the other, they must still satisfy the requirement that all dimensions must be limited.

[45] Section 4 of the 1979 Amendment explains the process of staged subdivision. The use of a series of plans contrasts with the deposit of a single "unit plan" under the principal Act. Each stage is effected as follows:

a) A "proposed unit development plan" is deposited. This is required to specify all units and the whole of the common property proposed to

comprise the development when completed. These are the future development units.

b) One or more "stage unit plans" which must specify each unit and each part of the common property (if any) completed to that date, in relation to a building or buildings comprising part of the development and already erected on the land. The "stage unit plan" must also specify areas in which further development or subdivision and other work is required to complete the complex.

c) The subdivision ends with the deposit of a "complete unit plan", specifying all units and the whole of the common property comprising the development in relation to buildings already erected on the land.

The terms "proposed unit development plan", "stage unit plan" and "complete unit plan" are defined in s 2 of the 1979 Amendment, in a manner consistent with this summary. All plans are deposited under the Land Transfer Act 1952.

[46] Developing the point made in para [37] above, the proposed unit development plan is, in effect, a concept plan designed to identify the way in which the land will be subdivided into principal units, accessory units and common property. Necessarily, at the time of the proposed unit development plan, no subdivision has, in fact, been effected. For that reason, the deposit of a proposed unit development plan does not affect the interest of the registered proprietor (usually the developer) in the un-subdivided land at the time that plan is lodged: s 5(2) of the 1979 Amendment. The purpose of the "stage unit plans" is to identify those units that have been converted into principal or accessory units, leaving the balance of the proposed units as future development units. That is why s 3(2) allows a stage unit plan to refer only to one principal unit, as that may be the only unit for which classification has changed. The complete unit plan will be deposited once the subdivision has been completed. As I understand the evidence, Unit 6 remains a future development unit.

[47] Other sections of the 1979 Amendment explain what provisions in the principal Act apply to a staged development. I outline the way in which the two Acts fit together. Unless indicated to the contrary, the references to section numbers in this summary are references to the 1979 Amendment.

[48] A proposed unit development plan must comply with rules of survey made under the Cadastral Survey Act 2002, and may not be deposited unless accompanied by a stage unit plan and approval by the Surveyor-General: s 5(1) and (3). This equates to the mode of survey used for "unit plans": see s 4(1) of the principal Act.

[49] Once a proposed unit development plan has been deposited, the proposal cannot be altered, in the absence of a new proposed unit development plan enjoying unanimous approval of existing proprietors or a majority of them, coupled with Court sanction: s 5(5). This has created a degree of inflexibility with regard to the use of a staged development: see, generally, the Law Commission's report, *Shared Ownership of Land* (NZLC, R 59, 1999) at para 49.

[50] Section 5 of the principal Act creates restrictions on deposit of a "unit plan". Section 5(1)(g) requires that the Chief Executive of the territorial authority in whose district the land is situated must give a certificate that every building shown on the plan has been erected and all other development work carried out to the extent necessary to enable all boundaries of every unit and the common property to be physically measured.

[51] In a staged development, no stage unit plan or complete unit plan can be deposited unless the Chief Executive's certificate includes a statement that the plan is consistent with the relevant proposed unit development plan: s 6(1) of the 1979 Amendment.

[52] Section 6(1) of the principal Act deals with unit entitlements. Before a unit plan is deposited it is necessary for each principal unit and every accessory unit to be assigned a unit entitlement which forms the basis of determining particular matters set out in s 6(3). Section 6(3) provides:

6 Unit entitlement

…

(3) The matters referred to in subsection (1) of this section are—

(a) The proprietor's share in the common property in accordance with section 9 of this Act;

(b) The extent of the proprietor's liability for damages and costs under section 14 of this Act;

(c) The extent of the proprietor's obligation under section 15 of this Act in respect of contributions levied by the body corporate, and of his rights under that section on a distribution of any surplus money or personal property;

(d) The extent of the proprietor's obligation for payment of rent and other money under section 26 of this Act;

(e) The extent of the proprietor's share of the value of any buildings, fixtures, and other improvements under section 30 of this Act;

(f) The proprietor's voting rights on a poll pursuant to clause 27 of Schedule 2 to this Act;

(g) Subject to section 48(5) of this Act, the proportion in which money (if any) received or held by the body corporate for distribution among the proprietors is to be distributed among them in accordance with section 45(7) of this Act; and

(h) The share in the land which is to vest in the proprietor under subsection (5) of section 45 of this Act upon the cancellation of the unit plan.

In a staged development, unit entitlements are not assigned until a principal or accessory unit has been created by a stage unit plan: see s 7(1) and (2) of the 1979 Amendment and para [22] above, in relation to the assignment of unit entitlements on plan J2624. A copy of J2624 is reproduced (in three pages) as Schedule B. The plan was registered on 13 September 1999.

[53] A unit entitlement, on a staged development, is fixed by a registered valuer "on the basis of the relative prospective value of the unit in relation to each of the other proposed units on the proposed unit development plan". That mechanism is analogous to that used for principal and accessory units in a development under the principal Act, save that the valuer, under the latter, assigns the unit entitlement "on

the basis of the relative value of the unit in relation to each of the other units [shown] on the unit plan": s 6(1) of the principal Act.

