IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-5756

UNDER	PART 18 OF THE HIGH COURT RULES
AND UNDER	THE DECLARATORY JUDGMENTS ACT 1908
AND UNDER	UNIT TITLES ACT 1972
BETWEEN	CHUAN WU Plaintiff
AND	BODY CORPORATE 366611 First Defendant
AND	THETA MANAGEMENT LIMITED Second Defendant

Hearing: 26 November 2009

Appearances: Mr B Rooney for plaintiff
Mr P D Sills for first defendant
Mr R B Stewart QC for second defendant

Judgment: 30 November 2009 at 4.30 pm

JUDGMENT OF LANG J
[on application for determination of preliminary questions pursuant to r 10.15(a)]

This judgment was delivered by me on 30 November 2009 at 4.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……………

Solicitors:
James Keat, Auckland
Hornabrook MacDonald, Auckland
Gilbert Walker, Auckland
Counsel:
Mr B Rooney, Auckland
Mr P D Sills, Kumeu
Mr R B Stewart QC, Auckland

[1] This proceeding concerns an apartment building situated in Whitaker Place, Auckland and known as the Empire Apartments. The building contains 315 residential units, virtually all of which are owned by proprietors who live overseas. Students who attend educational courses in the central city area form the vast majority of the occupants of the building. The plaintiff, Mr Wu, is the registered proprietor of one of the units in the building.

[2] In common with most similar complexes in this country, the management of the building is conducted through a body corporate constituted pursuant to the provisions of the Unit Titles Act 1972 ("the Act"). It comprises the individual proprietors of all of the units within the complex. The first defendant, Body Corporate 366611, is the body corporate created under the Act to manage the affairs of the Empire Apartments.

[3] The root cause of the present litigation is that a significant number of proprietors of units in the building, one of whom is Mr Wu, have not yet been able to obtain access to their units. This has occurred despite the fact that they have owned their units for approximately two years.

[4] The difficulties arose after the body corporate appointed the second defendant, Theta Management Limited, as the building manager. It has entrusted Theta with the day to day control and administration of the building, including control of security and access to the building. The body corporate has needed to entrust those functions to an outside contractor because at any given time more than 700 people live within the building. This gives rise to numerous issues relating to the security of the building and access to it. The person responsible for dealing with those issues must have staff on the premises 24 hours a day and 7 days a week.

[5] The body corporate and Theta have, however, created a state of affairs under which proprietors are only able to obtain keys to their units if they comply with requirements that the body corporate and Theta have imposed. These include the payment of a refundable deposit amounting to $5,650 and the execution of a detailed security and access protocol. Mr Wu and approximately 50 other proprietors have

refused to pay the deposit and sign the agreement. For that reason Theta and the body corporate have refused to provide them with keys to their units.

[6] Litigation arising out of the dispute between the body corporate, Theta and unit owners who have refused to comply with the body corporate's requirements has now been on foot for nearly two years, seemingly without tangible result. On 14 October 2009, however, the parties agreed that the Court should determine two preliminary questions pursuant to r 10.15(a) of the High Court Rules. This judgment determines those questions.

[7] In order to understand the questions it is necessary to briefly outline in greater detail the events that provide the factual matrix for the determination of the questions.

Factual matrix

[8] Like all bodies corporate established under the Act, the body corporate in the present case has rules that regulate the conduct of its affairs. The original developer of the complex promulgated the body corporate's current rules on 30 March 2006 at a time when it owned all the units, and therefore had the power to pass unanimous resolutions. They replaced the original rules, sometimes known as the statutory or default rules, prescribed in Schedules 2 and 3 of the Act.

[9] Unusually, the new rules were not divided into two separate Schedules that mirrored Schedules 2 and 3 to the Act. Instead, the new rules provided for two groups of rules, one under the heading "Rules that may be amended by unanimous resolution" and the other under the heading "Rules that may be amended by majority resolution". The latter included a new r 3.10, which related to security keys. It provided as follows:

> **3.10 Security Keys**
>
> (a) If for security purposes the Body Corporate or its agent the Secretary and/or the Building Manager restricts the access of any Proprietor or occupier to Common Property it may make available to that person a Security Key.

