IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

CIV 2010-404-3324

	BETWEEN	BODY CORPORATE 164205 Plaintiff
	AND	BERACHAH INVESTMENTS LIMITED Defendant

Hearing: 8 October 2010

Appearances: T J Herbert for plaintiff
K W Berman and M Perkin for defendant

Judgment: 22 December 2010

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 11 am on Wednesday 22 December 2010

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[1] This proceeding, brought pursuant to the procedure prescribed by s 24C(4) of the Judicature Act 1908, is concerned with a building at 17 Albert Street, Auckland. Title to the property is held under the provisions of the Unit Titles Act 1972 (the Act). The building, several storeys high, is used predominantly for commercial purposes. 80% of the roof forms part of Accessory Unit AU3; 20% of the roof is part of the common property.

[2] A dispute has arisen as to legal responsibility for the cost of repairing or replacing the roof. An early amendment to the plaintiff's rules fixed the plaintiff Body Corporate with sole responsibility, but the Body Corporate argues that the rule amendment was ultra vires and therefore invalid.

[3] In consequence, the plaintiff claims, the plaintiff is responsible for only 20% of the cost of repair or replacement of the roof. For its part the defendant supports the validity of the rule and argues that the plaintiff is solely responsible for effecting and paying for any repair or replacement.

[4] The plaintiff seeks a determination of the question of whether the rule amendment is valid. If the answer is adverse to the plaintiff, it seeks the determination of a further question, namely as to whether its legal liability is merely to repair and maintain the roof and not to replace it.

Further background

[5] The property is an older building, redeveloped in the 1990s, and brought under the provisions of the Act. A unit plan was deposited on 15 November 1994. Initially, the Rules were those set out at schedules 2 and 3 of the Act.

[6] Paragraph 2 of the Rules required the plaintiff as the relevant Body Corporate to:

> (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.

[7] Not long afterwards, whilst the building was still under the sole control of the developer, the Rules were amended. In particular, paragraph 2 of the Rules was amended so as to read (as relevant):

> The Body Corporate shall –
>
> (a) Repair and maintain the roof and common property together with all chattels, fixtures and fittings (including without limitation, stairs, lifts, elevators, fire escapes, security or fire protection systems) used, or intended, adapted, or designed for use, in connection with the common property or the enjoyment thereof.

[8] For present purposes the significant feature of this amendment is that for the first time it imposed on the plaintiff Body Corporate an explicit obligation to repair and maintain the roof. There has been no further amendment of relevance. It is common ground that the roof is somewhat dilapidated. The majority of members of the Body Corporate consider that it needs replacement now. The defendant takes the view that targeted repairs would be sufficient in the short term, although it accepts that replacement will be needed before long.

[9] The defendant says that such repairs as are now required are the responsibility of the Body Corporate pursuant to the amended rule. But the plaintiff says the amendment was ultra vires to the extent that it imposed upon the Body Corporate the obligation to repair the whole of the roof, because there is neither a duty nor a power under the Act for a Body Corporate to assume legal responsibility for the replacement or repair of property which is not common property.

Earlier authorities

[10] Although for some years the provisions of the Act received little judicial attention, that is no longer the case. Three recent decisions require consideration in the context of the issue before the Court for determination.

[11] The first in time is the judgment of the Court of Appeal in *Velich v Body Corporate 164980*,[1] a judgment given on 19 May 2005. There, the question for determination was somewhat different from that presently before this Court. The developer owner, while still the registered proprietor of all the units, amended the Body Corporate rules, repealing the default rules set out in schedules 2 and 3 of the Act, and substituting new rules. One of the new rules, r 2.1(f), dealing with duties of a proprietor, prohibited a proprietor from making any additions or alterations to the unit or in any way altering its elevation or external appearance without the consent in writing of the Body Corporate. The consent of the Body Corporate was not to be unreasonably or arbitrarily withheld or delayed where the additions or alterations to the unit were of a non-structural nature, did not in any way alter the external elevation or appearance of the unit, and were being carried out in order to fit-out or partition the unit.

[12] A purchaser purchased a unit in an unfinished state and sought to complete it by installing a "sky cabin" apartment structure and a deck. Those features were part of the original design, but were structural in character. The Body Corporate refused consent because the works would interfere with the views and privacy of some of the other unit proprietors.