[54] As a matter of logic, it follows that unit entitlements are not assigned to future development units that remain after particular principal and accessory units have been created by a stage unit plan. That is confirmed by s 7(3) of the 1979 Amendment.

[55] While a stratum title is created in respect of individual principal and accessory units on deposit of a stage plan showing them as such, the position is different with regard to remaining future development units. On deposit of a stage unit plan a stratum estate (in freehold or leasehold) is created in respect of each future development unit. But, that estate ceases either on deposit of a subsequent unit plan specifying it as other than a future development unit (s 8(1)(a)(i)) or on cancellation of a stage unit plan, in accordance with ss 45-47 of the principal Act (s 8(1)(a)(ii)). That undivided share in the relevant estate is held by the registered proprietor of that part of the land shown as future development units, to which a proprietor of the unit is contingently entitled by virtue of s 9(6)(c)(i). The term "proprietor" is defined by s 2 of the principal Act.

[56] Section 4(3)-(6) of the principal Act explain the nature of the stratum estate created on deposit of a unit plan under that Act. In particular, they authorise the transfer, lease or mortgage of a unit. Those provisions apply, with necessary modifications, in respect of a stratum estate in a future development unit, as if it were a principal unit: s 8(2) of the 1979 Amendment.

[57] On the deposit of a stage unit plan, the Registrar may, at the request of the registered proprietor, issue a separate certificate of title for any future development unit: s 8(3) of the 1979 Amendment. That means that the person who is the registered proprietor of the land on which future development units are to stand may request individual certificates of title to issue for all or any of the future development units shown in the stage unit plan. That approach is consistent with that followed in respect of principal and accessory units created under a unit plan deposited under the principal Act: s 8(2) of the principal Act. The same provisions as to the issue of

certificates of title and their content apply both to standard and staged developments: s 8(3) and (4) of the principal Act, read in conjunction with s 8(4) of the 1979 Amendment.

[58] Section 9 of the 1979 Amendment governs the relationship between other provisions of that statute and those in the principal Act. In summary:

a) A registered proprietor of a stratum estate in a future development unit is not, by virtue only of that interest in that estate, a member of the relevant body corporate: s 9(1).

b) A body corporate has "no duties in respect of any future development unit comprising part of the development". Nor is a registered proprietor of a stratum estate in any such unit required to contribute to any fund established by the body corporate under s 15 of the principal Act: s 9(2).

c) No part of the common property may be dealt with, and no land may be added to the common property and no unit or part of the common property may be redeveloped, without the consent of every registered proprietor of a future development unit included in the development: s 9(4).

d) Save for particular additions, exclusions and modifications set out in the 1979 Amendment, the provisions of the principal Act apply to subdivisions of land under the 1979 Act, in the same way as they apply to subdivisions into units under the principal Act: s 9(7)(a).

e) Stage unit plans and complete unit plans deposited (or to be deposited) under the 1979 Amendment are treated in the same way as unit plans deposited (or to be deposited) under the principal Act: s 9(7)(b).

[59] The effect of s 9 is to ensure that only registered proprietors of principal and accessory units are members of the Body Corporate. Therefore, only those who have acquired titles to principal or accessory units have control over the Body Corporate's affairs. The reason why a Body Corporate has no duties in respect of any future development unit and a proprietor of that type of unit is not required to contribute to any fund created by the Body Corporate is that the proprietor only has a contingent interest in the fee simple or leasehold estate of that unit. It is also consistent, in principle, with the notion that a registered proprietor of the future development unit is not a member of the relevant Body Corporate and has no say in respect of its affairs.

[60] On the other hand, because the registered proprietor of a future development unit does have an interest in the common property, he or she is required to consent to dealings with the land that would add to or redevelop any common property or unit.

Analysis

(a) Introductory comments

[61] Most of the issues that arise are devoid of authority. There is no case, of which I am aware, in which the Courts have grappled with the role of a body corporate when an individual proprietor proposes to demolish an existing dwelling and to rebuild, either in the context of an orthodox unit title development or a staged development. I suspect that is because, in most unit title developments, there will be a vertical and/or horizontal connection to at least one other unit that renders the option of demolition moot.

[62] An analysis of the two major issues must be prefaced by a short discussion of the practical problems which have led to the current impasse. It has been suggested that the 1979 Amendment was enacted to alleviate concern that a unit title development might not proceed because of financing restrictions. see Hinde McMorland & Sim, *Land Law in New Zealand* (LexisNexis, looseleaf), at para 14.038, where the authors refer to the problem caused to property developers who do

not have sufficient money to complete a development "all at once". In such a case the developer might prefer to build one or more of the units and then use the proceeds of sale to finance the building of the next block; continuing in that way until the development is completed. The 1979 Amendment allowed that to be done.

