IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-007992
CIV-2010-404-006184
[2012] NZHC 2676

BETWEEN	BODY CORPORATE 198245 Plaintiff
AND	Y K WONG & M Y CHONG First Defendants
AND	PINE DEVELOPMENTS LIMITED Second Defendant
AND	C L HUANG & B BONG Third Defendants

CIV-2010-404-006184

AND BETWEEN	BODY CORPORATE 198245 Plaintiff
AND	CREATION INVESTMENTS LIMITED (IN LIQ) Defendants

Hearing: 30 April - 4 May 2012

Counsel: TJG Allan for the Plaintiff
AJ Steele for the Defendants

Judgment: 12 October 2012

RESERVED JUDGMENT OF ELLIS J

This judgment was delivered by me on 12 October 2012
at 4.30 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors: Grove Darlow & Partners, PO Box 2882, Auckland 1140
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[1] The plaintiff in both these proceedings is the Body Corporate of a strata-titled complex in Parnell known as "the Ridge". The Ridge comprises 18 luxury apartments and seven ground level retail/commercial units. Those units front onto Parnell Road. The 18 residential units are constructed immediately above and behind the retail units.

[2] These proceedings have been brought by the Body Corporate to recover unpaid levies that have been issued to the defendants, all of whom are owners of retail units in the Ridge. The circumstances giving rise to the levies will be set out in considerably more detail below. For introductory purposes, it is sufficient to note that the levies relate to the cost of repairs to the Ridge that first became necessary following the discovery of significant leak problems in 2004. Some indication of the scale of the problem can be gleaned from the fact that the total cost of repairs has been over $9 million.

[3] Both historically, and in these proceedings, the defendants' joint position has been advanced principally by Mrs Michelle McDonald. Mrs McDonald and her husband are the shareholders and directors of Creation Investments Ltd (CIL), the defendant in CIV-2010-404-006184. CIL owns retail unit 6F and is now in liquidation. Mr Boris van Delden, who is one of the two liquidators appointed by the McDonalds, was the other principal witness for the defendants in these proceedings.

[4] The first defendants in CIV-2010-404-007992 own retail unit 3C. The second defendant (Pine Developments Ltd) owns retail unit 5E.[1] The Body Corporate has now settled and discontinued its claim against the third defendants, who are the owners of retail unit 7G.

[5] All defendants in both proceedings were represented by Mr Steele.

[6] The Body Corporate says the remaining defendants owe:

(a) Mr Wong and Mrs Chong (Retail Unit 3) – $52,211.71;

[1] At the hearing Mr Wong briefly gave evidence for the first defendants and Mr Day gave evidence on behalf of Pine Developments Ltd. Both were generally content, however, to adopt Mrs McDonald's position.

(b) Pine Developments Ltd (Retail Unit 5) - $48,139.44;

(c) Creation Investments Ltd (Retail Unit 6) - $157,840.31.

[7] Those amounts essentially constitute the outstanding share[2] of remedial costs attributed to the defendants by the Body Corporate and which comprised:

(a) costs of common property repairs that have been apportioned on a unit entitlement basis;

(b) consultancy and legal costs associated with the repairs that have been apportioned on a unit entitlement basis;

(c) actual costs of private repairs to the specific units owned by the defendants;

(d) interest and recovery costs.

[8] The present dispute between the Body Corporate and the defendants principally concerns (a) and (b). The defendants have pleaded a number of affirmative defences.

[9] First, they say that, insofar as the claims relate to the cost of repairs to common property, they are unlawful because the defendants did not substantially benefit from certain of those repairs, which included repairs to balconies and patios attached to and used by specific residential units. The defendants also take issue with having to contribute to repairs to corridors and lifts that they do not use. They say that the Body Corporate should therefore have raised the levies or taken steps to recover the repair costs in accordance with s 33 of the Unit Titles Act 1972 (the UTA72) and rr 3.8 and 38 of the Body Corporate rules (the rules) (which are set out in [49] and [50] below).

[10] Secondly, the defendants allege that:

[2] Payments already made have been deducted from the amounts claimed.

(a) certain items have wrongly been included as "common property" repairs; and

(b) the Body Corporate wrongly apportioned the consultancy fees of $1,767,412 as if they were costs relating to common property and was wrong to seek to recover those fees on a unit entitlement basis; but

(c) (in the alternative to (b)) if the Body Corporate was right to apportion those fees on a unit entitlement basis, it should nonetheless have made adjustments under s 33 or the rules on the basis of substantial benefit;

(d) there has been inadequate accounting by the Body Corporate for some of the costs because some of the underlying invoices are missing and there are instances of double counting and other arithmetical errors.

[11] Relatedly, Mr van Delden says that he has rightly rejected the Body Corporate's claim as an unsecured creditor in the liquidation of CIL on the grounds that it lacks the detail required by s 304 of the Companies Act 1993.

Background

[12] It was first discovered that the Ridge suffered from leaks in 2004. The leak problems affected both common and private property. The interface between common and private property was problematic. Unit owners were levied by the Body Corporate on a unit entitlement basis to fund the necessary repairs.

[13] These initial levies were resisted by Mrs McDonald and others on the basis that the Body Corporate was only able to levy unit owners for the purpose of meeting costs associated with remediating common property.[3]

[14] The repairs undertaken in 2005 were unsuccessful. The Body Corporate became involved in litigation against some of the trades-people involved. The Body

[3] The s 48 Scheme discussed below was stated retrospectively to apply to costs that had been incurred in undertaking the first repairs and, as I understand it, the initial levies were then reapportioned on the basis of the Scheme.

Corporate commissioned Alexander & Co (Alexanders), a firm of building surveyors and architects, to provide a report on the nature and extent of remedial work required. Alexanders were then to prepare plans and specifications for the work required, and to call for tenders to complete that work.