[13] In the High Court, the Body Corporate obtained an injunction preventing the unit owner from continuing with the work, the Court finding that the rule gave power to the Body Corporate to refuse consent and that it was permitted to act arbitrarily or even unreasonably in so doing.

[14] On appeal, the owner argued that the amended rule was ultra vires because it was inconsistent with s 37(6) of the Act, which provides that no rule amendment shall destroy or modify any right created by the Act. So the question there was quite different from that arising here. But, as in this case, the Court found it necessary to examine the legislative foundations of Body Corporate powers and duties.

[15] The Court commenced by referring to s 37(5) of the Act which provides:

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[1] *Velich v Body Corporate 164980* (2005) 5 NZ ConvC 194,138 (CA).

(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.

[16] By way of context the Court noted that certain definitions appear in s 2 of the Act:

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:

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:

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:

[17] It is convenient also to refer to the definition of the term "common property" which by virtue of ss 2 and 3(1)(b) means:

so much of the land as is not comprised in any unit.

[18] The Court of Appeal[2] then noted that 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).

[19] The Court held that the amended r 2.1(f) related to the powers and duties of the Body Corporate and therefore fell within the scope of the proviso to s 37(5). Accordingly, the amendment could be valid only if the new powers and duties conferred could fairly be seen as "incidental" to the performance of powers and duties imposed on the Body Corporate by the Act.[3]

[20] Having observed that the only duty imposed by the Act which could be invoked to justify the amended r 2.1(f) was that imposed by s 15(1)(a) "to … carry out any duties imposed on it by the rules"[4] the Court held that a rule which appreciably expanded the existing powers and duties of the Body Corporate (as r 2.1(f) purported to do) could not fairly be regarded as merely "incidental" to those existing powers and duties. It followed, the Court held, that r 2.1(f) was ultra vires.[5]

[21] In essence, the Court of Appeal gave full effect to the proviso to s 37(5) by holding that no powers or duties may be conferred or imposed upon the Body Corporate by an amended rule, unless the amendment could fairly be said to be incidental to the performance of the duties or powers imposed on the Body Corporate by the Act. A rule which appreciably expanded the existing powers and duties could not fairly be said to be merely "incidental" to those existing powers and duties.

[22] The second decision is *Young v Body Corporate 12006.*[6] That case concerned an apartment complex in Herne Bay, Auckland that was subject to weathertightness problems. The windows and doors of individual apartments, and the decks to those apartments, were not common property. The Body Corporate passed a resolution conferring on itself power to maintain and repair the whole of the exterior of the building, including that part of the exterior that was unit property.

[23] The design of the apartment complex was unique. It resembled a tiered wedding cake and so that in some instances, the deck of one apartment also formed the roof of the apartment immediately beneath it. A group of owners disputed the

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2 At [28].
3 At [29].
4 At [30].
5 At [31]-[32].

necessity for the work and applied for an interim injunction restraining the Body Corporate from implementing its resolutions. The amended rule obliged the Body Corporate to "repair and maintain the exterior of the building of which the units form part in all respects"[7].

[24] Harrison J held that the apparent rationale for r 2(d), which imposed upon the Body Corporate an obligation to repair and maintain the whole of the exterior of the building, lay in the unique construction of the complex,[8] and said that the amendment was understandable in that it met " … the requirements imposed by the unorthodox configuration of this complex".[9] But he was faced with an argument for the plaintiffs to the effect that the resolution was ultra vires because the amended rule was "not incidental to the performance" of the Body Corporate's statutory powers and duties.

[25] The Judge rejected the plaintiff's argument. He considered that the proviso to s 37(5) was arguably superfluous, saying that:

> [30] …A rule that relates to the control, use or enjoyment of the units or common property, within the substantive purview of s 37(5), must necessarily be incidental to the performance of the duties and powers imposed by the Act. Something is incidental if it naturally attaches or is causally relevant to something else. The phrase 'relate to' has a similar meaning of reference to or concern with. It would be incongruous if a rule constituting an addition to the rules in Schedule 2 met the substantive test embodied in s 37(5) but failed because it was outside the scope of the proviso, the purpose of which does not appear to be exclusionary.