[63] However, in a contemporary article, a former Registrar-General of Land, Mr E K Phillips, expressed a different view about the reason for introduction of the staged development process: *Unit Titles Amendment Act 1979* [1980] NZLJ 418. Mr Phillips offered another suggestion: namely, the desire of developers "to escape from reserve contributions for a subdivision": at 420. This reason is more likely to accord with Mr Holland's desire to undertake the development through the 1979 Act: see para [12] above. Section 2A of the principal Act deals with its relationship to the Resource Management Act 1991. That Act (in s 11 and Part 10) creates restrictions on the subdivision of land. However, s 2A(3) of the principal Act makes it clear that nothing in those provisions of the Resource Management Act apply to the deposit of a stage unit plan or a complete unit plan under the 1979 Amendment.

[64] In expressing the need for some caution in the use of the 1979 Amendment, Mr Phillips suggested (at 420) that, while the rights of promoters appeared to be adequately safeguarded by the provision of a future development unit, the individual proprietor did not appear to be in as strong a position as a unit owner under a development carried out under the principal Act.

[65] Mr Phillips also raised (at 421) the possibility of the promoters losing (effective) control over a future development unit because of financial difficulties. Because s 8 of the 1979 Amendment gives a future development unit the status of a principal unit, a promoter may borrow on the faith of a mortgage or debenture attaching to those units. In that situation, owners of units in the early stage of the development could find themselves indefinitely within a partially completed development or one which, through the voting strength available through the body corporate, had changed its character.

[66] In a development such as Pacific Shores (with little in the way of common property and no accessory units) the balance between the rights of individual

proprietors to do what they wish on their own title of land conflicts more starkly with rights of remaining owners not to suffer economic loss or to lose any amenities or views, as a result of unexpected changes to a neighbouring dwelling that do not run counter to a territorial authority's planning requirements, covenants that run with the land or express body corporate rules.

[67] Drawing on the democratic model of decision-making that I espoused in *World Vision* (at para [51](a)), the tension is between the rights of individual proprietors to do as they wish on their own land and the rights of the collective body of remaining proprietors to be consulted about and to make decisions on proposed structural changes or additions to an individual property that are likely to affect the use, enjoyment or value of their units.

[68] As I pointed out in *World Vision,* unless s 42 of the principal Act (Court relief in cases where, otherwise, unanimous decision was required) could be invoked, the unanimous support of all individual proprietors is required for decisions that are likely to affect the economic value or use and enjoyment of units comprised in the plan.

(b) Rule 1(f) and (h) of the Body Corporate's rules

[69] Rule 1(f) provides:

> 1 A proprietor shall—
>
> …
>
> (f) Make no additions or structural alterations to the unit without the consent of the body corporate.

What do the terms "additions or structural alterations" mean, in the context of a "unit", as defined by the principal Act?

[70] I deal first with the concept of "structural alterations". The type of structural issues to which r 1(f) of Schedule 2 applies are discussed by Fisher J, in *Smallfield v Brown* (1992) 2 NZ ConvC 191,110 (HC), in the context of a cross-lease development. In that case, it was submitted that the erection of a deck on one of two

detached units in a cross lease development was a "structure", for the purposes of the consent provisions of the particular lease. It was also argued that the substitution of french doors for a window constituted a "structural alteration". Fisher J accepted that the deck was a "structure" to be erected "on any part of the said land", for the purposes of the relevant clause but that the substitution of french doors for a window was more problematic.

[71] The Judge discussed the concept of a "structural alteration", at 191,117:

> … It seems to me that ``structural alteration" in this context was intended to involve an alteration to any part of the building which had significantly contributed to the strength of the building as distinct from something superficial such as non-load-bearing cladding, decoration etc which did not make any significant contribution to holding up the building or maintaining its inherent shape, strength and integrity. In cases of ambiguity or doubt I think one should also have regard to the cross-lease context and view with greater stringency any alteration which would be likely to have some impact upon the neighbouring lessee. I have already commented that the neighbour's interest in the reversion by virtue of his interest as co-owner is theoretical only. However one can, as I have remarked before, envisage structural alterations which could affect the neighbour's enjoyment of his own property.

[72] In relation to the french doors, the Judge concluded that there "would probably have been detrimental effects upon the structure of [the] house if an adequate lintel had not been installed to span the opening across the two french doors in place of the existing single window". While recognising that he was not qualified to say to what extent the increased size of the opening might have affected the structural integrity of the house, the Judge held that the substitution qualified as a "structural alteration" for the purpose of the clause. He added, also at 119,117:

> … I mentioned also that in cases of doubt one would in this context be more inclined to classify it as a structural alteration if it could conceivably have some effect upon the neighbour. In that respect I think that to increase an opening in a house facing towards a close neighbour in this situation could be expected to impact in a minor way upon the enjoyment and privacy of the neighbouring property. For those reasons I consider that installation of the french door did constitute a structural alteration and that the plaintiff's consent was required to that as well.

[73] The term "additions" makes sense, in the context of changes being made to a dwelling that already exists. But, in the context of a defined "unit" comprising a

polyhedron of space, the word does not sit easily with the concept of demolition of an existing structure and erection of a replacement.