[15] Substantial further funds were required to fund the proposed repairs. Because of the levying difficulties previously encountered, the Body Corporate applied to the High Court for settlement of a scheme under s 48 of the UTA72. Despite opposition from CIL the Scheme was settled by Baragwanath J on 30 November 2006. In his minute approving the Scheme, Baragwanath J said:

> The problems which need not be rehearsed in these reasons for judgment are deep-seated, relating not only to the actual deficiencies in construction of the building but in the fact that the boundary line between the private and public parts of the building has been drawn in a manner which appears to be quite arbitrary. For that reason the operation of the Unit Titles Act and the rules which govern repairs to the common parts of the building fail to apply, often a result that is quite arbitrary, in relation to damaged portions which fortuitously happen to be privately owned.
>
> The scheme which I have commended deals imaginatively and practically with these problems. The decision-making as to what work is to be done and by whom and therefore at what cost rests in relation to the scheme as it does in relation to the common portions of the property with the body corporate. The body corporate decisions are made by elected members. One of the respondents [Mrs McDonald] is a member of the committee and accordingly has power under s [43] of the Unit Titles Act in the event of any decision considered to be inequitable for a minority to make application to this Court for relief.
>
> I am satisfied that the democratic process of election of the body corporate committee, the membership of which has been selected within the past 12 months at a stage where the current problems had arisen, provides a further and fundamental safeguard against irrational conduct. The downside of any precautions of the kind proposed by the respondents is the injection of complexity and therefore cost and possible delay in a process that needs to be carried out efficiently and without distraction.

[16] The Preamble to the Scheme included the following statements:

> In so far as repairs are required to be carried out to common property, the Unit Titles Act 1972 and the relevant Body Corporate rules are determinative.
>
> In so far as repairs are required to private property this scheme is intended to govern the situation where:

(a) Repairs to common property will necessarily involve repairs to private property (e.g. where repairs to the exterior wall of a building that is common property requires the replacement of timber framing within the wall thereby in turn requiring repairs to the internal walls being private property); and

(b) Repairs to the exterior walls part of which comprise private property and part of which comprise common property and where both are integral with, abut, or are physically indistinguishable one from the other and where repair is required to the whole exterior wall be it common property or private property (i.e. where there is no physical dividing line on the exterior wall distinguishing common property from private property).

(the private property falling within the ambit of 1 and 2 above hereafter referred to as the "Relevant Private Property").

The costs of repairs as outlined above will be tendered by contractors as a total cost from such repairs and there is need to determine the proportion of the total cost of repairs that is attributable to common property and that which is attributable to each unit that comprises the private property ("Initial Repairs") and once calculated to require unit holders to abide by such determination and to pay their proportion of the total cost.

...

This scheme is intended to ensure the repairs proceed in a co-ordinated manner irrespective of such repairs are to common or to private property and that the owners pay their proportion of the cost of such repairs that relates to their relevant private repairs.

[17] The Scheme contained the following relevant specific provisions:

(a) Clause 2.1 which empowers the Body Corporate to ensure (inter alia) that the money required to meet the cost of repairs "is collected from each Owner in such proportion as determined by the Body Corporate ..."

(b) Clause 2.3 which conferred power on the Body Corporate:

...

(h) to levy and charge owners for their proportion of the cost of repairs to private property.

(i) to employ suitably qualified advisors to determine the final cost and to determine the allocation between owners of the cost of repairs to relevant private property.

...

(k) to delegate to such advisors or individuals such powers and authorities hereby given the Body Corporate as it from time to time determines necessary to effectively progress the repairs.

(c) Paragraph (n) of cl 2.3 states that, except as specifically varied by the Scheme, all powers conferred on the Body Corporate in relation to common property under the UTA72 or the rules are also granted to the Body Corporate under the Scheme in relation to the relevant private property.

(d) Clause 3.1 which imposes numerous obligations on the Body Corporate including the obligation to have the repairs completed diligently and expeditiously (para (c)) and to account to Owners for all money that the Body Corporate receives and expends on their behalf under the Scheme.

(e) Clause 4.1 which authorises the Body Corporate:

... to levy and collect from each owner such money from time to time as may be necessary for undertaking and completing the repairs to the relevant private property, in such proportion as between owners as the Body Corporate shall decide.

(f) Clause 4.2 which authorises the Body Corporate to:

(a) Determine, after advice from suitably qualified advisors, the apportionment of costs between each unit both *vis a vis* other units and the common property ("the levy")

(b) To demand payment of such levy from each owner in amounts and at times that the Body Corporate may from time to time determine.

(c) To sue for and take such other steps as the Body Corporate deems advisable to recover from any owner who fails to pay such levies in the amount and at the time determined by the Body Corporate.

(d) ...

(e) To pay contractors and subcontractors for work completed on the Repairs in accord with certificates signed by suitably qualified advisors

(f) To generally have the same powers with regard [sic] collection and recovery of Levies in respect of each unit and each owner that the Body Corporate has under the Unit Titles Act 1972 for the recovery of levies for repairs and maintenance to common property.

(g) To determine any refunds that may be payable to the Owner and to determine when such refunds should be made

(g) Clause 6.1 and 6.2 which provide that:

> The proportion of the cost of repairs for the relevant private property shall be allocated to each owner on the basis of that owner's legal title as set out in the deposited plan 198245.
>
> Costs will be allocated to individual unit holders in accordance with the provisions of 4.2(a) both at the outset of the Repairs and over the course of the Repairs as needed from time to time.

(h) Clause 7.2 which obliges the Body Corporate to keep a permanent and current record of payments received and payments made in accordance with the Scheme and in relation to common property.

(i) Clause 7.4 which permits the Body Corporate to adjust the various owner accounts where there are corrections to payments made.

(j) Clause 8 which stipulates various reporting requirements, including that the Body Corporate shall provide to owners:

> A final report on the Repairs eventually undertaken as part of the scheme, the cost and how it is apportioned.

(k) Clause 10 which provides that Body Corporate decisions in relation to matters arising under the Scheme shall be final except in relation to objections over a certain monetary value. Such objections must be made within 10 working days of receiving notice from the Body Corporate and that on receipt of an objection, the Body Corporate will refer the matter to an arbitrator who shall determine the dispute under the Arbitration Act 1996.

(l) Clause 15.1 which provides that an owner's liability to contribute to the cost of repairs to common property is separate from the Scheme and is to be governed by the UTA72 and the relevant rules.

[18] After going out to tender based on Alexanders' plans and specifications the Body Corporate engaged Scope Projects Limited (Scope) to co-ordinate the remedial works. Scope's tender price was $3,656,250 and on 26 September 2007 the Body Corporate resolved to raise a float for 30 per cent of that amount, on a unit entitlement basis, to enable it to begin the necessary remedial work.

[19] To enable the Body Corporate to separate out the private and common repair costs, it engaged quantity surveyors, Yeomans Limited (Yeomans), to determine the demarcation between private and common property by reference to the Unit Plan. The Body Corporate then engaged Maltbys Limited (Maltbys) to allocate the costs incurred and paid as either "Body Corporate" or "private" line by line, on the basis Yeomans' delineation exercise.