(b) A Proprietor or occupier in possession of a Security Key must not duplicate it, or permit it to be duplicated, and must take all reasonable steps to ensure that the Security Key is not lost or handed to any other person.

(c) A Proprietor or occupier must notify the Building Manager or the Body Corporate promptly if a Security Key is lost, or destroyed.

[10] Subsequently, on 8 February 2008, the body corporate held an extraordinary general meeting of unit owners at which a majority of unit owners passed a resolution repealing the amended r. 3.10 and replacing it with the following new rule:

3.10 Security keys

(a) That the Body Corporate or its agent the Secretary, or the Building Manager as necessary from time to time to ensure the ongoing security and efficient management of the Building may require any Proprietor or occupier of any Unit to:

i. Enter into a security and access protocol agreement detailing the regulations relating to the security of and access to services in the Building as the Body Corporate may from time to time prescribe; and

ii. Pay a refundable security deposit to the Body Corporate, or its agent the Secretary or the Building Manager of a total amount as set out below (which amount notwithstanding the provisions of rule 1.3 shall only be revised by a resolution of the Body Corporate) for the purposes of access security, fire protection, telecommunication services and utilities services for the Building.

Refundable security deposit	$2,650
Key and swipe card	[ ]
Telephone and internet	[ ]
Fire security	[ ]
TOTAL	**$2,650**

[11] Then, on 17 April 2009, the body corporate held its Annual General Meeting at which a majority of those entitled to vote passed yet another resolution repealing the (twice) amended rule 3.10 and replacing it with the following new rule:

3.10 **Access and security**

(a) That the body corporate or its agent the secretary, or the building manager as necessary from time to time to ensure the ongoing security and efficient management of the building may

require the proprietor, proprietor's represent or the occupier of any unit to:

1. Enter into a security and access protocol agreement detailing the regulations relating to the security and access to services and utilities in the building and each unit as the body corporate may from time to time prescribe; and

2. Pay a refundable security deposit to the building manager of a total amount as set out below (which amount shall only be revised by a resolution of the body corporate) for the purposes of access security, fire protection, insurance excess reserve, telecommunication services and utilities services and repair for the building and each unit:

Refundable security deposit	$5,000
Key and swipe card	[ ]
Telephone and internet	[ ]
Fire security	[ ]
TOTAL	**($5,000)**

3. In the context of this rule a proprietor's representative includes individuals or companies appointed by the proprietor to act as the proprietor's representative to either rent, manage or sell a unit ("representative"). Where such representative is appointed by a proprietor, an individual person must be nominated to accept personal responsibility and liability under this rule on the terms set out below.

4. Where a proprietor's representative has been appointed by the proprietor of a unit, then the following additional security and access rules apply:

   (a) The representative must provide the body corporate or its agent the secretary, or the building manager, with a signed undertaking and warranty letter from the proprietor appointing the representative and authorising him or her to act on behalf of the proprietor.

   (b) The representative must agree to abide by all of the body corporate or its agent the secretary, or the building manager's rules and regulations imposed from time to time, copies of which will be provided to the representatives upon request;

   (c) A representative undertaking and warranty letter must be signed by the representative for each unit they represent. The form of the letter is to be as prescribed by the body corporate or its agent the secretary, or the building manager from time to time.

(d) The representative must procure the signature of each proprietor certain undertakings required by the body corporate that relate to acceptance of liability for damages and excess on insurance premiums that have been taken out by the body corporate, or its agent the secretary, or the building manager, for the benefit of the building as a whole;

(e) The representative must agree to only let the unit or units he or she manages to students over 18 years old with a valid student ID;

(f) The representative must ensure they advise the proprietor of their IRD obligations when the unit is rented residentially;

(g) The representative acknowledges that open homes and the display of marketing signage or flags are strictly forbidden in the Empire Apartments and its proximities;

(h) The representative must register every showing of a unit or units that he or she manages with the on duty manager appointed by the building manager;

(i) The representative is to personally accompany every student, prospective purchaser or guest who is shown a unit;

(j) Any access cards provided by the building manager to the representative must remain in the possession of the representative at all times. Should an access card be found not to be in the possession of the representative then all access cards currently held by the representative will be cancelled;

(k) The representative agrees to rent any units for not less than the minimum rents in the building plus utilities (electricity and telephone) set from time to time by the body corporate, or its agent the secretary, or the building manager.