[74] Rule 1(h) deals discretely with the construction of improvements made by a proprietor of a future development unit. In its current form (which corresponds to the wording in force at the time Ms Fraser and Mr Lewis acquired Unit 10), r 1(h) states:

> (h) A proprietor of a future development unit shall not be allowed to construct improvements thereon without the prior written consent of the body corporate PROVIDED HOWEVER that the consent of the body corporate shall not be unreasonably withheld in the event that the improvement proposed consists of a dwellinghouse and associated improvements that:
>
> (i) are not of a temporary nature;
>
> (ii) meet with the intention of the body corporate that on completion of the future development unit will be a prestigious quality development which benefits the character and location of the site. The body corporate intends that each dwellinghouse and improvements will be of modern design, high quality construction, high quality finish, and well presented;
>
> *(iii) the plans and specifications for the future development unit are compatible with the intention of the body corporate as stated in sub-clause (ii) above and with Holland Associates Plan Nos. J.1529-01C and J.2624 and subsequent amendments as unit title plans are issued; [Amended 13.09.99]*
>
> (iv) are compatible with other units erected in the development;
>
> (v) has a construction cost of not less than $200,000 (exclusive of goods and services tax), except for:
>
> 1. Units 3-6, 17, 18, 20 which shall be $200,000 (plus GST) plus C.P.I. effective from 1 August 1997.
>
> 2. Units 1, 2, 21-24 which shall be $150,000 (plus GST) plus C.P.I. effective from 1 August 1997. [Amended 13.09.99]
>
> (vi) Comply with the Tauranga District Council or its successor's town planning requirements as to separation between units, outdoor living courts, minimum yard, boundary walls, height, and vehicle parking;

> (vii) Comply with the requirements of the Tauranga District Council or its successor as to the issue of a building permit;
>
> *(viii) Does not excess the height and is located within the prescribed limits shown in Holland Associates Plan J.1529-01C and J.2624 and subsequent amendments as unit title plans are issued. [Amended 13.09.99]* (my emphasis)

[75] Mr Brittain submitted that, even if r 1(f) did not apply, r 1(h) did. Therefore, consent from the Body Corporate was required to the construction of any improvements within the specific unit. Ms McTavish Butler, recognising that r 1(h) may act as an impediment to her argument that r 1(f) had no application to an empty polyhedron of space, submitted that r 1(h) was *ultra vires* on the grounds that the Body Corporate had no power to add it to the default rules in Schedule 2. She based that submission on *Velich v Body Corporate 164980* (2005) 5 NZ ConvC 194 at paras [28]-[32]. However, the short answer to both submissions is that r 1(h) has no application to a principal unit. At the time Ms Fraser and Mr Lewis acquired Unit 10 it was no longer a future development unit: see paras [37] and [46] above; as evidenced by the assignment of a unit entitlement to Unit 10 on plan J2624: see paras [22] and [52] above and the second page of Schedule B.

[76] That analysis requires me to revert to the question whether r 1(f) applies to prevent demolition and rebuilding of a dwelling on Unit 10, without the consent of the Body Corporate.

[77] Although decided in a different context, assistance can be gained from *Smithfield v Brown:* see paras [71] and [72] above. I agree, with respect, with Fisher J's analysis of the concept of a "structural alteration". Because the relationship between proprietors of leasehold estates who share a common piece of land through a cross lease arrangement is akin to that of neighbours in a unit title development, the observations made by that Judge are relevant to the present case.

[78] Neither the principal Act nor the 1979 Amendment contemplates the possibility of a deliberate decision to demolish an existing structure and to replace it with another. Because r 1(f) is a statutory default rule, I am entitled to interpret it in accordance with orthodox principles of statutory interpretation. Section 5(1) of the

Interpretation Act 1999 authorises me to interpret the text, in light of the purpose of the legislation.

[79] The purpose of r 1(f) is clear. It is to ensure that proprietors of individual units who are members of the Body Corporate have a say in respect of any structural changes or additions to a particular dwelling that may affect their economic or aesthetic interests: see paras [34], [66] and [67] above. Demolition itself could create those types of concern, if something went wrong in the process. Rebuilding (depending upon design and placement of the dwelling within the unit space) may also have economic or aesthetic ramifications to other proprietors.

[80] It is plain, in my view, that Parliament intended that the proprietors who make up a body corporate and might be affected by a fundamental reconstruction of a dwelling would have the right to refuse consent, if their economic or aesthetic interests were adversely affected. I hold that r 1(f) does apply to the proposed changes to the whole structure of the existing dwelling contemplated by Ms Fraser's proposal. In my view r 1(f) is intended to apply to any changes to an existing structure built within the unit space, including its demolition and replacement.

[81] I find, therefore, that Body Corporate consent was required to the proposed rebuilding. In the absence of consent, I turn to consider Ms Fraser's application for Court sanction to a scheme which, if granted, would override the Body Corporate's refusal of consent.

(c) The s 48 application

[82] Ms Fraser's application to settle a scheme is made under s 48 of the principal Act:

> **48. Scheme following destruction or damage**
>
> (1) Where any building or other improvement comprised in any unit or on any land to which a unit plan relates is damaged or destroyed, but the unit plan is not cancelled, the Court may, on the application of the body corporate, an administrator, the proprietor or one of the proprietors of a unit, or a registered mortgagee of a unit, by order settle a scheme including provisions—

(a) For the reinstatement in whole or in part of such building or other improvement; or

(b) For the transfer of units to the proprietors of the other units so as to form part of the common property.