[20] Under the arrangements established by the Body Corporate pursuant to the Scheme:

(a) invoices from contractors were sent to Scope who would in turn submit a monthly Progress Payment Claim (PPC) to Alexanders;

(b) from that information, Alexanders would create a Monthly Progress Claim Schedule (MPC), which was made available to the Body Corporate's Finance Sub Committee (FSC);[4]

(c) the FSC had 12 working days to challenge any aspect of the MPC. Changes were sometimes made as a result of this process;

(d) in the absence of any challenge, at the expiry of the 12 day period Alexanders would certify the claims on the MPC for payment;

[4] Membership of the FSC was open to any unit owner. One of the retail unit owners was a member.

(e) once that certification occurred, the MPC became binding on the Body Corporate to make payment of the certified amount to Scope;

(f) the certified MPC was also passed on to Maltbys. Maltbys would then create an Apportionment Detail Sheet (ADS) for each MPC based on the demarcation work undertaken by Yeomans; and

(g) the information contained in the ADS would be transferred to a Monthly Summary Sheet (MSS) which was a claims schedule that apportioned the relevant costs between private and common property.

[21] Further levies of $300,000 and $2.1 million (payable in three instalments) were imposed by the Body Corporate on its members on a unit entitlement basis in May and July 2008 respectively.

[22] But Mrs McDonald and some of the other retail unit holders refused to pay the levies. Their position throughout the period of the repairs was that because the retail units required far less in the way of remediation it was unfair to raise the initial levies on a unit entitlement basis. They said retail unit holders were being required (for the time being) to subsidise the owners of the residential units for repair costs that would ultimately be borne by them.

[23] On 23 September 2008 the Body Corporate resolved at its Annual General Meeting that:

(a) The secretary was authorised to recover any unpaid levies owed to the Body Corporate, whether through court proceedings or otherwise;

(b) Interest was to be levied at 10 per cent per annum on unpaid levies;

(c) All costs and expenses incurred in recovering any unpaid levies were to be recovered from the proprietor as a debt on an indemnity basis;

(d) That levies would be on a unit entitlement basis;

(e) Common/private apportionment would be done at the end of the repair project and that this apportionment would deal with the apportionment of consultancy fees;

(f) Levies would be retrospectively corrected for private "recharges".

[24] On 8 October 2008 the Body Corporate received a notice of objection from the defendants (under cl 10.2 of the Scheme) relating in particular to the aspects of the September resolution detailed in [23](d) to (f) above. The grounds for the objection were that the resolution was unlawful and *ultra vires* the Scheme or, alternatively, "unfair and inequitable".[5] The dispute was referred to arbitration before Mr Tomas Kennedy-Grant QC.

[25] Although an argument was advanced that Mr Kennedy-Grant had no jurisdiction over the dispute (essentially because it related to a Body Corporate resolution which, the Body Corporate said, was something prior to the matters governed by the Scheme), that argument was rejected by him.

[26] In terms of the substance of the objection, Mr Kennedy-Grant found that the September resolution was not contrary to the Scheme and was valid. However, he agreed with CIL that an aspect of it was "unfair and inequitable" because, in requiring them to pay levies on a unit entitlement basis with apportionment occurring at the end of the project, the Body Corporate was forcing them in the meantime to meet some of the costs of private repair work undertaken on the residential units.

[27] After taking into account certain practical matters, Mr Kennedy-Grant said that the effect of this finding was that:

(a) There should be a monthly apportionment of contractors' repair costs on the basis that each unit owner should be liable to pay only

[5] Although the terms of the objection did not make it clear, it seems that the unfairness/inequity claim was made on the basis of s 43 and possibly s 33 of the UTA72 and rr 3.8 and 38. The Scheme itself does not refer to the concepts of fairness and equity.

(i) that unit owner's unit entitlement of the percentage of common property repair costs incurred in the month to which that apportionment relates; and

(ii) any private property repair costs incurred in that month in relation to that unit owner's unit;

(b) Any unit owner whose share of common property repairs costs and private property repair costs in relation to his unit at the date of any monthly apportionment exceeds the amount then held to that owner's account by the Body Corporate, should be required by the Body Corporate to make good the short-fall;

(c) If any unit owner's account is in credit after any monthly apportionment, the amount in credit should be held by the Body Corporate in trust against the possible liability of that unit owner to pay future levies;

(d) There should be a final accounting and apportionment at the conclusion of the repair of the Body Corporate's building;

(e) The Body Corporate should continue to charge unit owners for their respective shares of consultants' charges on a unit entitlement basis until the completion of repairs at which stage an apportionment similar to that directed to be carried out on a monthly basis in respect of contractor's charges, should occur.

[28] There was further disagreement between CIL and the other unit holders about the meaning of Mr Kennedy-Grant's award, and in particular whether it retrospectively invalidated the Body Corporate's earlier levies based on unit entitlement. Clarification from the Arbitrator was sought. In his Second (Final) Award dated 21 December 2008, Mr Kennedy-Grant said:

> It is, in my view, clear from a careful reading of my First (Partial) Award that the levies were valid but that the decision regarding apportionment contained

> in the impugned resolution was objectionable ... However, I made no express finding to that effect.
>
> I should have.
>
> I do so now.

[29] He went on to state that:

> I have struck down the apportionment provision of the resolution of 23 September 2008 but have upheld the levies of 26 September 2007, May 2008 and July 2008. The result is that the Body Corporate are entitled to recover from all members the amounts levied but is obliged to apply those amounts in the manner directed in my First (Partial) Award rather than as provided for in the resolution of 23 September 2008.

[30] But the difficulties for the owners of the Ridge were far from over. At about the time of the arbitration the remedial work done on the building revealed further, structural, problems. In effect, it was found that the structure was not compliant with the relevant seismic standards and, as a consequence, the scope of the repairs required substantially increased.[6]

[31] The defendants maintained their refusal to pay the levies, notwithstanding Mr Kennedy-Grant's statement that "the Body Corporate are entitled to recover from all members the amounts [previously] levied". This refusal posed a significant problem for the Body Corporate which, by early 2009 date, was having difficulties paying its contractors. The Body Corporate issued CIL with a statutory demand under s 289 of the Companies Act for the unpaid levies.

[32] On 1 April 2009, Mr and Mrs McDonald decided to place CIL in voluntary liquidation and Mr van Delden was appointed as one of two liquidators. There were three creditors of the company: Westpac (being a secured creditor), MML Consumer Products Limited (a company also owned by Mr and Mrs MacDonald) and the Body Corporate. Mr van Delden continued to pay the mortgage and the ordinary Body Corporate levies, it appears, from rent received from the lease of retail unit 6.

