IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-007966

IN THE MATTER OF	Declaratory Judgments Act 1908
AND	
IN THE MATTER OF	Unit Titles Act 1972
BETWEEN	BODY CORPORATE 201036 First Applicant
AND	MICHAEL JAMES REHM Second Applicant
AND	BROADWAY DEVELOPMENTS LIMITED First Respondent
AND	PARNELL TERRACES MANAGEMENT LIMITED Second Respondent

Hearing: 29 September 2009

Counsel: T J Rainey and D A Cowan for the applicants
K Gould for the respondent

Judgment: 14 October 2009

JUDGMENT OF STEVENS J

This judgment was delivered by me on Wednesday, 14 October 2009 at 11am pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel:
T J Rainey, Rainey Law, PO Box 1648, Shortland Street, Auckland 1140
K F Gould, PO Box 1011, Shortland Street, Auckland 1140

Introduction

[1] This case concerns the management arrangements and rules applicable to a unit title development involving 81 units at The Strand, Parnell. The parties are the Body Corporate 201036 and a current unit owner Mr Michael Rehm (the applicants), the developer Broadway Developments Ltd and the manager Parnell Terraces Management Ltd (the respondents). The applicants applied for declaratory orders that the Body Corporate had no power to enter into an agreement entitled a Management Agreement with Broadway Developments Ltd, or to modify the Body Corporate rules to empower itself to enter into the agreement and to make provision for the collection of a Management Fee from members of the Body Corporate, or to modify certain other rules in the Body Corporate rules that altered the governance structure of the Body Corporate. The outcome turns on the application of the statutory power of the Body Corporate established under the Unit Titles Act 1972 (the Act) to enter into both the Management Agreement and the rules.

[2] The respondents contended that the actions of the Body Corporate in entering into the Management Agreement and rules relating to its implementation and enforcement were not *ultra vires*. But counsel for the respondents acknowledged that a number of the rules challenged by the applicants could, on the basis of the authorities, be challenged as being *ultra vires*.

[3] For the reasons set out in the judgment, the applicants are entitled to the orders sought. Detailed orders will be set out below. It is likely that the applicants will now file further proceedings against the respondents in relation to the financial aspects arising from the orders made. Nothing in this judgment should be taken as commenting upon or determining such consequential financial issues, particularly the question of whether the applicants (or either of them) might have a counterclaim based on *quantum meruit* for any services actually provided to unit owners in respect of the common property.

The hearing

[4] The application was brought by way of an originating application under Part 19 of the High Court Rules. The applicants obtained the leave of a Judge to do so. For the respondents, Mr Gould accepted that procedurally the case was properly brought.

[5] Shortly before the hearing, the applicants filed an amended notice of application specifying the declaratory orders sought, namely, that:

> A. The following rules of Body Corporate 201036 are ultra vires the Unit Titles Act 1972:
>
> (i) Rule 2.1(d)(ii), (iii), (iv) and (v);
>
> (ii) Rule 2.2(e);
>
> (iii) Rule 2.9, in respect of the proviso only;
>
> (iv) Rule 2.12;
>
> (v) Rule 2.19;
>
> (vi) Rule 2.21;
>
> (vii) Rule 2.23;
>
> (viii) Rule 2.29(ii)
>
> B. To the extent that the Rules of Body Corporate 201036 modified the Rules provided for in the Second Schedule to the Unit Titles Act 1972 by deleting Rules 4 to 13 (inclusive) the amended Rules are ultra vires the Unit Titles Act 1972.
>
> C. The written Management Agreement between Body Corporate 201036 and Broadway Developments Limited dated 29 March 2001 is void ab intio it having been entered into by Body Corporate 201036 ultra vires its powers under the Unit Titles Act 1972.
>
> D. To the extent that the Rules referred to in Orders A and/or B above are ultra vires the Unit Titles Act 1972, the equivalent Rules in Schedule 2 to the Unit Titles Act 1972 shall apply.

[6] The concession made by counsel for the respondents, which I am satisfied was properly made in the light of earlier decided cases, related to the rules identified in orders A(iii) to (vii) and B. Mr Gould also accepted that in relation to such orders, and any rules which the Court might find to be *ultra vires*, the consequential order

sought in D is appropriate. With respect to the rules identified in order A(i), (ii) and (viii) and order B, the respondents contended that these orders should not be granted.

[7] The case was argued on the basis of the evidence contained in the affidavits. There was no cross-examination of any deponent. Further, the challenge by the respondents to Mr Rehm's reply affidavit dated 10 June 2009 did not need to be resolved because of the way in which the argument proceeded.