(2) Where an order is made under paragraph (b) of subsection (1) of this section, the provisions of section 19 of this Act shall, so far as they are applicable, but subject to any order of the Court to the contrary, thereafter apply to any such transfer.

(3) A notice of any application made under subsection (1) of this section shall be served on the Registrar who shall thereupon enter on the supplementary record sheet a notification that application has been so made.

(4) On any application to the Court under subsection (1) of this section, any person having or claiming to have any estate or interest in any unit or in the land or in any part of the land or any insurer who has effected insurance on the buildings or other improvements comprised in any unit or in the land or any part thereof shall have the right to appear and be heard.

(5) In the exercise of its powers under subsection (1) of this section, the Court may make such orders as it considers expedient or necessary for giving effect to the scheme, including orders—

(a) Directing the application of any insurance money;

(b) Directing payment of money by or to the body corporate or by or to any person;

(c) Directing the deposit of an appropriate new unit plan; or

(d) Imposing such terms and conditions as it thinks fit.

(6) The Court may from time to time cancel, vary, modify, or discharge any order made by it under this section.

(7) On any application under this section the Court may make such order for payment of costs as it thinks fit.

[83] Ms Fraser (in respect of Unit 10) and Mr Dustin (in respect of Unit 13) seek an order settling a scheme in the form set out in an appendix to the amended application: see Schedule A to this judgment.

[84] Mr Brittain submitted that the only building of which there was evidence of damage was that of Ms Fraser. That may be so, but if Mr Dustin or any other individual proprietor were able to point to water ingress damage of the type afflicting Ms Fraser's property, it would be equally open to them to propose a scheme that would deal specifically with their property. That observation foreshadows my

conclusion that the scheme proposed by Ms Fraser is too vague to justify Court approval. Any scheme will need to be tailored to the specific needs of Unit 10. Likewise, any scheme proposed in respect of other units would need to be specific to them.

[85] Mr Brittain's submission is that an application to approve a scheme, in the form set out in Schedule A to this judgment, cannot be given under s 48 because:

a) The power to order settlement of a scheme can only be exercised for the "reinstatement in whole or in part" of a building or "for the transfer of units", so as to form part of the common property.

b) Any application of this type under s 48 must be "essential" for "reinstatement" to be permitted: Mr Brittain cites Courtney J's judgment in *Body Corporate 173457 v Dunn* (2007) 8 NZCPR 668 (HC), to support that proposition.

[86] Mr Brittain also submits that s 48 involves a balancing of competing interests of the type to which I refer in *World Vision* at para [51](a).

[87] Ms McTavish Butler submits that, because the unit plan has not been cancelled, s 48(1) applies to a situation in which a building is damaged but the individual proprietor chooses to demolish and reinstate by erecting another building in its place.

[88] Section 48 of the principal Act is set out at para [82] above. The Court is given a wide discretion to settle a scheme which allows for a damaged or destroyed building (or other improvement) to be reinstated. Alternatively, the scheme may provide for the transfer of units to the remaining proprietors, to form part of the common property.

[89] Section 48(3) and (4) require notice of an application to be served on both the District Land Registrar and any insurer who has effected insurance on the buildings or other improvements comprised in any unit or in the land.

[90] In exercising powers under s 48(1), the Court may make "such orders as it considers expedient or necessary for giving effect to the scheme". By way of non-exhaustive examples, s 48(5) empowers the Court to direct the application of any insurance money, to direct payment of money by or to the Body Corporate or any other person, to direct the deposit of an appropriate new unit plan or to impose such terms and conditions as it thinks fit. From time to time, any order made under s 48(1) may be cancelled, varied, modified or discharged.

[91] These provisions suggest that the Court is given a wide discretion to do justice *among all proprietors* in a manner that will best resolve the particular problem that has led to the application. There is no fetter on the Court's discretion, which is designed to meet a vast array of circumstances that could not have occurred to the drafters of s 48. The only absolute requirement is that the Court exercise its discretion judicially, not arbitrarily or capriciously.

[92] For those reasons, I do not accept that any gloss should be placed on s 48(1) to impose a threshold requirement that such work be "essential". With respect to Mr Brittain, the judgment of Courtney J in *Dunn* does not support that proposition.

[93] *Dunn* was an undefended application under s 48. The body corporate sought an order to allow for reinstatement of an apartment building in which individual units were located. The building had suffered water ingress and required substantial repair. The application sought an order that the work be undertaken as a single project, by one contractor, with all unit holders levied for the total cost.