(l) All tenants procured by the representative must be registered with the building manager and provide proof of student ID to the satisfaction of the building manager;

(m) All tenants must sign utilities agreements (electricity and telephone) directly with the building manager and pay those utility charges directly to the building manager.

5. The following additional refundable security deposits to be paid to the building manager shall be provided by the proprietors

> and/or occupiers of any units that are managed by a proprietor's representative other than the building manager appointed by the body corporate:
>
> Key and swipe card $150
> Utilities deposit $500

[12] The body corporate and Theta have relied upon the provisions of r 3.10, as amended in 2008 and 2009, as justification for their decision to refuse to supply Mr Wu and others with keys to their units. They contend that they are not obliged to provide keys to proprietors who have not complied with the requirements of the rule.

[13] With that background in mind I turn to the issue that is determinative of the questions that the Court is required to answer.

Did the Body Corporate act in excess of its powers under the Act in resolving on 8 February 2008 and 17 April 2009 to amend Rule 3.10?

[14] I have already referred to the fact that the unit owners of the body corporate purported to pass both resolutions by a majority rather than by a unanimous vote. Mr Wu contends that this fact means that the resolutions are invalid, because the Act required resolutions of this type to be passed by the unanimous vote of the proprietors.

[15] In order to understand this argument it is necessary to briefly refer to the framework of the Act and the issues that arise when a body corporate changes its rules. These provide the necessary backdrop to any consideration of the status of the rules that the body corporate purported to create in 2006, 2008 and 2009.

The framework of the Act

[16] The affairs of a body corporate must be conducted strictly in accordance with the provisions of the Act. It has no powers other than those that the Act bestows upon it, and it has no duties or obligations other than those that the Act imposes upon it.

[17] Every body corporate must also comply with the rules applicable to that body corporate. Section s 37(1) of the Act provides as follows:

> Except as otherwise provided by this Act, the control, management, administration, use, and enjoyment of the units and the common property shown on a unit plan, and the activities of the body corporate that comprises the proprietors of those units, shall, while there are more proprietors than 1, be regulated by the rules for the time being applicable to the body corporate.

[18] The powers of the body corporate are set out in s 16 of the Act and paragraph 3 in Schedule 2. Section 16 provides:

> **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.

[19] Paragraph 3 of Schedule 2 provides:

> **3 The body corporate may—**
>
> (a) Borrow any money necessary to enable it adequately to perform its duties or exercise its powers:
>
> (b) Invest any money for the time being held by it (whether in a fund established under section 15 of the Unit Titles Act 1972 or otherwise) in any of the modes of investment for the time being authorised by law for the investment of trust funds:
>
> (c) Establish a current account at a bank, and nominate for the purposes of this paragraph 3 persons (including the secretary) of whom any 2 may operate the account:
>
> (d) 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:
>
> (e) Grant to a proprietor of a unit or to anyone claiming through him any special privilege (not being a lease) in respect of the enjoyment of part or parts of the common property:
>
> Provided that any such grant shall be determinable by special resolution.

[20] The duties and obligations of every body corporate are prescribed by s 15 of the Act and by paragraph 2 in Schedule 2.

[21] Section 15 provides:

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.

[22] Paragraph 3 of Schedule 2 provides:

2 The body corporate shall—

(a) Repair and maintain all chattels, fixtures, and fittings (including stairs, lifts, elevators, and fire escapes) used, or intended, adapted, or designed for use, in connection with the common property or the enjoyment thereof:

(b) Repair and maintain all pipes, wires, cables, ducts, and all other apparatus and equipment of whatsoever kind and wheresoever situate which may be reasonably necessary for the enjoyment of an incidental right which may from time to time exist by virtue of section 11 of the Unit Titles Act 1972:

(c) On request, produce to any unit proprietor, or a registered mortgagee of any unit, or any person authorised in writing by any unit proprietor or registered mortgagee of any unit, all policies of insurance effected by the body corporate under the provisions of section 15 of the Unit Titles Act 1972 and the receipt for the last premiums paid in respect thereof.