Factual background

[8] There is no dispute as to the facts. The respondents accepted the applicants' chronology at the hearing.

[9] The buildings in this proceeding are named "Parnell Terraces" and comprise an 81 unit development. The units are located at 50-82 Ronayne Street, 18A-24C The Strand and 12-44S Ngaoho Place, Parnell.

[10] On 2 August 1996, a deed of lease was entered into between Ngati Whatua and Magellan Orakei Limited for a term of 150 years. The lease provides for a ground rental of ten cents per annum for an initial period of 15 years. In March 1999, Broadway Developments purchased the leasehold interest in Parnell Terraces for $3,545,000 with the lessee Magellan Orakei Limited as covenator.

[11] Between August 1999 and April 2000, Broadway Developments developed the leasehold property and the units were built. The initial sales of units occurred between 2000 and 2001. The sale and purchase agreements included all provisions relating to the proposed amendments to the Body Corporate rules and the Management Agreement.

[12] The Body Corporate came into existence on 27 March 2000 after unit plan 201036 was deposited. Certificates of title for the first 54 units were then issued. On 28 March 2000, an extraordinary general meeting of the Body Corporate was held with Broadway Developments as sole proprietor of all the units. Resolutions to enter into the Management Agreement and appoint Broadway Developments as

manager, to authorise the Secretary to execute the Management Agreement and to deposit the unit plan for stage two of the development were passed. The Body Corporate also entered into an agreement to appoint Strata Title Administration Limited as the Secretary.

[13] On 29 March 2000, the Body Corporate adopted the amended rules to replace the default rules in the Act. The Body Corporate Secretary also executed the Management Agreement as authorised by the resolution passed on 28 March 2000. On 31 March 2000, particulars of the amended rules were entered into the Register and came into effect.

[14] On 17 April 2000, an amended unit plan was deposited for stage two of the development and certificates of title for the remaining 27 units were issued. Broadway Developments sold its rights under the Management Agreement to Parnell Terraces Management Limited on 15 December 2000.

[15] From 1 January 2001, the Body Corporate has paid annually an amount of $259,706.25 to Parnell Terraces pursuant to the Management Agreement. From the same time, the Body Corporate has collected the fees payable under the Management Agreement from the individual unit owners pursuant to powers conferred on it under the amended rules.

[16] From February 2008 to July 2008, the informal owners committee commissioned a survey of the buildings comprising the Body Corporate. The resulting report suggested that the development is likely to be leaky. On 17 July 2008, the Body Corporate Secretary declined to recognise the appointment of a formal owners' committee.

The rules

[17] The amended rules that are alleged to be *ultra vires* are as follows:

> 2.1 Duties of Proprietor: A Proprietor of any Unit must:
>
> …

(d) …

(ii) duly and punctually pay to the Secretary all sums levied in respect of the Unit by the Body Corporate including without limitation, the Body Corporate levy which will include the Proprietor's portion of the Management Fee payable by the Body Corporate under the Management Agreement, the Proprietor's portion of the ground rent payable under the Lease, and the Secretary's administration fee;

(iii) in complying with the provisions of clause 2.1(d)(ii), each Proprietor will on or before the date of settlement of the purchase by the Proprietor of the Unit, execute and provide to the Secretary (or the nominee of the Secretary), automatic payment authorities to comply with the Proprietor's obligations to pay the Body Corporate levy including the Management Fee;

(iv) duly and punctually pay to the Secretary the Management Fee levied by the Body Corporate to the Body Corporate by way of such automatic payment authority on the first of each and every month, with the first payment commencing on the first day of January 2001, and thereafter calendar monthly on the first day of each and every month with the last payment ceasing on the second day of August 2011.

(v) on any sale of the Unit by the Proprietor prior to 2nd August 2011, obtain at the time of seeking a Section 36 Certificate and as a pre-settlement obligation, replacement automatic payment authorities from the purchaser who is to become the Proprietor of the Unit, and provide same immediately following settlement of the sale to the Secretary in order to observe compliance with the provisions of this rule.

2.2 Powers and duties of the Body Corporate: The Body Corporate must:

…

(e) enter into, comply with, and enforce compliance by each Proprietor of the terms and conditions of a Management Agreement which is to be in the form annexed;

…

2.9 …PROVIDED HOWEVER the Secretary is hereby authorised and empowered to act as proxy for any Proprietor at any annual general meeting or any extraordinary general meeting or any adjournment thereof if such Proprietor or his/her/its duly authorised agent or proxy (other than the Secretary) is not present in person at such meeting.