[94] Courtney J held:

> [12] I am satisfied that because of the close connection between the work required to the common and the private areas *it is essential for the good of the both the Body Corporate and the individual unit holders that all the work that needs to be done is undertaken at the same time and to the same standard.* I accept Mr Leishman's view that this cannot be assured if individual unit owners are permitted to undertake repairs to their own units when and as they wish. For the greater good, the work should be the subject of a single managed building contract of the kind that has been proposed. (my emphasis)

In making those observations, Courtney J was not purporting to lay down a legal principle. Rather, she was simply forming an evaluative judgment, on the facts of the particular case, about the need for the work to be done in that way. That interpretation of her judgment is confirmed by para [16], in which the Judge simply recorded that she was "satisfied as to both the necessity and appropriateness of the scheme", in making the formal order sought.

[95] Once jurisdictional prerequisites are established, I agree with Mr Brittain that an application under s 48 is one on which a balancing approach is necessary. In determining whether a specific scheme should be settled, the Court must take account of the economic and other needs of the individual proponent, while balancing his or her needs and desires against the economic interests of other individual proprietors, any prejudice caused to other owners by the proposed work and the common good of the owners as a whole. In order to form a judgment on whether a particular scheme should or should not be imposed, the Court requires a level of detail about the proposed work that, with respect, goes well beyond that contained in Schedule A.

[96] It is important to put the s 48 jurisdiction into context. The owners have their own individual economic and aesthetic interests to consider. Those interests may or may not conflict with others who occupy dwellings within the unit title development. Ordinarily, the first port of call will be consultation between the proponent of a scheme and those who may be adversely affected. Once a consensus has been reached, proposals can be put, for approval, to the Body Corporate. If consent is not forthcoming then the specific proposal made to the Body Corporate can be used as the basis for the s 48 application.

[97] The dynamics of a unit title development community are such that there are incentives for all proprietors to reach agreement on the form of any proposal, without recourse to the Court under s 48. In a case like this, s 48 should be a remedy of last resort. Likely risks and costs of litigation and the desirability of maintaining good personal relationships within a geographically defined locality are considerations that would lead most reasonable people to reach consensus about what could or could not be done on the land of an individual owner. I accept, however, that the

incentives are diminished when an owner proposes to sell, so that a purchaser can rebuild. However, the condition that Mr Miln inserted into the agreement for sale and purchase for his own benefit (see para [3] above) suggests that the prospective purchaser will also be mindful of the need to enjoy good relations with those within the community.

[98] A proposal prepared for submission to other owners and the Body Corporate ought to be sufficiently detailed to put before the Court, in the event that a s 48 application cannot be avoided. By way of non-exhaustive guidance, the scheme should articulate the way in which demolition is to be undertaken (the work required to demolish the building may impact adversely on neighbouring properties), the plans for the replacement dwelling (including particulars of the building footprint and the building's dimensions) and information about the standard to which the dwelling will be rebuilt and whether it is consistent with the balance of the development.

[99] It is important for a scheme proponent to remember that a view is not purely aesthetic in nature. The existence of a view towards the ocean or Mt Maunganui is likely to enhance the economic value of a neighbouring property. If the views were shut out or diminished by a replacement dwelling, the owner of that property is likely to suffer not only aesthetically but also economically, if the unit were sold.

[100] I hold it is premature to consider an application under s 48. However, I propose to keep the application on foot while further proposals are developed and discussed in light of this judgment. That will avoid the necessity for a fresh proceeding to be issued, in the event that determination of such an application cannot be avoided. If a scheme can be developed to which the Body Corporate consents, there will be no need for the s 48 application to be pursued.

Result

[101] For the reasons I have given:

a) I declare that r 1(f) applies to the proposed demolition of the existing dwelling on Ms Fraser's land and the erection of a replacement dwelling.

b) The application under s 48 is adjourned for a telephone conference, to be held on the first available date after 1 February 2010. The Registrar shall confer with counsel before fixing a date.

[102] If the s 48 application were to proceed, an amended application and proposed scheme shall be filed and served on or before 29 January 2010, in the detail to which I have referred.

[103] I reserve all questions of costs. I will hear further from counsel on that topic at the telephone conference to be scheduled in February 2010. If there are issues to be determined, I will give directions to facilitate resolution of those questions at that time.

[104] I thank counsel for their assistance.

P R Heath J

Delivered at 2.00pm on 10 September 2009

SCHEDULE A

PROPOSED SCHEME UNDER SECTION 48 OF UNIT TITLES ACT 1972

In regard to Body Corporate S63621 South Auckland Registry situated at 199 Papamoa Beach Road Papamoa

Preamble

[A] Pacific Shores Body Corporate is a 24 unit title development in which several of the individual dwellings are suffering from water ingress and require reinstatement or replacement.

[B] This is a scheme to allow for reinstatement or replacement of dwellings currently erected on the individual unit entitlements at Body Corporate S63621 known as Pacific Shores; 199 Papamoa Beach Road, Papamoa.

[C] As the rules currently stand there is no rule covering the replacement of existing dwellings.

[D] This scheme is intended to govern the repair of or the building of replacement dwellings on individual unit entitlements in accordance with the relevant territorial authority (the Tauranga District Council) rules for building consents which are to be issued for that purpose.

[E] The cost of the reinstatement or replacement of existing dwellings is to be borne solely by the registered proprietor/s of the individual unit entitlement where the dwelling on that unit requires reinstatement or replacement.