[6] As I understand it, the application of the Scheme to the apportionment of the costs associated with those structural repairs meant that the costs were entirely or almost entirely borne by the residential unit holders because the structural aspects of the building were private property.

[33] On 18 May 2009, there was an EGM of the Body Corporate. The minutes of that meeting note that:

> The body corporate has 3 owners who are unable or unwilling to pay levies totalling $750k. The remaining owners owe $1m in raise levies and if the body corporate could have this paid immediately it would cover the current funding problem.
>
> Some owners had already indicated an ability to assist with extra funds over and above their levies to ensure funding to completion if appropriate mechanisms for security and repayment can be found. P Crotty has carried out preliminary research into finding funding and confirmed that the body corporate could borrow for the common repair costs, which are currently estimated at $1.7m including legal and consulting fees. In addition all owners would have to agree to support this course of action.
>
> The committee is to research the funding issue further and bring proposals back to the body corporate as soon as practical for consideration. It was agreed to co-opt Mr P Crotty to assist the committee in resolving any potential funding shortfall and to preparing the required documentation to allow for lending to the body corporate. This will require further consideration by a general meeting.

[34] The minutes also record that the Committee had "indicated" that future levies would most likely be imposed on the following bases:

(a) The costs of private property repairs would be invoiced to the appropriate unit as the schedules are received from Maltbys;

(b) Costs of common property would be levied on all units on the basis of unit entitlement;

(c) Consultancy costs and legal costs would be levied on the basis of unit entitlement.

[35] It will be noted that the last item represented a departure from the Body Corporate's previous position and, in particular, the position as it was understood at the time of the arbitration.

[36] Overall, during the period of the repairs, Scope issued 27 progress claims to the Body Corporate and, in accordance with the process I have described above, these claims were scrutinised by the FSC and then certified by Alexanders and

apportioned by Maltbys on the basis of the Yeomans' demarcation report. Although it was open to any of the defendants to participate in the FSC's consideration and approval of the invoices, they did not do so.

[37] The Maltbys' monthly summaries were then provided to Crockers Property Management Ltd (Crockers) which was then the Body Corporate Secretary. From these reports, Crockers prepared what was known as the "Final Wash-up Calculation" (FWC). The FWC (which separately included consultants' and legal costs, apportioned on a unit entitlement basis) formed the basis for the final levies that were sent to unit holders. The FWC was approved by the Body Corporate on 2 August 2010.

[38] It is the unpaid portions of the FWC levies sent to the defendants that form the basis of the present claims by the Body Corporate against them. All other unit holders have paid the final levies.

[39] The Crockers' employee who was most intimately involved in preparing the FWC, Mr Tiller, has since left New Zealand. It appears that some of his working papers and certain invoices cannot now be located. It is the resulting unexplained gaps and absences that underlie aspects of the defendants' defence to the claims. Nobody from Crockers was called as a witness during the hearing.

[40] Mr van Delden rejectd the Body Corporate's claim against CIL for the levied amount. Subsequently he has undertaken a detailed analysis of the FWC and of the underlying Schedules and invoices. Extensive interrogatories were asked and (insofar as was possible) answered. It is not in dispute that some invoices have not been able to be located, that aspects of the FWC remain unexplained and there are some arithmetical errors. However for the purposes of the trial, an audit of Maltbys' apportionment and the FWC was conducted by a Chartered Accountant, Mr Anthony McCullagh. While noting that it was not now possible to reconcile all aspects of the FWC on a line by line basis, Mr McCullagh concluded that, overall, it was based on a robust and reasonable process whose outcome could, in general terms, be relied on.

[41] On 1 October 2010, Mr van Delden issued a notice disclaiming any interest in retail unit 6. It can be noted in passing that this act appears to be on its face inconsistent with the fact that CIL has continued to pay standard administrative levies and to meet mortgage payments in relation to that unit.

[42] It is against that factual background that I turn now to consider the merits of claims and the affirmative defences raised.

Prima facie validity of the FWC levies

[43] Before turning to the specific issues raised by the defences, the starting point appears necessarily to be whether the final levies based on the FWC were prima facie lawful, in the sense of being intra vires the s 48 Scheme. In my view, they were not. More particularly:

(a) By cls 2.3(i) and 4.2(a) of the Scheme, the Body Corporate was authorised to employ suitably qualified advisors to determine the final cost of repairs and to allocate or apportion those costs both as between individual units for private repairs and as between private and common property repairs;

(b) By cl 2.3(k), the Body Corporate could delegate any of its own powers to such advisors for the purpose of effectively progressing the repairs;

(c) By cl 15.1, the Body Corporate or its advisors could require owners to contribute to the costs of common property repairs on a unit entitlement basis;

(d) By cl 6.1, the Body Corporate or its advisors could determine liability for private property repairs by reference to each owner's title as recorded in the unit plan;

(e) By cls 4.2(a), (b) and (c), the Body Corporate could levy owners to meet the costs of repairs in such in amounts as the Body Corporate from time to time determined and to take the necessary steps to recover any unpaid levies; and

(f) By cl 4.2(g), the Body Corporate or its advisors could determine what refunds were payable to an owner and when they should be made and by 7.4 refund and make adjustments to owner accounts reallocation.

[44] I record at this point that, while there may once have been an issue about the timing of any recharging or refunding on the basis of apportionment:

(a) Mr Kennedy Grant held that the Body Corporate's resolution to reapportion at the conclusion of the repairs did not breach the s 48 Scheme;

(b) That issue is, in any event, of historic interest only.

[45] In my view the FWC and the levies that were based upon it are properly to be regarded as the legitimate product of the exercise of the authority conferred on the Body Corporate by the Scheme. The merits of the defendants' defence will therefore necessarily turn therefore on whether (and the extent to which) they are entitled either:

(a) to contend that a different process should have been followed; or

(b) to go behind the FWC itself.

Should the Body Corporate have apportioned the repair costs on a "substantial benefit" basis under s 33 of the UTA72 and/or rr 3.8 and 38?

[46] The issue raised by this aspect of the defendants' defence can usefully be divided into two parts:

(a) whether, in light of the settlement of the s 48 Scheme, there is any room for s 33 and the relevant Body Corporate rules to apply; and

(b) if such room exists, whether s 33 and/or the rules should have been applied by the Body Corporate in the way that the defendants' now contend.

[47] Each will be considered in turn.