[23] As I have already mentioned, the rules set out in Schedules 2 and 3 to the Act apply in the first instance to every body corporate.

[24] Section 37(3) and (4) permit the body corporate to amend or repeal the statutory rules. Section 37(3) gives the body corporate the power to amend the rules in Schedule 2 by means of a unanimous resolution of the proprietors but not otherwise. Section 37(4) gives the body corporate the power to amend the rules in Schedule 3 by majority resolution of the body corporate at a general meeting. These two provisions lie at the heart of the questions that the Court is now required to determine.

[25] A body corporate does not have an unfettered ability to repeal or amend the rules prescribed in the two schedules. Its ability to repeal or amend those rules is, in fact, extremely limited in scope. Sections 37(5) and 37(6) of the Act impose two very significant restrictions on that ability. They provide as follows:

> (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.

The issues that arise when a body corporate changes its rules

[26] Generally speaking, it will not be difficult for a body corporate to ensure that an amendment to its rules falls within the first part of s 37(5). Most amendments can be categorised as relating in some way to the "control, management, administration, use, and enjoyment of the units and the common property". Alternatively, they can be viewed as relating to "the regulation of the body corporate" or to "the powers and duties of the body corporate".

[27] As the authorities in this area demonstrate, the difficulty generally arises when considering whether an amended or substituted rule contravenes the proviso to s 37(5). The focus in the cases has been upon the extent to which the amendment purports to confer new powers, or to impose new duties, on the body corporate. The amendment will fall foul of the proviso if it creates a new power or duty that cannot properly be said to be "incidental to the performance of the duties or powers imposed on [the body corporate] by the Act".

[28] The leading authority in relation to the effect of Rule 37(5) is *Velich v Body Corporate 164980* (2005) 5 NZ ConvC 194,138 (CA). In that case a body corporate had purported to repeal the statutory rules and to substitute new rules in their place. One of the new rules prohibited the proprietors of individual units from adding to, or altering, their units in any way without first obtaining the written consent of the body corporate. The Court of Appeal held that the rule contravened the proviso to s 37(5)

because it expanded the powers of the body corporate beyond those that it possessed in the statutory rules. In delivering the judgment of the Court William Young P said:

> [29] Rule 2.1(f) [the new rule] 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 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*.

[29] The Court of Appeal in *Velich* applied the proviso to s 37(5) in the clearest of terms. It proceeded upon the basis that a body corporate may only amend its rules so as to create a new power or duty where the new power or duty is incidental to existing powers and duties. The new rule cannot create powers or duties that are wider than those contained in the Act or the statutory rules. If the new rule "appreciably expands" the existing powers and duties of the body corporate, it will be invalid because it will not be incidental to the body corporate's existing powers and duties.

[30] This Court has taken the same approach. In *Body Corporate 188529 v North Shore City Council & Ors* HC AK CIV 2004-404-3230 28 August 2007, for example, Heath J considered the validity of an amendment to the body corporate rules that required the body corporate to be responsible for the maintenance or repair of property other than the common property. In concluding that the new rule was *ultra vires*, Heath J said:

> [110] In my view, the provisions of the Unit Titles Act contemplate corporate responsibility for the maintenance or repair of common property only. Applying the Court of Appeal decision in *Velich v Body Corporate No 164980,* the amendment to r 2(b) of the default rules was *ultra vires* because it purported to confer an obligation on the body corporate inconsistent with the powers and duties conferred by the Act. Thus, the amendment was outside of the powers to vary the rules authorised by the Unit Titles Act.
>
> [111] The issue of vires was also considered by Rodney Hansen J in *Fifer Residential Ltd v Gieseg*. In that case, the Judge considered the extent of the proviso to s 37(5) and the meaning of the phrase "not incidental to the performance of the duties or powers imposed" on the body corporate by the 1972 Act. At [43] and [44], Rodney Hansen J said:
>
> > …
> >
> > [44] I accept [counsel's] submission that r 2.2(g) …is not incidental to any of the duties imposed on the Body Corporate by the Act. It is not incidental in the sense of being naturally attached to, or arising from, or naturally appertaining to any of the duties – the meaning ascribed to 'incidental' by Paterson J in *Chambers* at [44] and subsequently adopted by Ronald Young J in *Body Corporate 199883 v Clarke Family Associates Limited* (2005) 5 NZ ConvC 194,087 at [39]. Rule 2.2(g) purports to create an entirely independent duty which requires the Body Corporate to agree to the development of the seventh floor. I accept the respondents' submission that whether r 2.2(g) is interpreted narrowly, as they contended, or broadly, as argued for the plaintiff, the duty it imposes is not incidental to the performance of any duty imposed by the Act and is therefore *ultra vires*.