[F] This scheme is required to facilitate the reinstatement or replacement of dwellings to those registered proprietors that have leaky homes upon their individual unit entitlements.

[G] None of the proposed reinstatement or replacement of dwellings involves interference with common property other than the use of common driveways to access individual units.

[H] This scheme is intended to ensure that the reinstatement or replacement of existing dwellings that are damaged or destroyed can proceed in a co-ordinated and timely manner without involving the need for a re-development of the unit titles.

Power

[1] The registered proprietors of the unit entitlements at Pacific Shores Body Corporate are hereby granted the general power to reinstate or to erect a replacement dwelling on the owner's individual unit entitlement in circumstances where the current dwelling has been damaged or destroyed provided such reinstatement or replacement is carried out in strict accordance with a building consent to be obtained from the Tauranga City Council.

[2] The power of a registered proprietor to reinstate or to build a replacement dwelling on an existing unit entitlement shall include the following:

(i) Power to instruct suitably qualified advisors to develop plans and specifications for the work, together with such variations or additions as may from time to time be required.

(ii) Power to apply for and obtain such consents and local body approvals and certificates of compliance as the law requires.

Duties of the Registered Proprietors

[3] The registered proprietor of any dwelling to be reinstated or replaced must:

[i] Apply to the Tauranga City Council for a building consent to carry out the reinstatement to or replacement of the existing dwelling;

[ii] Ensure that any construction work is carried out in compliance with such building consent;

[iii] Provide a complete set of the plans and a copy of the building consent to the Body Corporate to establish adherence to this Scheme;

[iv] Provide monthly progress reports to the Body Corporate concerning the progress of the reinstatement or the replacement of the dwelling

[v] Not reinstate or replace any dwelling house with one that is of a temporary nature;

[vi] Restrict any replacement dwelling to a maximum of two (2) storeys, including garaging;

[vii] Ensure the any reinstated or replaced dwelling will fit into the character and the location of Pacific Shores;

[viii] Ensure that any replacement dwelling complies with the height restrictions for each individual unit as contained in Unit Plan S62361;

[ix] Complete the construction in relation to any reinstatement or replacement of the existing dwelling and associated site works within twelve months of commencement of the work;

[x] Make good at their own expense any damage to common property caused by the contractors used during the reinstatement to the existing dwelling or the building of a replacement dwelling;

[xi] Ensure his/her contractors, agents and tradespeople do not interrupt the other registered proprietors quiet enjoyment of the units before 7am or after 5pm on any given day;

(xii) Provide the Body Corporate Secretary with a copy of the Code Compliance Certificate upon completion of either the reinstatement work or the replacement dwelling;

(xii) Provide the Body Corporate with a copy of the memorandum confirming that the registered proprietor has concluded this Scheme in respect of his or her individual unit.

Body Corporate Duties

[4] The Body Corporate must:

[i] Allow the contractors, agents and tradespeople of the registered proprietor/s access over the common property to and from that owner's unit.

[ii] Not interfere with an owner's right to reinstate or erect a replacement dwelling on their individual unit provided such owner complies with the duties set out in this Scheme;

Joint and Several Ownership

[5] Where a registered proprietor comprises more than one person and/or entitles:

[i] All such persons are deemed one owner: but

[ii] The provisions of this scheme shall jointly and severally bind the individual persons or the entities comprising such owner.

Interpretation

[6] In this scheme except, to the extent that the context otherwise specifies:

[i] Words denoting the singular include the plural and vice versa;

[ii] Reference to an Owner or Owners means the registered proprietor/s of units in Pacific Shores and shall include their successors, executors, administrators and permitted assigns (as the case may be);

[iii] Words denoting individuals or persons include bodies corporate, partnerships, trust and other recognised legal entities and vice versa;

[iv] Words denoting any gender include all genders;

[v] Headings are for convenience only and do not affect interpretation;

[vi] Reference to any documents or agreements include reference to that document or agreement as amended novated, supplemented, varied or replaced from time to time;

[vii] Anything which may be done at any time may also be done from time to time (unless stated otherwise);

[viii] Terms defined in the body of this scheme shall bear the defined meaning throughout this scheme;

[vix] Any obligation not to do anything includes any obligation not to suffer, permit or cause that thing to be done;

[x] "Including" and similar words do not imply any limitation;

[xi] Any covenant that binds any two or more persons or parties will bind each of them jointly and severally;

[7] Any obligation or deemed authority by an owner, which is properly something to be carried out wholly or in part by a company, shall be deemed to include a covenant on the part of the shareholders and directors of that company to procure that the company carry out its activities in accordance with such obligation or deemed authority.

SCHEDULE B

REGISTERED OWNERS

NOTES:

1/ REDUCED LEVELS ARE IN TERMS OF MOTURIKI DATUM.