Does the Scheme leave room for s 33 and/or rr 3.8 and 38?

[48] I begin by setting out s 33 and the two rules relied on by the defendants. Section 33 provides:

> **33 Recovery of money expended for repairs and other work**
>
> (1) Where the body corporate does any repair, work, or act which it is required or authorised by or under this Act or by or under any other Act to do (whether or not the repair, work, or act is done pursuant to any notice or order served on it by a local authority or public body) but the repair, work, or act is substantially for the benefit of one unit only, or is substantially for the benefit of some of the units only or benefits one or more of the units substantially more than it benefits the others or other of them, any expense incurred by it in doing the repair, work, or act shall be recoverable by it as a debt in any Court of competent jurisdiction in accordance with the following provisions -
>
> (a) So far as the repair, work, or act benefits any unit by a distinct and ascertainable amount, the proprietor at the time when the expense was incurred and (subject to the provisions of section 36 of this Act) the proprietor at the time when the action is instituted shall be jointly and severally liable for the debt; or
>
> (b) So far as the amount of the debt is not met in accordance with the provisions of paragraph (a) of this section, it shall be apportioned among the units that derive a substantial benefit from the repair, work, or act rateably according to the unit entitlements of those units, and in the case of each such unit the proprietor at the time when the expense was incurred and (subject to section 36 of this Act) the proprietor at the time when the action is instituted shall be jointly and severally liable for the amount apportioned to that unit:
>
> Provided that, if the Court considers that it would be inequitable to apportion the amount of the debt in proportion to the unit

> entitlements of the last-mentioned units, it may apportion that amount in relation to those units in such shares as it thinks fit, having regard to the relative benefits to those units.

[49] Rule 3.8 provides that any levy imposed on unit holders to recover the cost of repairing and maintaining the common property:

> ... will be made in proportions differing from the allocated unit entitlements where a levy calculated strictly in accordance with allocated unit entitlements would be unfair to one or more proprietors having regard to the fact that those costs have been incurred for the substantial benefit of one or more units ... and may be made without the necessity of making an application pursuant to section 33 of the Unit Titles Act 1972

[50] Rule 38 provides that where, in the opinion of the Body Corporate, it is necessary to undertake (inter alia) any repair work to the common property which –

> ... is substantially for the benefit of one unit only, or is substantially for the benefit of one or more of the units than for the benefit of the others of them, the body corporate may apportion the amount payable to the proprietor or any unit or units having regard to the relative value of such work notwithstanding that the amount so apportioned may be greater or less than the unit entitlement assigned to that unit or those units, without the necessity of making any application pursuant to section 33 of the Unit Titles Act 1972; provided however that this rule shall be without prejudice to the rights of any proprietor pursuant to that section.

[51] Although the issue was not directly raised by either counsel, it is difficult to see how each of these rules is not ultra vires. I say that because they purport to confer on the Body Corporate more power than is conferred on it by s 33 itself. Moreover the rules appear to be intended to authorise the Body Corporate to levy for repairs to common property other than on a unit entitlement basis, contrary to s 15(2)(c) of the UTA72.[7] For both these reasons the rules seem to me to be in breach of the proviso to s 37(5) which states that:

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[7] Section 15(2) provides:

> 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.

> ... 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 ...

[52] It is difficult to see how the powers apparently conferred on the Body Corporate by these rules can be said to be incidental to the Body Corporate's powers under the UTA72. The rules are not merely facilitative, administrative or operational in nature. Rather, as I have said, they purport to expand or increase the Body Corporate's statutory powers.

[53] But whether or not the rules are ultra vires may, however, ultimately be immaterial. That is because I consider that neither s 33 nor the rules could apply in the face of the s 48 Scheme that governed the remediation of the Ridge. In my view, that is a conclusion that can be drawn both as a matter of principle and also from the terms of the particular Scheme itself.

[54] As far as the "in principle" argument is concerned there is, I think, merit in the view that s 33 and s 48 are mutually exclusive. There is support for that conclusion to be gleaned from remarks made by the Court of Appeal in *Tisch v Body Corporate 318596* where Wild J (for the Court) said:[8]

> [25] Within the Act, s 48 seems to sit alone. It appears in Part 3, containing miscellaneous provisions. Section 48 is not expressly linked to any other section in the Act. In particular, it contains no reference to ss 15 and 16 which prescribe the duties and powers of the body corporate. The duties subject to the provisions of the Act include those imposed on the body corporate by its rules. The repairs, control, management and administration duties of the body corporate relate to "the common property". *There is no cross-reference to s 33, which enables the body corporate to recover money it expends on repairs and other work. There is no indication in s 33 or in s 48 as to when the one section, rather than the other, is appropriately employed.*
>
> [emphasis added]

[55] And the footnote to the penultimate sentence of [25] states:

> Section 33, **Recovery of money expended for repairs and other work**, is not an issue in this case. Counsel agreed it does not fit a "leaky building" situation. Rather, it provides a mechanism to reallocate repair costs after they have been incurred, and are thus known. It contemplates: i) a levy; ii) repairs; iii) reallocation of the cost of those repairs (counsel termed this a

[8] *Tisch v Body Corporate 318596* [2011] NZCA 420; [2011] 3 NZLR 679.

> "back end adjustment") if the repairs substantially benefit some unit(s) more than another(s). The way in which the New South Wales equivalent of s 33 had been used was the issue in *Jacklin v Proprietors of Strata Plan No. 2795* [1975] 1 NSWLR 15.[9]

[56] Mr Steele understandably submitted that this footnote recorded the tenor of counsel's submissions in that case rather than the definitive view of the Court itself. Strictly speaking that must be correct, although equally it seems doubtful that the Court would have gone to the trouble of noting the submission if it had profoundly disagreed with it.

[57] As well, it seems to me that a Scheme will only be settled under s 48 in circumstances that involve some kind of crisis that:

(a) warrants the Court approving a specific departure from the Act; and

(b) requires guidelines governing the manner of its resolution.

[58] In circumstances of that kind it would be decidedly odd if the possibility of some further, but unknown departure from the UTA72 under s 33 remained at large.

[59] That said, however, it must be accepted that in the present case the terms of the Scheme itself arguably admit the possibility that s 33 could still be applied. In particular, cl 4.2(f) provides that the Body Corporate will generally have the same levy recovery powers under the Scheme as it has under the UTA72 for the recovery of levies for repairs and maintenance to common property. Section 33 is undoubtedly such a recovery power. Similarly, cl 15.1 provides that an owner's liability to contribute to the cost of repairs to common property is separate from the Scheme and is to be governed by the UTA72 and the relevant rules.

