IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-1155

BETWEEN	BODY CORPORATE 322588 Applicant
AND	K MITCHELL INVESTMENTS LIMITED & ORS Respondents

Hearing: 23 July 2009

Appearances: T J G Allan for Applicant
J A McKay & E A O Turner for 39th,40th, 41st and 43rd Respondents
M V Robinson & E C Gellert for 46th Respondent
B N White for 42nd Respondent

Judgment: 4 August 2009

JUDGMENT OF KEANE J

This judgment was delivered by Justice Keane on 4 August 2009 at 3pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Solicitors:

Grove Darlow, Auckland for Applicant
Chapman Tripp, Auckland for 41st, 43rd & 49th Respondents
Simpson Grierson, Auckland for 46th Respondent
Buddle Findlay, Wellington for 42nd Respondent

[1] 'The Avenue', a 48 unit mews style complex of terrace houses in nine bocks in Albany, is owned largely by small investment companies, virtually all of which invested through the Bluechip group, now in liquidation. The complex has been completed for some years and is tenanted but still lacks a code compliance certificate. The decision of the North Shore city to decline a certificate was upheld by the Department of Building and Housing in February 2006. A notice to rectify, issued in 2003, is still outstanding. The complex is not weathertight.

[2] On 25 February 2008 a majority of owners, at an extraordinary general meeting, commissioned an investigation into the reasons why and an assessment of their prospects of recovering any loss. On 25 August 2008 they accepted that, to be made watertight, the complex needed to be reclad completely. They resolved to apply to this Court under s 48 of the Unit Titles Act 1972 for the approval of a scheme to employ a single contractor, under the control of a single consultant, answerable to the Body Corporate, and to obtain power to levy.

[3] The lead time to carry out comprehensive remedial work is not uncommonly six to nine months. The construction period itself is likely to be one and a half to two years. The work to be carried will be completed block by block and that might allow owners of repaired units to sell once the work in their block is complete. But, as everybody agrees, it is essential that the work, once commenced, be completed to a consistent standard so that each unit receives a code compliance certificate. The work needs to start as soon as possible.

[4] The cost of repairs for each unit has been estimated to lie in the range $102,000 - $162,000, depending on size and position. But there is this complication. The owners of 13 units are three months or more in arrears in meeting their relatively modest annual levies. A further eight are two months or more in arrears. Some of the investment companies are in or may at risk of liquidation. Some properties may be the subject of mortgagee sales. The 32 owners not in arrears may be forced to shoulder a further $45,187.50 each.

[5] These remaining owners are naturally very concerned. They have every reason to be. Some may not prove equal to the cost of repair of their own units. Yet

more may prove unable to meet the increased burden imposed by defaulting owners. There is the distinct risk that more owners will fall away, imposing an increasingly unsustainable burden on those remaining. This may render the scheme stillborn. Builders, it appears, insist on a body corporate holding at least 50% of the contract price before commencement. Mortgagees, it appears, will only make advances for repairs on the basis of certified progress claim certificates. If the complex is left as it is, it may even be condemned.

[6] The remaining owners question why they should have to carry this burden. They take the view that they will not so much be shouldering the burden of defaulting owners. They will be shouldering a burden that ought to be assumed by mortgagees, whose security will be preserved and enhanced. The units have a present value, allowing for stigma, profit and risk allowance, in the range $160,000 - $185,000. But once rectified and after a code compliance certificate is issued, absent any other weathertightness issues, their values will increase to $345,000 - $400,000.

[7] A feature of schemes like that now to be approved, the Body Corporate contends, is that all owners are liable for the levies of defaulting owners. Lenders do not question this redistribution. Indeed they rely on it. They cannot then say that this Court lacks power under s 48 to impose such a liability on unrelated third parties. Indeed if the Court were, as invited, to impose on them the liability of mortgagor that would be a small increment. To go that further distance in this case, the Body Corporate says, is both necessary and expedient.