[26] Having in effect put to one side the proviso to s 37(5), Harrison J then said:

> [32] …The Body Corporate is under a statutory obligation to keep and maintain the common property in good repair: s 15(1)(f). The scope of this obligation is extended by rule 2(a) to repair and maintenance of all fittings used in connection with the common property or its enjoyment. The statutory intention is plain. A Body Corporate must have all powers reasonably necessary to protect the common property in a building including a power to repair and maintain parts of the external structure, the condition of which might expose the common property to consequential physical damage. Leakage through a failure to keep the exterior in good condition

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6 *Young v Body Corporate 120066* (2007) 8 NZCPR 932 (HC).
7 At [20].
8 At [26].
9 At [32].

> places at risk the development as a whole incorporating, of course, the common property….

[27] His Honour considered that any other approach would lead to a practical absurdity.[10] The Court of Appeal decision in *Velich* appears not to have been cited to Harrison J.

[28] The third judgment is that of Heath J in *Body Corporate 188529 v North Shore City Council.*[11] That judgment was delivered on 30 April 2008. In the course of that leaky homes case, Heath J found it necessary to consider the entitlement of the Body Corporate to sue, and for that purpose to review the scheme of the Act.[12] There, as here, aspects of the exterior were unit property and not common property. In particular, the outside face of an exterior wall was part of an individual unit. Heath J noted that the default r 2(a) in Schedule 2 obliged the Body Corporate to 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.

[29] But there had been an amendment to that rule, effected on 30 April 1998, when the developers owned all the units within the unit title development. The amended rule provided that the Body Corporate was to keep clean and in a state of good repair, the exterior and roof of the building of which the units formed part, excluding the exterior of the windows of each unit. So the rule imposed upon the Body Corporate an obligation to repair part of the unit property.

[30] Heath J reviewed s 37(5), finding that:

> [106] In my view, s 37(5) makes it clear that only powers or duties incidental to the performance of duties or powers imposed on it by the 1972 Act may be amended. Section 37(5) has the effect of forbidding any change to the rules that creates a responsibility for the body corporate going beyond common property, or anything incidental to it.

[31] He then held that:

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10 At [33].

11 *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) (the so-called "Sunset Terraces" case).

12 At [83]-[116].

> [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*,[13] 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.

[32] Heath J did not refer to the judgment of Harrison J in *Young*.

[33] I accept Mr Herbert's submission that this Court is bound by the decision of the Court of Appeal in *Velich*. Heath J appears to have accepted that to be so in the *Sunset Terraces* case.

[34] Mr Berman supported the decision of Harrison J, characterising it as carrying with it "… a great deal of commonsense to the extent it would be a remarkably contrary interpretation of the Act if it did not allow for a unified regime of repair, maintenance and replacement". At a practical level that may well be so, but questions of vires will ordinarily turn on questions of statutory construction rather than commonsense or workability.

[35] However, Mr Berman's primary submission was that the decisions in *Velich* and *Sunset Terraces* were in effect, given per incuriam, in that they did not take into account the provisions of s 11 of the Act, to which I now turn.

Does s 11 make a difference?

[36] Section 11 provides:

> **11 Incidental rights**
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> (1) The common property and each unit on a unit plan shall, by virtue of this section, have as appurtenant thereto all such rights of support, shelter, and protection, and for the passage or provision of water, sewerage, drainage, gas, electricity, oil, garbage, air, and all other services of whatsoever nature (including telephone, radio, and television services) over the land and every part thereof as may from time to time be necessary for the reasonable use or enjoyment of the common property or unit.

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13 *Velich v Body Corporate No 164980* (2005) 6 NZCPR 143 (CA).

…

(3) The rights created by this section shall carry with them all ancillary rights necessary to make them effective as if they were easements.…

[37] In order to place Mr Berman's argument in its proper context, it is necessary to bear in mind the powers and duties affecting a Body Corporate, apart from s 11. Under s 15(1) the Body Corporate shall:

"(a) Subject to the provisions of the Act carry out any duties imposed on it by the rules

…

(f) Keep the common property in a state of good repair; …

(h) Subject to the Act, control, manage and administer the common property and do all things reasonably necessary for the enforcement of the rules."

…

[38] Under r 2 of the default rules in Schedule 2, the Body Corporate shall:

(a) Repair and maintain all chattels, fixtures and fittings (including stairs, life, 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.

[39] Section 16 of the Act provides that the Body Corporate shall have all such powers as are reasonably necessary to enable it to carry out the duties imposed on it by the Act and by its rules.