[60] But the difficulty with a literal application of these clauses is that the Scheme is principally concerned with the levying/recovery of repair costs and their interim and final apportionment, both as between unit holders and also as between private

[9] With the greatest of respect to the Court of Appeal my own reading of *Jacklin* does not indicate that a provision equivalent to s 33 was at issue. Rather, the issue was whether (absent such a provision) the Body Corporate had the power to decline to treat all common property in the same way and to require all unit holders to contribute to its maintenance other than on a unit entitlement basis. So far as I can ascertain the relevant NSW legislation did *not* contain a provision such as s 33.

and common property. To suggest or require that the Body Corporate should also conduct a separate, and differently based, exercise in relation to common property under s 33 would be not merely to undermine this fundamental aspect of the Scheme but to render its operation largely nugatory.

[61] It seems to me that the above analysis necessarily applies equally to rr 3.8 and 38. Accordingly, even if they are not ultra vires, they cannot in my view be applied in the context of the s 48 Scheme.

If there is room for s 33 and/or the rules should they have been applied by the Body Corporate in this case?

[62] If I am wrong in my conclusion that the existence of the Scheme precludes the operation of s 33 in the case of the Ridge, the issue becomes whether the Body Corporate was somehow bound to apply it in the instant case.[10] Although Mr Steel submitted that it was mandatory for the Body Corporate to do so, in my view the position is far from clear-cut.

[63] First, and as regards the contention that the wording of s 33 suggests that the Body Corporate is required to apply it, it seems to me that the words "*shall* be recoverable" dictates the mode of recovery, namely as a debt due to the Body Corporate through the court process. It does not require the Body Corporate to take such recovery action under the section.

[64] The discretionary nature of a decision to recover under s 33 also flows from the fact that it would necessarily be predicated on the Body Corporate's evaluation as to whether or not one or more unit holders have substantially benefitted more than others from the relevant repairs. And in the present case, the tenor of the Body Corporate's evidence is that that was not, in fact, its view.

[65] Secondly, there is room for doubt about whether s 33 applies at all to the recovery of costs relating to repairs to common property. That appears to have been

[10] I do not consider the potential operation of rr 3.8 and 38 here because to the extent they confer wider powers or more extensive obligations on the Body Corporate than s 33 they must, I think, necessarily be ultra vires.

the recent (obiter) view of Duffy J in *St Johns College Trust Board v Body Corporate 197230*.[11] After noting that a body corporate's statutory responsibilities might in some cases extend to the repair of private property, Her Honour said:

> [63] ... In such circumstances, s 33 provides the body corporate with authority to recover the repair costs from the unit holder. That s 33 sits with s 34, which allows for similar recovery where the repairs are due to the fault of persons connected with the repaired unit, provides further support for this reading of s 33. In this way, the ability of the body corporate under s 33 to recover costs according to the substantial benefit enjoyed by the subject unit holder/s is consistent with the interpretation applied in *Tisch* to s 48.
>
> [64] Thus, it does not necessarily follow that s 33 allows recovery of repair costs for common property based on a cost-benefit analysis of which unit holder substantially benefits from the repairs. I consider, therefore, that the parties' interpretation of the scope of s 33 is too broad.

[66] A somewhat less restrictive approach has, however, been signalled (if not applied) in Australia. I was referred in particular to one decision in which the Victorian equivalent to s 33 was squarely at issue: *Simons v Body Corporate Strata Plan No 5181*.[12] That case was concerned with repairs required in a strata-titled building as a result of water damage to common property that effectively formed part of the walls of one particular unit. One of the arguments with which the Court was faced was that the expense incurred by the Body Corporate in undertaking those repairs should be recovered from the unit holder concerned on the grounds of substantial benefit. In that respect Lush J said:

> S 18 [the Victorian equivalent to s 33] contains some directions, relevant to the debate in this case, which cover two alternatives. The section is concerned with situations in which the body corporate performs repairs or other work which it is required or authorized by the Act to perform but those repairs do not inure for the benefit of all the units. It provides that in two cases the money expended by the body corporate can be recovered from particular unit holders. The first case is where the repairs or other work are substantially for the benefit of one unit only. In those circumstances the owner and in some situations successive owners of the relevant unit are made liable. The second case is where the repairs or other work are substantially for the benefit of some only of the units and in that case the owners or in particular cases the successive owners of the benefited units are liable for a defined proportion of the total amount.

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[11] *St Johns College Trust Board v Body Corporate 197230* [2012] NZHC 827.

[12] *Simons v body Corporate Strata Plan No* 5181 [1980] VR 103. Although there was some suggestion that *Jacklin v Proprietors of Strata Plan No 2795* [1975] 1 NSWLR 15 was a case involving the NSW equivalent to s 33, in my view it is not, for the reasons already given in footnote 10.

Broadly speaking the scheme of the Act appears to be that where neither of the situations envisaged by s18 exists the costs incurred by the body corporate fall to be distributed in accordance with the provisions of s 16(d).

The difficulty in this case arises from the fact that the southern boundary wall of the applicant's property has failed to keep out water and since, at least, 1977 she, having bought the property in 1975, has had repeated and at times serious trouble from damp and from the entry of water into her flat.

...

The third argument was that the repairs for which the order was sought were substantially for the benefit of one unit only and accordingly some declaration ought to be made invoking the provisions or providing the foundation for the operation of the appropriate part of s18.

...

Turning to [that] issue, whether any expense incurred by the body corporate will be expense incurred for the benefit of unit 27 only or perhaps unit 27 and the two units above it, Mr Habersberger's argument in effect is that the applicant bought unit 27, it has proved defective, when the defect is made good unit 27 will be the better and no other units, with the possible exception of the two above, will be affected. Therefore, he contends, the repair is for the benefit of either unit 27 only or for the benefit of three units only.

Mr Adams, while appreciating some procedural difficulties in the consideration of this question and accordingly limiting his submissions on the matter, was disposed to put the view that the maintenance of the common areas in a sufficient and habitable condition is one of the obligations under the Act of the body corporate and the incurring of expense by it in carrying out that obligation is not to be regarded as incurred for the benefit of one unit holder only.

The procedural difficulty which I just mentioned is one of parties. This difficulty would, I think, prevent me from declaring that anyone other than those represented before me benefited, and even a negative declaration that the applicant is not the only one to benefit would affect the rights of others though, of course, since they are not parties to these proceedings they would not be bound by any such declaration. ...