The rules that the body corporate adopted by unanimous resolution on 30 March 2006

[31] As I have already indicated, when the body corporate in the present case replaced the statutory rules with a new set of rules on 30 March 2006 it divided those rules into two broad groups. The rules under the heading "Rules that may be amended by unanimous resolution" were grouped under the sub-headings "Duties of Proprietor", "Powers and Duties of Body Corporate", "Committee of Body Corporate", "General Meetings of a Body Corporate" and "Miscellaneous". These mirror exactly the headings contained in Schedule 2 of the statutory rules.

[32] The rules under the heading "Rules that may be amended by a majority resolution of the Body Corporate" commenced with six rules under the sub-heading

"Use". These prohibited proprietors or occupiers of individual units within the building from using or permitting their units or the common property to be used in specified ways. They also prohibited proprietors and occupiers from engaging in other specified conduct in or around the building. These prohibitions broadly mirror those contained in Schedule 3 of the statutory rules. The balance of the new rules dealt with a variety of governance issues including car parking, obstruction of accessways, dangerous substances and security. The new r. 3.10 was to be found in this group of rules.

[33] An issue that I am not required to determine, but which arises naturally in any discussion of the questions with which this judgment is concerned, is that of the validity of the new r 3.10 that the body corporate adopted on 30 March 2006.

[34] Schedule 3 of the statutory rules contains a short list of activities that the proprietor or occupier of a unit is prohibited from undertaking. These rules can properly be viewed as being regulatory in nature. Schedule 3 does not provide the body corporate with any powers at all.

[35] The new rule 3.10(a), however, purported to provide the body corporate with a new power, namely the power to provide access keys to proprietors or occupiers in circumstances where the body corporate or the building manager restricted the access of those persons to the common property.

[36] Parliament has seen fit to include the powers to be vested in a body corporate within Schedule 2 to the statutory rules. It has thereby imposed a requirement that any addition to, or amendment of, those powers may only be accomplished by unanimous resolution of the body corporate. This reflects the legislature's view that the alteration of or addition to the powers of a body corporate is a significant matter that affects all proprietors. Parliament clearly does not view this type of addition or amendment to the rules as properly falling within the ambit of Schedule 3.

[37] A clear distinction is to be drawn between the types of rule that Schedules 2 and 3 may each contain. In this context counsel for the plaintiff referred me to the

following extract from the article by Mr R Thomas, "Fifer, *Unit Titles and No. 8 Wire"* (2006) NZLJ 152:

> The rules in the Second Schedule of the Act are in the nature of constitutional rules. They deal with the inherent rights of proprietors to have meetings, make decisions, and set out the mechanics of how the development must run. The headings given to those rules make this clear. They read "Duties of Proprietor"; "Powers and Duties of Body Corporate"; "Committee of a Body Corporate"; "General Meeting of a Body Corporate"; and "Miscellaneous". These rules can only be changed by a proprietors' unanimous resolution (s37(3)).
>
> The Third Schedule rules deal with regulatory aspects of life within the development, such as noise, pets, hanging washing on balconies and the like. It is useful to think of them as the equivalent of municipal bylaws. They can be altered by proprietors' mere resolution, passed at a general meeting (s37(4)).
>
> If a Third Schedule right is inserted as a Second Schedule Rule (perhaps to try and "entrench" it), or vice versa, the proportion of proprietors' votes to amend it does not alter. A Court is likely to look at the effect of the rule, instead of where it is placed in determining the voting procedure required to amend or repeals".