[8] The result is that the scheme now to be approved, which is uncontroversial, indeed has the support of all owners, who have expressed a view, and lenders and insurers, contains a thus far unprecedented term that the lenders, almost all of whom are trading banks, resist. Where an owner defaults, cl 4.4.1 imposes that liability on the mortgagee:

> On Default of an Owner to pay a Levy, the Body Corporate (and without prejudice to the Body Corporate's right to levy non Defaulting Owners), is hereby authorised to collect the Defaulting Levy from the Mortgagee of the relevant Unit of the Defaulting Owner and the Mortgagee is obliged to pay such Levy on the terms set out in the demand issued by the Body Corporate. For clarity on demand for payment by the Body Corporate to a Mortgagee, the relevant Levy or so much as remains unpaid shall become a debt owing

> by the Mortgagee to the Body Corporate and recoverable by the Body Corporate from the Mortgagee accordingly.

[9] The next term in the scheme (cl 4.4.2) deems the liability the mortgagee assumes to be a debt owed by the defaulting owner to the mortgagee. Indeed, as I was told, it assumes that the debt will be a further advance under the mortgage of the defaulting owner.

[10] In resisting these two terms the lenders contend that they are at complete odds with the quite separate and different relationships in contract between mortgagor and mortgagee, and between the owners as between themselves and with the body corporate. The terms proposed, they say, would transform the defaulting owners' mortgages from sources of security into sources of indeterminate liability to the Body Corporate. That is a radical and incalculable redistribution of risk.

[11] The purpose of the Unit Titles Act 1972, the lenders say also, is to promote group housing by conferring unquestionable title, by ordering relations between co-owners, first and foremost, and only incidentally between co-owners and their mortgagees and insurers and local authorities. It is to set in place a milieu in which banks can safely lend. The terms now proposed, they contend, and for the first time in the history of the Act, will have precisely the opposite effect. They lie indeed, they say, beyond this Court's power to impose under s 48.

[12] The question whether this Court has power to approve and impose such terms and whether it ought to do so, the Body Corporate contends, has significance only for this case. The issue is one of practicality. It is only as to what is necessary or expedient in the singular context of this scheme. What marks out this scheme from others is the proportion of owners, who are insolvent, throwing an undue burden on the remainder.

[13] The issue, the lenders contend, could not be of wider significance. It is first and foremost an issue of law. It touches every body corporate scheme, where there is a need for wholesale repair. I agree. Whether it may seem necessary or expedient to gather in the mortgagees of the defaulting owners can only be in question if this Court is given power by s 48 to gather in mortgagees in the first place.

[14] This is an issue of law of very wide significance. There are more than 16,900 unit title developments in New Zealand. There are in excess of 96,000 units. Within 50 years over 500,000 people will be living in apartments, town houses or high rise buildings: *Hansard Debates*, vol 625; page 1714.

Section 48 – Scheme following destruction or damage

[15] Section 48, so far as it is relevant, says this:

> (1) Where any building or other improvement comprised in any unit or on any land to which a unit plan relates is damaged or destroyed, but the unit plan is not cancelled, the Court may, on the application of the body corporate, an administrator, the proprietor or one of the proprietors of a unit, or a registered mortgagee of a unit, by order settle a scheme including provisions—
>
> (a) For the reinstatement in whole or in part of such building or other improvement; or
>
> (b) For the transfer of units to the proprietors of the other units so as to form part of the common property.
>
> …
>
> (4) On any application to the Court under subsection (1) of this section, any person having or claiming to have any estate or interest in any unit or in the land or in any part of the land or any insurer who has effected insurance on the buildings or other improvements comprised in any unit or in the land or any part thereof shall have the right to appear and be heard.
>
> (5) In the exercise of its powers under subsection (1) of this section, the Court may make such orders as it considers expedient or necessary for giving effect to the scheme, including orders—
>
> (a) Directing the application of any insurance money;
>
> (b) Directing payment of money by or to the body corporate or by or to any person;
>
> (c) Directing the deposit of an appropriate new unit plan; or
>
> (d) Imposing such terms and conditions as it thinks fit.