2/ ORIGIN OF LEVELS DOSLI BMC7 RL=6.76
SITE BM IB 20 RL=8.07

UNIT DESCRIPTION	AREA (m2)	UNIT ENTITLEMENT	HEIGHT LIMITS UPPER	HEIGHT LIMITS LOWER	NEW C.T. ALLOCATED
FDU 1			17.00	5.00	51D/176
FDU 2			17.00	5.00	54B/352
FDU 3			19.00	7.00	54B/353
UNIT 4	516	367	19.00	7.00	54B/354
UNIT 5	543	367	16.50	5.00	56C/258
FDU 6			6.50	5.00	54B/356
UNIT 7	692	687	14.00	5.00	56A/547
UNIT 8	502	511	16.50	5.00	51D/177
UNIT 9	645	697	[illegible]	5.00	52A/434
UNIT 10	601	687	14.00	5.00	51C/33
UNIT 11	501	511	6.50	5.00	51D/178
FDU 12			16.50	5.00	54B/351
UNIT 13	617	687	14.00	5.00	54A/368
UNIT 14	621	687	14.00	5.00	52A/978
UNIT 15	515	495	16.50	5.00	55C/470
UNIT 16	565	399	19.00	7.00	
UNIT 17	503	367	19.00	7.00	54B/357
UNIT 18	452	367	[illegible]	7.00	[illegible]
UNIT 19	480	367	[illegible]	7.00	[illegible]
FDU 20			[illegible]	7.00	54B/359
FDU 21			[illegible]	5.00	54B/360
UNIT 22	455	208	[illegible]	5.00	54B/361
UNIT 23	450	208	[illegible]	5.00	54B/362
UNIT 24	493	206	[illegible]	5.00	54B/363
TOTAL UNIT ENTITLEMENT 7810					
SUPPLEMENTARY RECORD SHEET 57C/35					

ADDRESS OF BODY CORPORATE: 144 PAPAMOA BEACH RD PAPAMOA, TAURANGA

TERRITORIAL AUTHORITY TAURANGA DISTRICT

Surveyed by HOLLAND ASSOCIATES J2624

Scale 1 : 750 Date FEBRUARY 1996

Approvals

APPROVED PURSUANT TO SEC. 223 OF THE RESOURCE MANAGEMENT ACT 1991 ON THE.....DAY OF.....................1996 THE COMMON SEAL OF THE TAURANGA DISTRICT COUNCIL IS AFFIXED HERETO IN THE PRESENCE OF:

AUTHORISED OFFICER

PURSUANT TO SEC. 224 (C) OF THE RESOURCE MANAGEMENT ACT 1991 I HEREBY CERTIFY THAT ALL THE CONDITIONS OF THE SUBDIVISION CONSENT HAVE BEEN COMPLIED WITH TO THE SATISFACTION OF THE TAURANGA DISTRICT COUNCIL DATED THIS.......DAY OF ....1996.

AUTHORISED OFFICER
P5000-199-2

PURSUANT TO SEC. 224 (f) OF THE RESOURCE MANAGEMENT ACT 1991 I HEREBY CERTIFY THAT THE TAURANGA DISTRICT COUNCIL IS SATISFIED ON REASONABLE GROUNDS THAT EVERY BUILDING OR PART OF A BUILDING SHOWN ON THIS PLAN COMPLIES WITH OR WILL COMPLY WITH THE PROVISIONS OF THE BUILDING CODE SPECIFIED IN SECTION 46 (4) OF THE BUILDING ACT 1991 DATED THIS.......DAY OF........................ 1996.

AUTHORISED OFFICER

PURSUANT TO SEC. 5(1)(g) UNIT TITLES ACT 1972 I.................................AUTHORISED OFFICER OF THE TAURANGA DISTRICT COUNCIL HEREBY CERTIFY THAT EVERY BUILDING SHOWN HEREON HAS BEEN ERECTED AND ALL OTHER DEVELOPMENT WORK HAS BEEN CARRIED OUT TO THE EXTENT NECESSARY TO ENABLE ALL THE BOUNDARIES OF EVERY UNIT AND COMMON PROPERTY SHOWN ON THIS PLAN TO BE PHYSICALLY MEASURED. I FURTHER CERTIFY THAT THIS PLAN IS CONSISTANT WITH THE PROPOSED DEVELOPMENT PLAN DPS63620 DATED THIS .... [illegible] ....1996.

[illegible]

Total Area 2.0029 ha

Comprised in See Schedule Above & CT 53B/705

I, DAVID JOHN EYRES HOLLAND of TAURANGA Registered Surveyor and holder of an annual practising certificate (or who may act as a registered surveyor pursuant to section 25 of the Survey Act 1986) hereby certify that this plan has been made from surveys executed by me or under my directions, that both plan and survey are correct and have been made in accordance with the Survey Regulations 1972 or any regulations made in substitution thereof.

Dated at TAURANGA this day

of 19 Signature

Field Book p. Traverse Book p.

Reference Plans DPS59072,63621,63620,64497,6651,68464,69762 DPS69826,69959,70790,63620,72049,71783,

Examined Correct

Approved as to Survey

Chief Surveyor

Deposited this day of 19

District Land Registrar

File
Received
Instructions

APPROVED [illegible]

9.00 13.SEP99 B 566678·(

PARTICULARS ENTERED IN REGISTER
LAND REGISTRY SOUTH AUCKLAND
FOR REGISTRAR - GENERAL OF LAND