As at present advised I am not prepared to make a declaration, which is the only one that I could make in the presence of those who are now parties to the summons, that the applicant's unit is substantially the only one to benefit. While I am not prepared to make such a declaration, for reasons which I shall give in a moment, because of the difficulties of parties I feel that I cannot and should not make a futile declaration that her unit is not the only one to benefit.

My reasons for declining to say that the applicant's unit is the only one to benefit are that the defective exterior wall is not something which the applicant bought and which turned out to be faulty; it is something which all the unit owners bought and I think that, at any rate in relation to a problem of original construction or quality of units constructed in blocks as these are,

> the body corporate and, therefore, all the unit holders, has an interest in putting the property in an adequate functional condition.
>
> ...
>
> I emphasize that the views which I have expressed on the matters raised in this case, particularly the last observations on the third issue, are expressed in relation to the particular facts before me. This legislation is relatively new and solutions appropriate to areas of difficulty may develop slowly in the light of experience. I am concerned with making good defects in the original construction of the main structure of units built in a block. I would not take the same view of the question of benefit if, for instance, the defect was a defect occurring, in an area of common property, in fittings or equipment supplying a service to one unit only, for instance a blocked or leaking pipe.

[67] I am prepared to proceed on the basis that s 33 might authorise a body corporate to seek to recover common property repair costs other than on a unit entitlement basis. But even if that is the case the problems confronted by the Court in *Simons* also confront this Court.

[68] Neither counsel made submissions to me about whether the issue of "parties" raised by Lush J might also be an impediment to the defendants' position in the present instance. It is certainly the case that, in the event that I were to uphold any aspect of the defendants' defence, there would be adverse flow on effects for the other unit holders who are not, strictly speaking, parties to this litigation and who have not been heard.

[69] In particular, success for the defendants would not simply mean that the levies imposed on them by the Body Corporate were wrong, but that the levies imposed on all other unit holders were wrong as well. If, for example, I were to hold that a substantial benefit analysis under s 33 was required and would warrant a reduction in the defendants' levy, it is unlikely that it would simply be a matter of reapportioning an equivalent amount to other unit holders on a unit entitlement basis. By definition, the entire basis for the allocation of common property costs under the FWC would unravel and would need to be done again. Any assessment of relative or substantial benefit as between all unit holders would inevitably be as difficult as it would be contentious.

[70] And even if the "parties" issue did not present a further potential problem for the defendants, the present case (like Simons) is concerned with serious and

fundamental defects in "the original construction of the main structures of units built in a block".[13] More particularly I consider that:

(a) the weathertightness of the entire building is interlinked and indivisible;

(b) the proprietors all have a mutual interest in ensuring that the building as a whole is weathertight and kept in good repair. In the absence of expert evidence on the point,[14] it can reasonably be assumed that if part of the building is not weathertight then that would adversely affect the saleability and value of all units, regardless of whether they themselves are in fact leaky;

(c) each of the owners bought into the building as a whole, not just their individual unit;

(d) each owner must be taken to have bought into the building knowing, and on the basis, of the division between common and private property in the unit plan and knowing of their responsibility to contribute to the maintenance and repair of the common property as so defined;

(e) the sharing of common property repair costs on a unit entitlement basis necessarily contemplates that there may be an element of disproportionality and that prospect must also be taken to have been accepted when each owner bought into the Ridge.

[71] For these reasons, I conclude that even if:

(a) s 33 could operate notwithstanding the existence of the s 48 Scheme; and

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[13] Although as I understand it the residential units were constructed later than, and joined to, the retail units (which explains why the retail units were less leaky) it is in my view artificial to view a single unit titled structure as divisible along those lines.

[14] Compare the position in *St Johns College Trust Board v Body Corporate 197230* .

(b) there was not a "parties" problem;

it cannot be said that the Body Corporate was wrong not to seek to recover the costs of common property repairs from unit holders on a substantial benefit basis.

Is it open to the defendants to take issue with the inclusion of specific items as "common property" repairs?

[72] I have formed the view that this aspect of the defendants' defence also cannot succeed.

[73] At the outset I record that the allegation by the defendants that the balconies that adjoin and serve particular units were included as common property does not appear to have been borne out by the evidence. There remain, however, issues about other items of common property such as lifts and corridors which, the defendants say, should not be included because they receive no benefit from, and do not use, them.

[74] First, and in terms of principle, I have noted above that when Baragwanath J approved the s 48 Scheme for the Ridge he commented specifically on the apparent arbitrariness of aspects of the private/common divide in the unit plan for the building. The proposal and approval of the Scheme was therefore premised on an acknowledgement and acceptance of that.

[75] And the Scheme itself both contemplated and authorised an exercise of demarcation between private and common property. That exercise was undertaken by Yeomans based on the unit plan. But, because it was based on the unit plan, the outcome necessarily reflected the anomalies earlier noted by Baragwanath J. Although the defendants took issue with certain of these anomalies, they did not, as I understand it, allege that errors had been made by Yeomans in terms of their analysis of the unit plan.

[76] But even if the defendants had been able to establish that the Yeomans' demarcation exercise contained mistakes, I do not consider that would necessarily justify this Court interfering with the FWC and the levies that were based on it. That

is because in my view the Scheme contemplates and approves levying on the basis of a demarcation and allocation process that culminated in the FWC, and that unit holders would then be liable to pay those levies. The levies that were issued following a process that complied with the Scheme form the basis of the plaintiff's debt claim. It debt does not arise from the underlying contractors' invoices or the demarcation and apportionment exercises per se.

[77] Ultimately, therefore, I accept Mr Allen's submission that in a case involving a building with a multiplicity of owners, and repairs of considerable complexity and magnitude, a robust approach was required and that such an approach was authorised by the Scheme. It is neither possible nor desirable to revisit the material on which the levies were based on a line by line basis and indeed to do so would, in my view, undermine the very process contemplated and approved by the Scheme. While I accept that the position might be different if an obvious and significant error in the underlying processes had been identified, in my view no such error exists in relation to the private/common apportionment exercise. Rather, the evidence of:

(a) Mr Leightley (who is the owner of one of the residential units and one of the driving forces behind the repairs to the Ridge) about the detailed monthly reconciliation processes that actually occurred during the remediation; and

(b) Mr McCullagh (an accountant with considerable experience of building remediation in a Body Corporate context) who undertook an independent review of the FWC and concluded that the Court could be confident that the process was robust and the outcome was fair and reasonable;

satisfies me that the debt arising as a result of the levies cannot be disputed and the apportionment underlying the FWC (and the levies) should not be disturbed.