[16] Section 48(1), it will be seen, confers explicitly on the mortgagee of a unit standing to apply to the Court for an order settling a scheme. Section 48(4) gives 'any person having … any estate or interest in any unit' standing to appear and be

heard on the application. Patently a mortgagee has such a qualifying interest. The critical issue is whether s 48(5) enables the Court to make orders binding on a mortgagee.

[17] Orders under subs (5)(a) as to insurance money, and under subs (5)(c) directing the deposit of a new unit plan, may conceivably affect a mortgagee indirectly. That is not in issue. The Court's power under subs (5)(b) is of a different character. It is a power to impose a liability by 'directing payment of money by or to the body corporate or by or to any person'. Such an order may be made, subs (5) says, if the Court 'considers that expedient or necessary for giving effect to the scheme'. Does 'any person' extend to a mortgagee?

Principles of interpretation

[18] Section 5(1) of the Interpretation Act 1999 requires that the meaning of s 48 be 'ascertained from its text in the light of its purpose' and s 5(2) allows all pertinent features of the Unit Titles Act 1972 to be taken into account; an analysis to be made, as McHugh JA helpfully explained in *Kingston v Keprose Pty Ltd (No 3)* (1987) 11 NZSWLR 404, 423, in this way:

> A search for the grammatical meaning … constitutes the starting point. But if the grammatical meaning of a provision does not give effect to the purpose of the legislation, the grammatical meaning cannot prevail. It must give way to the construction which will promote the purpose or object of the Act.

Or as Tipping J said, perhaps more emphatically, in *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767, 24:

> Where … the meaning is not clear on the face of the legislation, the Court will regard context and purpose as essential guides to meaning.

[19] The words 'any person', that being so, are not to be understood literally. They take colour from the statute in which they appear and their scope can vary. In *Gordon v Treadwell Stacey Smith* [1996] 3 NZLR 281 the Court of Appeal held that 'any person' meant literally 'any person'. The provision in question, the Court held, was the only one in the Act in which 'any person' was not qualified in some way.

Furthermore, the Court concluded, at 288, 'nor … does any matter of policy or practical difficulty require otherwise'.

[20] In *Northrop Instruments & Systems Ltd (in receivership and liquidation)* [1992] 2 NZLR 361, by contrast, McGechan J read 'any person', in a very different statutory context, as calling for some 'connection' between the one to be made the subject of any exercise of power and the purpose for which the power was to be exercised. In *Travis Holdings Ltd v Christchurch City Council* [1993] 3 NZLR 32, once again, Tipping J, at [41] expressed doubt that 'any person' was to be read literally.

[21] The words 'any person' in s 48(5)(b) stand alone. They are not made more explicit, as they could be. Section 48(4), for instance, requires 'any person' to have or claim to have an estate or interest in a unit, which a mortgagee clearly has. Or, to take another example, s 51(1) confers a right to apply in the case of a body corporate's default 'on any person (including any local authority or public body for whose benefit any requirement or duty is imposed on the body corporate by this Act or any regulations made under this Act) … .'

[22] Absent qualifying words like these, the words 'any person' can only be given meaning when set against the Act as a whole. But not just that. The meaning the body corporate contends for must be set against the common law as it concerns freedom of contract, the relationship between banker and customer, and the nature of a mortgage security, which is also to be found partly in the Property Law Act 2007. It must be set against the invariable practice of lenders in assessing and underwriting risk.

Mortgage securities and lending practices

[23] The lenders rest first of all on the principle that contracts freely entered into are sacrosanct, underpinned by two principles, the first of which is freedom and the second of which is certainty. The Courts, so far as possible, uphold the bargain made by the contracting parties: *Printing & Numerical Registering Company v Sampson* (1875) LR 19 Eq 462, 465, Jessell MR; *Fender v Mildmay* [1937] 3 All ER 402

(HL), Lord Wright, 423; *Amaltal Corporation Ltd v Marhua (NZ) Corporation Ltd* [2004] 2 NZLR 614, CA, Blanchard J, 56.