2.12 At a general meeting of the Body Corporate, the chairperson shall be the Secretary. If the Secretary is not present or is unwilling to act, a chairperson shall be elected at the commencement of the meeting.

2.19 If there is any equal number of votes for and against any matter, the matter shall be referred to a single arbitrator where the Proprietors can agree on one, and otherwise to two arbitrators, one to be appointed by each group of Proprietors to the matter in difference and, if the arbitrators are unable to agree, then to their umpire to be appointed by them before entering upon the consideration of the matter submitted to them. In either case, arbitration shall be conducted in accordance with the provisions contained in the Arbitration Act 1996 or any other act in substitution for that act for the time being in force, and the decision of the arbitrator, arbitrators or their umpire shall be final and binding upon all Proprietors and upon the Body Corporate.

2.21 Secretary: A Secretary (who shall not be a Proprietor) shall be appointed by the Body Corporate for such term, at such remuneration, and upon such conditions as the Body Corporate may approve. Subject to the provisions of the Body Corporate Secretary Agreement, any Secretary so appointed may be removed by the Body Corporate by special resolution, either at an annual general meeting, or at an extraordinary general meeting called for that purpose. At any such meeting the Secretary shall have the right to attend and be heard. The Secretary and where appropriate, the Manager under the Management Agreement, shall be deemed to be agents of the Body Corporate for the control, management and the administration of the Building and the Common Property, and the exercise and performance of the powers, obligations and duties of the Body Corporate.

2.23 Subject to any direction or restriction imposed by the Body Corporate and the Management Agreement the Secretary may engage the assistance of any appropriately qualified person in relation to the control, management and administration of the Building and Common Property, and the exercise and performance of the powers and duties of the Body Corporate.

2.29 Section 36 certificates:

…

(ii) The Secretary will, as a pre-condition of the provision of a Section 36 Certificate to a proprietor obtain from the Proprietor the automatic payment authorities referred to in Rule 2.1(d).

The Management Agreement

[18] The Management Agreement and the Management Fee for which it provides, as mentioned in various of the challenged rules, lie at the heart of the applicants' case. The Management Fee itself is defined as the "fee and other consideration payable to the Manager under section 5 plus GST".

[19] The relevant provisions relating to the Management Fee provide:

> **5. Management Fee**
>
> 5.1 The Management Fee for each year of the Term for each Unit is $2,850.00 per annum plus GST payable monthly in advance, with the first payment commencing 1st January 2001. The Manager waives payment of the Management Fee until and including 31st December 2000.
>
> 5.2.1 The Management Fee represents remuneration for performance of the Duties (being the duties set out in section 3), as well as the consideration ascribed in respect of matters detailed in clause 5.2.2.
>
> 5.2.2 Prior to the constitution of the Body Corporate under the Act, Broadway Developments Limited purchased the leasehold interest under the Lease with part of the consideration paid by Broadway Developments Limited being ascribed to neither the Body Corporate nor any person having to pay ground rental to the Lessor under the Lease until 2nd August 2011. Part of the Management Fee is therefore the reimbursement to Broadway Developments Limited of the consideration so paid.

The statutory scheme

[20] The Act provides the statutory framework governing the ownership of units in a multi unit complex and the administration of common areas. The purposes of the Act are described in the Long Title as follows:

> An Act to facilitate the subdivision of land into units that are to be owned by individual proprietors, and common property that is to be owned by all the unit proprietors as tenants in common, and to provide for the use and management of the units and common property

[21] The nature of the scheme of the Act has been conveniently summarised in *World Vision of New Zealand Trust Board v Seal* [2004] 1 NZLR 673 (HC) at [21] – [52] and *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [83] – [102]. There is no need to elaborate on these observations in this judgment.

[22] The functions to be carried out by a body corporate were outlined by Heath J in *Body Corporate 188529 v North Shore City Council* at [81] – [124]. The Act provides that individual owners have responsibility for the units themselves but the body corporate is responsible for the administration of the common areas.