[38] The importance of the distinction between the rules contained in the two schedules can be discerned from the following passage from *World Vision of New Zealand Trust Board v Seal* [2004] 1 NZLR 673 where Heath J said at 681-2:

> [51] In my view, a number of underlying principles can be distilled from the Act. I summarise the principles which I regard as underpinning the Act as follows:
>
> (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 s42 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 the Second Schedule and an ordinary resolution to amend rules set out in the Third Schedule.

(c) The need for all owners in a body corporate to be bound by rules adopted from the statute or agreed by them unanimously.

[39] The new r 3.10 created a power that related to the control, management, and administration of both the units and the common property in terms of s 37(5). It was also arguably incidental or ancillary to the duty of the body corporate under s 15(1)(h) to "control, manage or administer the common property". For that reason it is unlikely that it would offend the proviso to s 37(5) if it had been added to the rules contained in Schedule 2.

[40] It is impossible, however, to argue that the new rule could be added to those contained in Schedule 3 of the statutory rules. The new rule was not incidental to the existing powers (or duties) under Schedule 3, because Schedule 3 conferred no powers or duties at all on the body corporate. Its sole function was to impose restrictions upon the unit owners. It follows that, if the amendment to the new rule was to be valid, it needed to form part of the rules that the body corporate passed to replace the statutory rules in Schedule 2. Those rules could only be further amended or added to by unanimous resolution of the body corporate.

[41] A body corporate cannot bypass the unanimity requirement imposed by s 37(3) by purporting to include a new rule within Schedule 3. Neither can it achieve that object by creating a new group of rules, not being described as either Schedule 2 or Schedule 3, that purports to be capable of amendment or addition by majority resolution. Both forms of amendment amount to an attempt to allow the rules in Schedule 2 to be amended or modified other than by unanimous resolution. If a new rule does not fit properly within Schedule 3, it can only be created, and subsequently amended or added to, by unanimous resolution.

[42] Counsel for Mr Wu referred me to two Australian cases that support these propositions. In *Ballard v Body Corporate / Strata Plan No. 1492* [1974] V.R. 818 Menhennitt J was required to determine an issue arising out of the Victorian counterpart to the Unit Titles Act 1972. The Victorian legislation is cast in very similar terms to the New Zealand Act. The First and Second Schedules to the Victorian Act contain bylaws (the Victorian equivalent to the rules in the New Zealand legislation) that may be repealed, added to or amended by resolution of the

body corporate. Bylaws in the First Schedule (and any additions thereto or amendments thereof) may be amended or repealed by unanimous resolution and not otherwise. Bylaws in the Second Schedule (and any additions thereto or amendments thereof) may be added to, amended or repealed by a majority resolution of the body corporate. As in New Zealand, the First Schedule contains numerous detailed provisions, whilst the Second Schedule contains very few provisions. Menhennitt J commented on this as follows:

> When one turns to the First and Second Schedules the significant features thereof are the length and breadth of subject-matters dealt with in the First Schedule and the paucity of the Second Schedule. The First Schedule contains 33 by-laws many of which contain a number of sub-clauses. Every matter mentioned in s. 24(1) is dealt with in some way in the First Schedule. The First Schedule contains regulations of the body corporate and the control, management, administration, use and enjoyment of the units and the common property. By s. 24(3) Parliament has enacted in unequivocal terms that by-laws in the First Schedule may be added to amended or repealed by unanimous resolution and not otherwise.
>
> …
>
> In contrast with all this the Second Schedule contains but one by-law with three sub-clauses all concerned with the subject of illegal use and nuisance or subjects akin thereto, …

[43] The issue for determination in *Ballard* was whether new bylaws that the body corporate had purported to introduce by majority resolution effectively amended a bylaw contained in the First Schedule. Menhennitt J concluded:

> It was submitted for the defendants that the purported additional by-laws are concerned with nuisance, but whatever the motives of those who passed them, the subject matter dealt with is undoubtedly, in my view, the use and enjoyment of the common property. Do the by-laws purported to be made on 5 April 1972 amount to amending by-law 3(a) of the First Schedule? In my opinion they do.
>
> …
>
> The by-laws in the resolutions of 5 April 1972 purport to superimpose upon the general rule in by-law 3(a) a different rule. This, in my view, amounts to amending by-law 3(a) and is void as contrary to the provisions of s. 24(3) in that it was not unanimous. As to this aspect of the matter any question as to the reasonableness or the like of the by-laws, is quite irrelevant. The only issue is, do the by-laws purport to superimpose a rule different from that laid down in by-law 3(a) of the First Schedule, and in my opinion they do.