[24] Certainty, the lenders say, is not a virtue for its own sake. As Glazebrook J said in *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324, CA, 118 'commercial parties are normally entitled to expect that the risk allocation they have negotiated (and paid for) will not be disturbed by the Courts.' And, more pointedly, the lenders say, the terms which the Body Corporate seeks to impose are inconsistent with the law governing banker and customer and that governing a mortgage security.

[25] A bank owes no duty of care to its customer as to the good sense or otherwise of the purpose for which the loan is sought. It is under no duty to advise the customer as to that: *Frost v James Findlay Bank Ltd & Couzens* [2001] EWHC CH, 404. A duty of care is inconsistent with the bank's duty to its shareholders as a commercial lender and the borrower's interest in securing the loan: *Chapman v Barclays Bank Plc* [1997] EWCA CIV-1341.

[26] In like fashion, the lenders say, a mortgagee has a right to remain passive. The equitable principles protecting mortgagors and mortgagees, as is stated in *Silven Properties Ltd & Anor v The Royal Bank of Scotland Plc & Ors* [2004] WLR 997, reduce to two reciprocal principles: a mortgage is security for the repayment of a debt and the security for repayment of a debt is only a mortgage. From these principles two rules flow:

> (F)irst that powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment and secondly that, subject to the first rule, the powers conferred on a mortgagee may be exercised, although the consequences may be disadvantageous to the borrower.

[27] These principles are to be found reflected in the Property Law Act 2007, for example in s 150, which gives a mortgagee in possession the option of deciding whether or not to repair. And the Act is very clear when it overrides a mortgagee's right to remain passive, as for instance in s 151 where it makes a mortgagee in possession liable for waste: see also *Golden Bay Cement Co Ltd v Commissioner of Inland Revenue* [1999] 1 NZLR 385, 392, PC, Lord Nolan.

[28] Again, a mortgagee exercising a power of sale owes an equitable and statutory duty of reasonable care to the mortgagor to obtain the best price reasonably obtaining at the time of sale: s 176 Property Law Act 2007. But a mortgagee is at all times free to consider its own interests to determine whether and when to exercise its power of sale. The mortgagee is under no obligation to improve the secured property or to increase its value.

[29] Finally, the lenders say, the terms proposed turn on their head the whole basis on which they assess risk and lend money. The terms impose on them an indeterminate risk from a foreign source.

[30] Banks assess a customer's financial circumstances, credit history and equity contribution. They assess the type and value of the security and any regulatory or legal regimes that may apply. They assess the property as security, including its location, its type and quality, its condition and its value. If further funding is sought to make repairs advances can be conditional on a registered valuation of the secured property before and after the repairs, a fixed price contract with the builders contracted to undertake repairs, and any information necessary to determine the borrower's capacity to service the increase.

[31] This risk assessment, the lenders say, is not just in their interest. It is also in the interest of the borrower, notwithstanding the common law and equity. Banks adhere to the New Zealand Bankers Association's Code of Banking Practice, cl 5.1(c) of which states:

> We will only provide credit to you or increase your credit limit when the information available to us leads us to believe you will be able to meet the terms of the credit facility. We have the right to decide not to provide credit to you. If banks were forced to advance further funds to mortgagors to pay repair levies they would certainly be in breach of that obligation.

[32] If banks are now to be made subject to indeterminate liability to bodies corporate under the Unit Titles Act 1972, the lenders say, they will have to assess their positions. They would clearly not have made the credit decisions that they made in making the present advances that might, if the Body Corporate succeeds on this application, trigger their liability in this case.

[33] Banks would also have to consider, they say, whether any 'default' under the mortgage gives them an immediate right to repayment, and the ability to deal with the security in any manner they choose, as some unit title schemes allow. Banks may well in the future have to adopt a lower loan to value ratio, or even impose blanket rule that a unit title is not a safe security.