[40] Section 11 deals with rights. The Body Corporate has certain rights over unit property, and unit holders have certain rights over both the common property and other unit property.

[41] By virtue of s 11(1), there exist rights of support, shelter and protection in respect of the accessory unit property which owns part of the roof. Section 11(3) provides that the rights created by s 11(1) are to carry with them all ancillary rights necessary to make them effective, as if they were easements.

[42] It is common ground that, although s 11 does not create an easement, the section may be construed in such fashion as to confer on those entitled to s 11 rights, the ancillary rights which the owner of an easement would enjoy. Those rights include an entitlement to enter onto the land of another for the purpose of repair. But there is of course no obligation to exercise rights arising under an easement. Nor does the mere existence of an easement oblige the owner of the servient tenement to pay for repairs.

[43] Mr Berman's argument is that by conferring in s 11(3) such ancillary rights as are necessary to make the s 11(1) rights effective as if they were easements, the Legislature has empowered the Body Corporate (in this case) to effect repairs to the roof. In that way the Body Corporate is empowered to fulfil its duty to keep the common property in a state of good repair.

[44] The difficulty with Mr Berman's argument is that the amended rule purports not to confer upon the Body Corporate a right (whether ancillary or otherwise), but rather imposes a duty for which there is no authority, either in the Act or in the default rules. I accept that a duty in relation to rights arising under s 11 in respect of the obligations is to be found in paragraph 2 of Schedule 2. That is a duty to "…repair and maintain all pipes, wires, cables, ducts, and all other apparatus and equipment of whatever 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 s 11 of the Unit Titles Act 1972".

[45] But that is a confined duty which cannot, in my view, properly be said to extend to the repair of a roof. None of the items and things expressly or impliedly referred to in paragraph 2 of Schedule 2 could possibly impose an obligation on the Body Corporate to repair a roof which is unit property. Further, I am unable to construe the rights of shelter and protection conferred by s 11(1) as conferring on the Body Corporate a duty to repair a roof forming part of unit property, even though a failure by a unit owner to repair that portion of the roof forming part of the unit property may ultimately cause damage to common property. The Body Corporate remedy is to enforce the obligation of the unit owner.

[46] Accordingly, a change to the rules which renders the Body Corporate responsible for the repair and maintenance of a roof which forms part of the unit property, must, as Mr Herbert submits, constitute an extension of the Body Corporate's duties.

[47] At that point Mr Berman's argument runs foul of the test in *Velich*, in that the relevant duty appreciably expands the duties otherwise resting upon the Body Corporate.

[48] In my view s 11 does not assist the defendant.

Result

[49] I consider that the plaintiff is entitled to the relief sought. There will accordingly be a declaration that the amendment to the plaintiff's Body Corporate Rules, effected in November 1994, is invalid to the extent that it requires the plaintiff to repair or maintain the roof, other than that part of the roof which forms part of the common property.

[50] I accept that the outcome of this proceeding does not answer certain practical problems with respect to the need to ensure that the roof is repaired or replaced in the course of a single exercise. Separate repairs or partial replacement would undoubtedly produce a most unsatisfactory, and indeed, unworkable result. That was

recognised in *Body Corporate 173457 v Dunn*,[14] where Courtney J approved a scheme under s 48 of the Act, aimed at ensuring that repairs to the roof of a Body Corporate building were effected in a coherent fashion. That was a case where there was no opposition to what was proposed.

[51] In the absence of a s 48 application, there will need to be a degree of co-operation between the plaintiff and the defendant if roof repairs and/or replacement are to be effected in a practical and sensible manner.

[52] I note, however, that s 138(4) of the Unit Titles Act 2010 appears to contemplate a procedure whereby the Body Corporate would be empowered to effect repairs to the whole of the roof and then to recover from the defendant a proportionate share of the relevant cost.

[53] Having regard to my findings in respect of the plaintiff's principal argument, it is unnecessary to consider the second issue, which concerned the extent of the plaintiff's obligation (whether simply to repair or to wholly replace), if the Court upheld the validity of the amended rule.

Costs

[54] The plaintiff is entitled to costs. Counsel may file memoranda if they are unable to agree.

C J Allan J

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[14] *Body Corporate 173457 v Dunn* [2007] 8 NZCPR 668 (HC).