[23] In a later case, *Body Corporate 318566 v Strata Title Administration Ltd* HC AK CIV 2008-404-6294 17 March 2009, Heath J emphasised the democratic basis upon which a body corporate is to operate. Heath J stated:

> [7] On deposit of a unit plan, the registered proprietor of the land to which the plan relates (the developer) becomes a body corporate (s 12(1)). Thereafter, the proprietor or proprietors for the time being of all units comprised in the plan constitute the body corporate: s 12(2).
>
> [8] The Act sets out, in Schedule 2, default rules which apply to the operation of every body corporate, in the absence of a unanimous resolution to the contrary.
>
> [9] In *World Vision*, at para [28], I held that those rules created a "democratic framework" within which the affairs of a Body Corporate are managed. In *World Vision*, at para [51], I articulated the underlying principles that could be discerned from the Act:
>
> a) The need to synthesise the conflicting views, needs and desires of proprietors who have differing interests, through the adoption of a democratic model. That model is designed to enable proprietors to make collective decisions (through the body corporate) about the use of common property and proposals to make structural changes or additions to the property likely to affect the use, enjoyment or value of units owned by other proprietors. Unanimous approval is required (unless s 42 (Court power to dispense with unanimity in certain circumstances) can be invoked) for decisions likely to affect the economic value or use and enjoyment of the units comprised in the plan.
>
> b) The need to distinguish between decisions to be made by a body corporate that are likely to affect all proprietors and those which are of less significance. The latter category of decisions can, generally, be left to the good sense of a majority of the proprietors to determine. Hence, the distinction between the need for unanimous consent to amend rules set out in Schedule 2 and an ordinary resolution to amend rules set out in Schedule 3.
>
> c) The need for all owners in a body corporate to be bound by rules adopted from the statute or agreed by them unanimously.
>
> d) That owners will, occasionally, disagree. For that reason:
>
> i) This Court is given power to dispense with the need for a unanimous resolution if a particular act is supported by 80 per cent or more of those entitled to vote: s 42.
>
> ii) Disaffected members of the body corporate in a minority can seek relief against any resolution passed on the grounds that it "would be inequitable for the minority": s 43.

[24] The statutory duties of a body corporate are set out in s 15 of the Act:

> **15 Duties of body corporate**
>
> (1) The body corporate shall—
>
> (a) Subject to the provisions of this Act, carry out any duties imposed on it by the rules:
>
> (b) Insure and keep insured all buildings and other improvements on the land to the replacement value thereof (including demolition costs and architect's fees) against fire, flood, explosion, wind, storm, hail, snow, aircraft and other aerial devices dropped therefrom, impact, riot and civil commotion, malicious damage caused by burglars, and earthquake in excess of indemnity value:
>
> (c) Effect such other insurance as it is required by law to effect or as it may consider expedient:
>
> (d) Subject to sections 45, 46, 47, and 48 of this Act, forthwith apply insurance money received by it in respect of damage to any building or improvements in rebuilding and reinstating the said building or improvements so far as the rebuilding or reinstatement may lawfully be effected:
>
> (e) Pay the premiums in respect of any policies of insurance effected by it:
>
> (f) Keep the common property in a state of good repair:
>
> (g) Comply with any notice or order duly served on it by any competent local authority or public body requiring repairs to, or work to be performed in respect of, the land or any building or improvements thereon:
>
> (h) Subject to this Act, control, manage, and administer the common property and do all things reasonably necessary for the enforcement of the rules:
>
> (i) Do all things reasonably necessary for the enforcement of any lease or licence under which the land is held:
>
> (j) Do all things reasonably necessary for the enforcement of any contract of insurance entered into by it under this section.
>
> (2) The body corporate shall also—
>
> (a) Establish and maintain a fund for administrative expenses sufficient in the opinion of the body corporate for the control, management, and administration of the common property, and for the payment of any insurance premiums, rent, and repairs and the discharge of any other obligations of the body corporate:
>
> (b) Determine from time to time the amounts to be raised for the purposes aforesaid:

(c) Raise amounts so determined by levying contributions on the proprietors in proportion to the unit entitlement of their respective units.

(3) The body corporate may, pursuant to a resolution of the proprietors, distribute any money or personal property in its possession and surplus to its current requirements among the proprietors for the time being according to their unit entitlements.

(4) For the purposes of effecting any policy of insurance under the provisions of subsection (1) of this section the body corporate shall be deemed to have an insurable interest in all the buildings and other improvements on the land.

(5) Any policy of insurance authorised by this section and effected by the body corporate in respect of any buildings or other improvements on the land shall not be liable to be brought into contribution with any other policy, save another policy authorised by this section in respect of the same buildings or improvements.

[25] The powers of a body corporate are also defined by statute as follows:

16 Powers of body corporate

Subject to the provisions of this Act, the body corporate shall have all such powers as are reasonably necessary to enable it to carry out the duties imposed on it by this Act and by its rules:

Provided that the body corporate shall not have power to carry on any trading activities.