Body Corporate stance

[34] The Body Corporate defends the terms proposed for four reasons, the first of which is, as the Body Corporate contends, that s 48 is very wide and in two senses, the first of which is as to standing. The proprietor of a unit, the registered proprietor of a unit, the registered mortgagee, the body corporate itself, or an administrator may apply. There is an even wider entitlement to appear and be heard. Anybody with 'an estate or interest' has standing.

[35] Section 48(5), furthermore, the Body Corporate says, enables the Court to make not just any order that is 'necessary' but any that is 'expedient' and this includes the ability to direct payment of money by or to 'any person' or the imposing of 'such terms and conditions as the Court thinks fit'. The Court has the ability, therefore, to exercise its power as the circumstances call for.

[36] Section 48(5)(b), it is relevant to note, the Body Corporate says, creates a debt but not a charge and, because any person having an interest is entitled to appear and be heard, it is not appropriate to read down s 48 and impose any restriction not specifically expressed.

[37] Secondly, the Body Corporate says, mortgagees enjoy a security interest not just in the unit title over which they hold security, but in the common areas. Their security interest is in that sense co-extensive with the title and rights of the mortgagor.

[38] Section 9, the Body Corporate says, provides that an owner enjoys a proportionate share with other owners in the common property 'as tenants in common in shares proportional to the unit entitlement in respect of their respective

units': Thus, where the unit holder charges the whole of their legal interest, the mortgagee may not have a charge over common property, but does have control over the sale or transfer of that unit's interest in common property: s 18(2).

[39] The Act also renders all unit holders jointly liable for repairs to common property. If one or more fails to pay the others have the liability. The sum unpaid is deemed a secured debt payable by the defaulting unit holder to the body corporate: *Re Young ex parte Body Corporate 197217* (HC AK CIV 2007-404-001874, 27 March 2008), Associate Judge Robinson.

[40] An application for a scheme may be made under s 48 by a mortgagee. Such a scheme invariably involves all owners. A mortgagee has then the ability to seek a remedy beyond its secured interest, imposing liability on other owners. The implication has to be, the Body Corporate contends, that the Court is given the ability when it is expedient or necessary, to gather in mortgagees when settling a scheme for repair.

[41] Thirdly, the Body Corporate contends, unless that happens mortgagees can rely on owners generally to meet the cost of repair of the unit over which they hold security. They can sell the unit, once repaired, when the market suits, without being obliged to disclose to the purchaser the levies owed to the Body Corporate by the defaulting owner.

[42] A mortgagee, the Body Corporate points out, has no obligation to pay outstanding body corporate levies on the property it has a charge over. Nor does a levy have any priority over the mortgage: ss 15, 16. Parliament has been equally specific about from whom unpaid rates can be recovered: s 32. Nevertheless levies 'run with the land'. Section states that the levies may be recovered from:

> … the person who was the proprietor of the unit at the time when the amount became payable or (subject to the provisions of s 36 of this Act) from the proprietor of the unit at the time when the proceedings are instituted.

[43] Section 36, furthermore, usually underpins this by setting out in the certificate given the levies outstanding. These are an outgoing on settlement, normally reducing the amount received by the vendor, though occasionally accepted

by the purchaser. This practice is reflected in s 7.0 of the 8th edition ADLS form of agreement for sale and purchase (cls 7.1(1), (2)).

[44] Section 48 levies owed by a defaulting owner, however, are not incorporated in a s 36 certificate. They will only be captured, if at all, by the duty imposed by cl 7.1(1) of the 8th edition of the Auckland District Law Society Agreement for Sale and Purchase, which requires a vendor to warrant and undertake that the body corporate has not levied or proposed to levy any contribution not disclosed.

[45] Fourthly, and finally, the Body Corporate contends, the terms proposed will work no injustice for any mortgagee. No mortgagee will be locked in. A mortgagee not willing to make the payments required under a s 48 order may avoid that by agreeing to discharge its security in the event that the Body Corporate sells the property by writ of sale.