[44] The second case is the decision of the Supreme Court of New South Wales in *Craig-Gordon v. Proprietors – Strata Plan No. 16* (1964) 82 W.N. (Pt. 1) (M.S.W.) 306. That case, too, dealt with legislation having similarities to the New Zealand Act. In that case Jacobs J said:

> "In my view this submission does not take account of the overriding effect of the First Schedule by-laws. It is not possible to introduce by-laws into the Second Schedule which will cut down the effect of the by-laws in the First Schedule unless this be done by express or implied amendment of the First Schedule, an act which requires a unanimous resolution".

[45] It may be arguable that the new rule 3.10 was valid to a limited extent because the body corporate adopted it by unanimous resolution. It could also arguably have incorporated the new rule within the group of rules that replaced those in Schedule 2. To the extent, however, that the new rule 3.10 purported to be capable of future amendment by majority resolution, it was clearly invalid. Even if the rule itself was valid because it was created by a unanimous resolution, s 37(3) required any future amendment of or addition to the rule to be effected by unanimous resolution.

The rules adopted in 2008 and 2009

[46] The need for unanimity in relation to future amendments and additions to r 3.10 effectively answers the two questions that I have been asked to determine.

[47] The amendments to r 3.10 in 2008 and 2009 were wide ranging in scope. They purported to provide the body corporate and its agents with the power to require unit owners to pay substantial sums of money and to require them to enter into onerous contracts. Those are clearly the types of powers that the body corporate could only ever acquire by way of a rule under Schedule 2 rather than Schedule 3. Even putting aside the issue of the width of the powers, the absence of unanimity when the body corporate passed the resolutions means that they are ultra vires and invalid.

Result

[48] It follows that the answer to each of the three questions that the Court has been required to determine is "Yes".

Other matters

[49] Counsel also sought guidance as to whether, assuming that the new rules had been validly passed, they were nevertheless invalid because they provided the body corporate with powers that were wider than those permitted by the Act.

[50] If I was to provide assistance in this way it would amount to answering a hypothetical question. The question will remain hypothetical whilst the Act remains in its present form, because in the absence of agreement by Mr Wu it will not be possible for the body corporate to alter its rules again in the way that it purported to do in the past. For these reasons I have concluded that it would be inappropriate for me to go further in this judgment. Given the history of this litigation I consider that it is highly unlikely in any event that anything that I might say by way of obiter comment would assist the parties to reach mutually acceptable common ground.

[51] I record only that during the hearing I discussed with counsel the requirements imposed by the current form of rule 3.10. Counsel for the body corporate appeared to concede that rr 3.10.4 (d), (e) and (k) are clearly invalid on the basis that they infringe s 37(6) of the Act. That section prohibits the creation of rules that prohibit or restrict inter alia the leasing of units. For the reasons discussed with counsel at the hearing it is also difficult to see how the current rules 3.10.4 (f) and (j) can be valid.

[52] The final matter to which I refer relates to the issue of access to units. As I indicated at the beginning of this judgment, Mr Wu and others have now been prevented from obtaining access to their units for more than two years. The effect of this judgment is that the rules that the body corporate and Theta have been relying on to justify their actions to date are invalid as a result of this judgment.

[53] There can be no justification for the body corporate and Theta denying proprietors access to their units in the future. Counsel for the body corporate responsibly accepted during the hearing that this was the case. I would therefore expect the body corporate and Theta to co-operate immediately in providing Mr Wu and others in his position with keys to their units.

Costs

[54] Mr Wu is entitled to costs in relation to the determination of the preliminary questions on a Category 2B basis.

____

Lang J