[26] The final aspect of the Act to be noted are the provisions of s 37 dealing with the rules applicable to a body corporate. Section 37 relevantly provides:

37 Rules

…

(2) Subject to any amendment or repeal thereof or addition thereto the rules applicable to each body corporate shall be those set out in Schedules 2 and 3 to this Act.

(3) The rules in Schedule 2 to this Act and any additions thereto or amendments thereof may be added to or amended or repealed in relation to any body corporate by unanimous resolution of the proprietors and not otherwise.

(4) The rules in Schedule 3 to this Act and any additions thereto or amendments thereof may be added to, amended, or repealed in relation to any body corporate by resolution of the body corporate at a general meeting.

(5) Any amendment of or addition to any rule shall relate to the control, management, administration, use, or enjoyment of the units or the common property, or to the regulation of the body corporate, or to the powers and duties of the body corporate (other than those conferred or imposed by this Act):

Provided that no powers or duties may be conferred or imposed by the rules on the body corporate which are not incidental to the performance of the duties or powers imposed on it by this Act or which would enable the body corporate to acquire or hold any interest in land or any chattel real or to carry on business for profit.

(6) No rule or addition to or amendment or repeal of any rule shall prohibit or restrict the devolution of units, or any transfer, lease, mortgage, or other dealing therewith, or destroy or modify any right implied or created by this Act.

(7) No addition to or amendment or repeal of any rule pursuant to subsection (3) or subsection (4) of this section shall have effect until the body corporate has lodged a notification thereof in form 4 in Schedule 1 to this Act with the Registrar, and the Registrar has recorded it appropriately on the supplementary record sheet.

…

Applicable principles

[27] This case turns upon the application of the *ultra vires* rule to the Management Agreement and some of the rules adopted by the Body Corporate on 29 March 2000 to replace the default rules in Schedule 2 of the Act.

[28] The *ultra vires* principle was summarised by Lord Selbourne in *Ashby Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653 at 693:

> ...when I say that a statutory corporation, created by Act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that Act.

[29] In the same case, Lord Cairns elaborated upon the principle at 672 as follows:

> ...it is not a question of whether the contract sued upon involves that which is malum prohibitum or malum in se, or is a contract contrary to public policy, and illegal in itself. I assume the contract in itself to be perfectly legal, to have nothing in it obnoxious to the doctrine involved in the expressions which I have used. The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract...If so, my Lords, [if the contract was beyond the powers of the company to make the contract] it is not a question whether the contract was

> ever ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder of the company had said, "That is a contract which we desire to make, which we authorize the director to make, to which we sanction the placing the seal of the company", the case would not have stood in any different position from that in which it stands now.

[30] The *ultra vires* principle was applied in the context of the Act by the Court of Appeal in *Velich v Body Corporate No. 164980* (2005) 6 NZCPR 143. The Court made a declaration declaring one of the Body Corporate rules (2.1(f)) *ultra vires*. At issue was the validity of the particular rule under s 37(5) of the Act. The Court of Appeal stated:

> [27] ...Mr Velich's entitlements as an owner in fee simple of the stratum estate necessarily include rights of use in relation to the entire space on the fifth floor of the building in respect of which he has title. Such rights must necessarily be seen as "implied or created" by the Unit Titles Act for the purposes of s 37(6).
>
> [28] Under s 37(5) amendments of, or additions to, the rules must relate to:
>
> (a) The control, management, administration, use, or enjoyment of the units or the common property; or
>
> (b) The regulation of the body corporate; or
>
> (c) The powers and duties of the body corporate (other than those conferred or imposed by the Act).
>
> [29] Rule 2.1(f) undoubtedly relates to "the powers and duties of the body corporate". For this reason it is within the scope of the proviso to s 37(5). Accordingly it is only valid if the new powers and duties conferred can fairly be seen as "incidental" to the performance of powers and duties imposed on the body corporate by the Act.
>
> [30] The only duty imposed by the Act which could be invoked to justify rule 2.1(f) is that provided by s 15(1)(a), "to … carry out any duties imposed on it by the rules". As a matter of common sense, it is only powers and duties which are extant at the time of the rule change which are relevant. So the only new powers or duties which may be conferred by rule change on a body corporate are those which are "incidental" to existing powers and duties.
>
> [31] At the time rule 2.1(f) was adopted, there was no rule in place which required the body corporate to carry out the functions contemplated by rule 2.1(f) to the extent that they go beyond those required by default rule 1(f). So rule 2.1(f) expanded the powers and duties of the body corporate and further, did so appreciably. A rule which appreciably expands the existing powers and duties of the body corporate (as rule 2.1(f) purports to do) cannot fairly be regarded as merely "incidental" to those existing powers and duties.