Focus and purposes of Act

[46] The first reason for pause lies in the long title of the Unit Titles Act 1972, which sets its focus precisely:

> 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.

[47] This focus is on the owners in their relations between themselves and with the body corporate. A body corporate comprises the registered proprietors of the stratum titles engaged: s 12. It does not comprise anybody else. The Act does not purport to regulate as generally relations between owners and mortgagees, or between mortgagees and the body corporate.

[48] Thus, in *World Vision of New Zealand Trust Board v Seal* [2004] 1 NZLR 673 Heath J, at para 57(a) identified the first governing principle, or rather purpose, underpinning the Act to be this:

> 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.

[49] A further purpose, or consequence of the Act, was identified by Barker J in the earlier case *Geddes v Devon Park Town Houses Ltd* [1977] 1 NZLR 53:

> The Act appears to provide a more efficient system of ownership and control of apartment blocks, with management vested in a body corporate created under the Act, and with each individual occupier obtaining a certificate of title for his unit under s 8. The ability to obtain a land transfer title is of considerable advantage; such a title makes for easier marketability, as well as facilitating the raising of mortgage finance.

[50] These two purposes, I consider, are inconsistent with any liability being able to be imposed on a mortgagee, either by the Body Corporate or by this Court, unless that is said directly and clearly.

Power to levy

[51] The second reason for pause is that a body corporate's power to levy for repairs, as this Body Corporate concedes, is to levy the owners and does not extend to a power to levy anybody else.

[52] A body corporate has under s 15 the power to levy 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'. It may call on the owners 'in proportion to the unit entitlement of their respective units'. The body corporate's only latitude is, under s 32, as to which owner to pursue. The body corporate may recover from:

> the person who was the proprietor of the unit at the time when the amount became payable or (subject to the provisions of section 36 of this Act) from the proprietor of the unit at the time when the proceedings are instituted.

[53] Also, where repairs are made for the benefit of one owner, or less than all owners, s 33 enables the body corporate to recover from them alone. Where repairs result from a negligent act or omission, or a breach of the rules, s 34 confers a wider power, but one still referable to the estate of the owner, from 'any proprietor or his

tenant, lessee, licensee, or invitee'. Conversely, s 35 limits the liability of owners to 'the due proportion recoverable … under ss 15(2) and 32', and s 36 entitles an owner to obtain from the body corporate a certificate stating the owner's liability and the basis for it.

[54] From every perspective the liabilities that a body corporate may impose on owners are closely circumscribed and one would expect that if the body corporate were to have the ability to levy anybody else, or that were a power reserved to the Court, that would be stated as explicitly.

[55] It is not unknown for mortgagees, particularly mortgagees in possession, to be made liable on default of the mortgagor. Section 62(1)(c) of the Local Government (Rating) Act 2002, for instance, entitles a local authority, where an owner defaults, to 'recover, as a debt from the first mortgagee of a rating unit, the rates payable in respect of the rating unit that remain unpaid', after a defined minimum period. That this liability is imposed specifically speaks for itself.

[56] A liability to meet rates is as nothing to the liability that the Body Corporate seeks to impose here and the absence of a specific power is telling. In 1999 the Law Commission recommended in NZLC pp 35, para 35, NZLCR 59, para 56 as one of three proposed solutions, to answer the difficulties facing body corporates recovering levies from defaulting proprietors, a new s 15A enabling the body corporate to turn to a mortgagee. That was not adopted in the 2003 amendments to the present Act.

Rights and immunities of mortgagees

[57] The third reason for pause is that, insofar as the Act refers to mortgagees, it does so to recognise and secure their rights. A useful litmus test as to the ambit of the Act is provided by the rule making power contained in s 37. Section 37(11) is explicit as to who is bound, and mortgagees in possession could notionally, it appears, lie within the ambit of rules made:

> The rules shall be binding on -
>
> (a) The body corporate;

> (b) All proprietors; and
>
> (c) Any other person in actual occupation of a unit—
>
> and shall enure for the benefit of the body corporate and every proprietor.

[58] As against that, however, s 37(6) prohibits any rule that might inhibit the ability of owners to deal with or charge their units and in this recognises that there are relations in contract that owners are free to enter into that are autonomous:

> 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.

[59] There are then provisions recognising the rights and immunities of mortgagees, beginning with s 38(3) which confirms a mortgagee's insurable interest:

> Every unit proprietor, and every person entitled as mortgagee by virtue of a registrable mortgage in respect of any unit, has an insurable interest in the property covered by the principal insurance policy.

[60] Then, as interestingly, s 38(6) segregates from that interest the owners' reinstatement interest; an interest from which the members of the body corporate generally might benefit. Section 38(6) precludes a mortgagee from applying the proceeds of any reinstatement cover to repayment of its debt, except where the body corporate agrees:

> Unless by unanimous resolution all the proprietors otherwise resolve, all money paid by the insurer pursuant to the principal insurance policy shall be applied in or towards reinstatement, and, where it is to be so applied, no mortgagee shall be entitled to demand that any part of any such money be applied in or towards repayment of the mortgage debt.

[61] The mortgagee's power to protect its interest is secured rather by s 39(1)(b), which confirms that not merely may a mortgagee oblige an owner to insure against destruction or damage, but may also:

> … require the proprietor, as a condition of the loan, to effect a policy of insurance (in this section referred to as a mortgage redemption policy) to indemnify the proprietor against liability to repay the whole or any part of the sum secured to the mortgagee in the event of the destruction or damage of the unit.

[62] There are then provisions in which the mortgagee's right is secured in the event of redevelopment (s 44), cancellation of a plan on application of the proprietors (s 45) and on the cancellation of a plan (ss 45, 46). There may be others.

[63] The only event that might, one would have thought, result in a mortgagee becoming subject to a liability imposed directly or indirectly under the Unit Titles Act 1972 is on entry into possession. But here again the Act is only specific in one way. Section 41(2) recognises that an owner's voting right may be exercised by such a mortgagee:

> A proprietor's voting rights shall not be affected by reason only of the fact that his interest in his unit is subject to a registered mortgage, but, on giving written notice to the body corporate, the mortgagee shall be entitled to exercise those rights—
>
> (a) In accordance with any provision to that effect in the mortgage; or
>
> (b) So long as he is in possession of the unit.

[64] The only conclusion open, it seems to me, from the particular provisions of the Act, is that relations between mortgagors and mortgagees, whether the mortgagees are bankers or not, are governed as they have always been by the common law, by equity or by the Property Law Act. The Unit Titles Act 1972 does not set out in any way to alter the ordinary balance of that general law.

Conclusion

[65] The scheme proposed is clearly both necessary and expedient and there is no dissent to it except as to the terms seeking to impose liability on the mortgagees. Those terms may seem necessary and expedient to the owners for whom I have every sympathy. They are not necessary and expedient from the perspective of lenders for all the reason which I have set out. And I do not accept that banks could obtain any windfall relying on an absence of candour.

[66] Whether the terms proposed are necessary or expedient is, however, not the point. The point is whether this Court has the power to impose such terms and it does not. The Unit Titles Act 1972 does not confer, directly or indirectly, any ability to

trench upon the relationship in contract between mortgagor and mortgagee, between banker and customer, in the manner proposed. Indeed if such terms could be imposed they would alter radically that relationship and in ways that could work to the great disadvantage, not just of lenders, but of unit title proprietors seeking finance.

[67] I make an order under s 48 approving the scheme as proposed with the exception that cls 4.4.1 and 4.4. 2 and other clauses that reflect those terms are to be deleted. Any submissions as to costs are to be made by the lenders within 14 working days of the date of this decision and those for the Body Corporate in the succeeding 14 days.

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P.J. Keane J