[32] It follows that rule 2.1(f) is ultra vires.

[31] The *ultra vires* principle has been applied in a number of cases to strike down body corporate rules: see *Chambers v Strata Title Administration Ltd* (2004) 5 NZ ConvC 193,864 (HC); *Body Corporate No 199883 v Clarke Family Associates Ltd* (2005) 5 NZCPR 947 (HC); *Fifer Residential Ltd v Gieseg* (2005) 6 NZCPR 306 (HC); and *Body Corporate 318566 v Strata Title Administration Ltd.*

[32] According to counsel's research, there appears to be no New Zealand authority in which the *ultra vires* doctrine has been applied to agreements affecting the rights of unit holders entered into by a body corporate. However, the Australian decision in *Humphries v Proprietors "Surfers Palms North" Group Titles Plan 1955* (1994) CLR 597 is of assistance. In *Humphries*, the High Court of Australia held that the *ultra vires* doctrine applied to a mortgage agreement entered into by a body corporate. There is also some support for this approach in *Mann v Edinburgh Northern Tramways Company* (1893) AC 69 (HL). A company created by private Act of parliament entered into a contract to pay two of its promoters £17,000 to defray the expenses of securing the passing of the private act of incorporation. Those expenses were authorised by the Act but the payment of £17,000 would leave a surplus in the promoters' hands. The *ultra vires* principle was applied. It was held that the company had no authority to provide such a benefit to the promoters. The agreement providing for the payment of the entire sum of £17,000 for an unauthorised purpose was held to be invalid.

Submissions for the applicants

[33] Mr Rainey, counsel for the applicants, submitted that the *ultra vires* principle in *Ashby* applied with full force to a body corporate under the Act. The fact that Parliament had provided statutory powers for, and limitations to, the activities of a body corporate provided a sound policy basis for the application of the *ultra vires* doctrine to transactions by, and the rules applicable to, a body corporate.

[34] The applicants submitted that the starting point is what statutory power the Body Corporate is exercising when it entered into the Management Agreement.

Clause 3(d) of schedule 2 of the default rules allows the Body Corporate to enter into any agreement with a proprietor or an occupier of any unit for the provision of amenities or services by it to the unit or to the proprietor or occupier. The applicants submitted that there is an implied limitation in cl 3(a) to (e) that the exercise of the powers must be to enable it to perform its duties or powers.

[35] Counsel first addressed the challenge to the Management Agreement. Mr Rainey accepted that there is no New Zealand authority on the application of the *ultra vires* doctrine to agreements entered into by a body corporate. But he relied on the decisions in *Humphries* and *Mann* to support his challenge.

[36] The applicants submitted that the primary purpose of the Management Agreement was to compensate the developer for the fact that under the terms of the lease the ground rental was fixed at ten cents per annum for the first 15 years of the lease. The applicants submitted that s 15 of the Act did not authorise such a payment. In relation to s 15, Mr Rainey submitted that the Management Agreement had nothing to do with insurance or its enforcement (s 15(1)(b)-(e), (j)), nothing to do with keeping the common property in a state of good repair (s 15(1)(f)), nothing to do with compliance with a notice by a local authority or public authority (s 15(1)(g)), nothing to do with enforcement of the rules (s 15(1)(h)) and nothing to do with enforcement of the lease (s 15(1)(i)).

[37] With respect to the powers in s 15(2)(a) of the Act, Mr Rainey submitted that this provision did not afford the Body Corporate the power to enter into the Management Agreement. Such provision was limited to the power to establish and maintain a fund for certain specified purposes. These were for administrative expenses related to the control, management and administration of the common property. Another permitted purpose was for the payment of any insurance premiums, rent and repairs, and the discharge of any other obligations of the body corporate.

[38] Mr Rainey submitted that the description of the permitted purposes for which the fund in s 15(2)(a) might be used drew on the duties provision in s 15(1) of the Act. He submitted that not all of the listed items in s 15(1) were included, but

s 15(2)(a) made reference generally to expenses sufficient for the control, management and administration of the common property. In particular, the general words at the end of para (a) were intended to cover other types of liabilities of the body corporate which must be paid in the discharge of the duties listed in s 15(1) of the body corporate.

[39] Mr Rainey further submitted that the final words in para (a) of s 15(2) could not be used as a statutory basis for a body corporate to enter into agreements or other transactions such as to create a liability of the body corporate which it then had to discharge. In summary, he contended that such an argument was circular. Section 15(2)(a) does not authorise the making of new or different obligations not otherwise permitted by the statute. Mr Rainey submitted that the consideration referred to in cl 5.2.2 of the Management Agreement was not permitted by s 15(2)(a).

[40] The applicants submitted that it is impossible to see the Management Fee as anything other than bound up with the invalid part, i.e. payment of past consideration for the rent free period. The applicants further submitted that there is nothing to suggest that a rational body corporate would pay the whole of the fee.

[41] The applicants also raised a timing point. Under the Act the amended rules came into force when the unit plan was deposited with the Registrar. This occurred on 31 March 2000. This meant that the Body Corporate was not authorised to enter into the Management Agreement on 28 March 2000 when it passed the resolution to do so or even on 29 March 2000 when the Management Agreement was executed. The applicants submitted that this is not just a formality and it could be cured by the principle in *Bobbie Pins Limited v Robertson* [1950] NZLR 301 that a company is bound by a transaction, intra vires and honest though irregular, which has the assent of all the corporators, as it is competent for the corporators (if they are unanimous) to waive all formalities. The applicants relied on the discussion by Rodney Hansen J in *Fifer*, where he refused to apply *Bobbie Pins*, where there was no transaction capable of being validated. The applicants submitted that *Bobbie Pins* has no application where the amended rules are themselves *ultra vires*.

[42] The applicants further submitted that the amended rules must be incidental to the powers and duties of the Body Corporate imposed by the Act, which are in existence prior to the amended rules. The applicants submitted that it is possible to vary powers and duties already in existence, but it is not possible to introduce a new duty.

[43] In relation to relief, Mr Rainey sought a declaration that the amended rules are *ultra vires*, a declaration that the Management Agreement is void ab initio and an order that the equivalent rules (to the amended rules) shall apply.

Submissions for the respondents

[44] The respondents submitted that the amended rules all relate to the discharge and facilitation of the Body Corporate's obligations pursuant to the Management Agreement and are therefore incidental to the performance of the duties of the Body Corporate. The respondents relied on s 15(2)(a) of the Act. Mr Gould submitted that the Management Agreement placed an obligation on the Body Corporate to operate a fund that was permitted by s 15(2)(a) of the Act. He further submitted that, when the Body Corporate came into existence, it was obligated under s 15 of the Act to comply with the resolution of 28 March 2000 to enter into the Management Agreement with the respondents.

[45] The respondents submitted that, even if the Management Agreement were declared to be void ab initio, the Body Corporate is still liable to pay for services other than the consideration for the proprietor's rent-free holding, with Parnell Terraces being entitled to invoice the Body Corporate on a monthly basis. The respondents submitted that the effect of declaring the Management Agreement void ab initio would be to give a windfall to the Body Corporate of approximately $440,000, less any payment to Broadway for the other services rendered to the Body Corporate. However, as already noted at [3] above, this application is not concerned with the financial consequences arising from the challenge to the Management Agreement and the disputed rules.

[46] In relation to the timing of the amended rules, the respondents relied on *Chambers v Strata Title Administration Limited* and *Bobbie Pins* to submit that the amendments were intra vires despite not complying with the formal requirements.

[47] As already noted, Mr Gould accepted that rules 2.9 (proviso only), 2.12, 2.19, 2.21 and 2.23 are in a category that could be challenged for vires on the available authorities. The real dispute turned on the Management Agreement and certain amended Rules consequential upon it.

Discussion

Management Agreement

[48] The starting point is whether the Body Corporate had statutory power to enter into the Management Agreement. Although I was referred to no New Zealand cases on the application of the *ultra vires* doctrine, agreements entered into by a body corporate, I consider that the matter can be resolved by applying first principles. Moreover, the application of the *ultra vires* doctrine in *Humphries* and *Mann*, discussed above, is persuasive in terms of the application of first principles to the Management Agreement in this case.

[49] The respondents relied on s 15(2)(a) of the Act as permitting them to enter into the Management Agreement. Section 15(2)(a) places a duty on a body corporate to establish and maintain a fund for administrative expenses and for the payment of any insurance premiums, rent and repairs and the discharge of any obligations of the body corporate. The Management Agreement was intended to compensate the developer for having negotiated a rent-free period for ten years upon the acquisition of the leasehold interest under the lease with Ngati Whatu. This is clearly not an administrative expense which falls within the wording of s 15(2)(a) of the Act. The administrative expenses or obligations there referred to in each case stem from matters covered in the duties provision (s 15(1)(a) to (j)) or obligations of a similar type or genus. The obligation to reimburse the developer for steps taken to acquire the lease for the development is simply not within the class of permitted administrative expenses.

[50] The respondents could point to no statutory provision which purported to permit the developer to enter into a Management Agreement of the type containing the provisions in clauses 5.1, 5.2.1 and 5.2.2. I agree with the submissions of the applicants that the Management Agreement in this case is *ultra vires.*

Amended rules consequential on the Management Agreement

[51] In relation to the amended rules consequential on the Management Agreement, s 37(5) of the Act expressly permits the amendment of or addition to any rule, provided that it is incidental to the performance of the duties or powers imposed on the body corporate by the Act. If the amendments or additions are not incidental to the performance of duties or powers imposed on the Body Corporate by the Act then they will be *ultra vires*: see principle in *Ashby* discussed at [28] and [29].

[52] The respondents again relied on s 15(2)(a) of the Act. The respondents submitted that the amended rules were incidental to the performance of duties and powers imposed on the Body Corporate under s 15(2)(a). This in turn was based on the submission that the Management Agreement required the Body Corporate to establish a fund, which was a duty already placed on the Body Corporate under s 15(2)(a). The respondents relied on the words of s 15(2)(a) which stated "discharge of any other obligation". The applicants submitted that this argument is circular and the Management Agreement (of itself *ultra vires*) could not require the Body Corporate to establish a fund as required by s 15(2)(a) of the Act.

[53] I am unable to accept the respondents' submission. The amended rules are not incidental to the performance of any duty or power imposed on the Body Corporate by the Act. The respondents cannot rely on s 15(2)(a) of the Act as this section does not authorise either the Management Agreement (for the reasons discussed at [49]), or the payment of the Management Fee under it. The fund contemplated by s 15(2)(a) is in relation to administrative expenses as described and not the compensation of a developer. The expenses included by s 15(2)(a) are within a defined class and are not broad enough to include the Management Fee or rules relating thereto.

[54] Accordingly, I am satisfied that the amended rules consequential on the Management Agreement, namely, rules 2.1(d)(ii), (iii), (iv) and (v), 2.2(e) and 2.29(ii) are *ultra vires*. These rules are not permitted by s 15(2)(a) of the Act. The orders sought by the applicants must be granted.

Timing issue

[55] It is also necessary to discuss briefly the applicants' submission that the timing of the amended rules meant that the Body Corporate was not authorised to enter into the Management Agreement on 28 March 2000 when it passed the resolution to do so or on 29 March 2000 when the Management Agreement was executed. The amended rules came into force on 31 March 2000. As was stated in *Velich* by the Court of Appeal at [30], it is only the powers and duties which are extant at the time of the rule change that are relevant. As the amended rules were not in effect at the date of the execution of the Management Agreement, they cannot be used to justify entering into it.

[56] The respondents submitted that the timing issue was a mere formality and could be cured under the principle in *Bobbie Pins*. This principle was considered by Rodney Hansen J in *Fifer* (at [49] – [53]), where he refused to apply it on the basis that there was no transaction capable of being validated and the respondents were not contractually bound to assent to the new rules. Similarly in this case, I consider that there is no transaction capable of being validated. However, more fundamentally, it is inappropriate to apply the principle in *Bobbie Pins* where the amended rules are of themselves *ultra vires.*

Result

[57] The applicants are entitled to each of the orders sought. I therefore make the following orders:

a) The following rules of Body Corporate 201036 are *ultra vires* the Unit Titles Act 1972:

i) Rule 2.1(d)(ii), (iii), (iv) and (v);

ii) Rule 2.2(e);

iii) Rule 2.9, in respect of the proviso only;

iv) Rule 2.12;

v) Rule 2.19;

vi) Rule 2.21;

vii) Rule 2.23; and

viii) Rule 2.29(ii)

b) To the extent that the Rules of Body Corporate 201036 modified the Rules provided for in the Second Schedule to the Unit Titles Act 1972 by deleting Rules 4 to 13 (inclusive) the amended Rules are *ultra vires* the Unit Titles Act 1972;

c) The written Management Agreement between Body Corporate 201036 and Broadway Developments Limited dated 29 March 2001 is void ab intio it having been entered into by Body Corporate 201036 *ultra vires* its powers under the Unit Titles Act 1972; and

d) To the extent that the Rules referred to in Orders A and/or B above are *ultra vires* the Unit Titles Act 1972, the equivalent Rules in Schedule 2 to the Unit Titles Act 1972 shall apply.

[58] The applicants are entitled to costs. If the parties are unable to agree, then the parties are to file memoranda of no more than three pages within 20 working days.

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Stevens J