Should consultancy fees have been apportioned on a unit entitlement basis?

[78] This aspect of the defendants' defence raises somewhat different issues from those just discussed both because the Scheme does not specifically deal with consultancy fees and because apportionment of those fees was not undertaken as part of the Yeomans' demarcation exercise. Rather, as I have indicated, a decision was simply taken by the Body Corporate that all consultancy fees would be payable on a unit entitlement basis.

[79] It is not disputed that the Body Corporate changed its position about the appropriate allocation of the consultancy costs over time. I accept that at an earlier stage the defendants had a well-founded expectation that these costs would be apportioned between private and common property. That did not, of course, occur.

[80] I also accept that the effective attribution of all consultancy fees to common property repairs seems prima facie inconsistent with the 2008 arbitral award and in particular Mr Kennedy Grant's direction that:

> The Body Corporate should continue to charge unit owners for their respective shares of consultants' charges on a unit entitlement basis until the completion of repairs at which stage an apportionment similar to that directed to be carried out on a monthly basis in respect of contractor's charges, should occur.

[81] But no steps have ever been taken by either the plaintiff or the defendants to enforce the award (or to set it aside) and no arguments formally based on the Arbitration Act 1996 (the AA) were advanced before me. But in my view the requirement in art 35 of Schedule 1 of the AA that an Award be "recognised" precludes the plaintiff from relitigating the dispute that led to the arbitration or the terms of the Award.

[82] That said, however, the defendants' objection (which effectively formed the reference to arbitration) was not concerned with the way in which consultancy costs were to be apportioned. That was no doubt for the simple reason already given, namely that at the time of the arbitration the Body Corporate intended to allocate consultancy costs in the same way as contractors' costs (ie based on a

private/common property demarcation). The defendants instead took issue with the timing of the proposed apportionment. Likewise, Mr Kennedy-Grant was not required to, and did not, turn his mind to the question of how consultancy costs should appropriately be apportioned.

[83] Accordingly in my view only those aspects of the Award that relate to issues that were squarely before the Arbitrator are required to be "recognised" under art 35 of the AA. The apportionment of consultancy costs was not one of those aspects. The arbitral award did not, by itself, preclude the Body Corporate from revisiting that issue.

[84] The reasons for the change of approach by the Body Corporate were set out by Mr Leightley in his evidence. He said:

> 36. The professional consultants involved directly or indirectly with the Ridge's remedial work included:
>
> - Maltbys- Quantity surveyors
> - Alexander & Co. Building surveyors/Engineers
> - Dainty Alderton-Consulting engineers – Overseeing auditors of the Engineering Process
> - Brian Carter – Structural engineer
> - Copeland Consulting – Architects
> - Forensic and Industrial Science – analysis of wood and construction materials decay and failure
> - Morgan Coakle – Lawyers
> - Grove Darlow & Partners – Lawyers
> - Crombie Lockwood – Insurance Brokers
> - PW Jones/Christopher Taylor – Lawyers
> - New Zealand engineering Services – Lift repairs
>
> 37. Maltbys' work/time was to look at common and private apportionment of cost and to apportion between structural and weathertightness cost. Maltbys were largely forced on the owners by the defendants requiring the split between private and common costs to be calculated with precision from the outset. Not only did they expect that to occur in the final analysis, they went so far as to

> insist that it be applied to levies intended simply to raise a pool of money along the way for construction costs. It has to be remembered that these levies were simply estimates by experts for the purposes of establishing a pool of money to pay for repairs.
>
> ...
>
> 40. Alexander & Co were the principal consultants and engineers under the contract with Scope. Aside from their role as 'engineer' under the contract, they had a wide role liaising between consultants of all sorts who were not in any way dividing their time between common and private areas of the building or structural and weathertightness for that matter. They treated the building's structural elements and inter-linking components as a single whole. These components did not have a private and common distinction. For ultimate cost allocation purposes an outside wall was half common cost and half private cost but the wall was not seen as such by an engineer. The wall was simply an integral part of the building.
>
> 41. Dainty Alderton were the auditing engineers. They fall into the same category as Brian Carter, structural engineer. They had 'audit' roles. They had no interest in the distinction between common and private. They were interested in the structural components on the building.
>
> 42. Coupland Consulting Ltd was the architect. They drew plans for construction uninfluenced by the private and common property distinction.
>
> 43. Forensic and Industrial Science analysed the decaying wood and studied fungi and other materials. Again, this was uninfluenced by whether the piece of timber had been extracted from the common property side of the boundary line or the private property side of a boundary line.
>
> 44. The lawyers did not split their advice between common property and private property. Indeed, even when this Court made the original order that the costs of applying and obtaining the order were to be the costs of the Body Corporate, the Court did not distinguish between what might be common costs and what might be private costs. It could not.
>
> 45. New Zealand Engineering Services undertook lift repairs. While these are common property "shafts" the repairs were carried out uninfluenced by whether they might be working on common property or working on private property. It was simply an element of the structure which they were asked to repair.

[85] I have little hesitation in concluding that, in the circumstances of the repairs to the Ridge it would simply not be possible to conduct a line by line apportionment of the consultancy costs on a private/common basis. As I understood it, however, that is not what the defendants contend should have occurred. Rather, they said that

the consultancy costs should have been divided in a way that reflected the overall division between private and common property costs and the respective shares paid by each unit of those costs. The difference such an approach would have had on the outcome can, perhaps, best be understood by using CIL as an example.

[86] Under the unit entitlement approach adopted by the Body Corporate, the apportionment of CIL's share of the consultancy costs was ascertained as follows:

(a) The total amount of consultancy costs was $1,767,412;

(b) CIL's unit entitlement is 3.23 per cent;

(c) CIL was therefore levied for 3.23 per cent of the $1,768,412, namely $84,000.

[87] Under what I understand to be the proposed approach the maths becomes a little more complicated, as follows:

(a) The total repair costs for the Ridge (excluding consultancy and legal fees) was $6,816,626;

(b) Of that amount, $4,006,182 (59 per cent) was spent on private repairs and $2,810,445 (41 per cent) was spent on common property repairs;

(c) Consultancy costs should therefore similarly be divided:

(i) Private: 59 per cent of $1,768,412 = $1,043,363

(ii) Common: 41 per cent of $1,768,412 = $725,049

(d) CIL would then be liable to pay its unit entitlement share of the common property consultancy costs, ie $23,419 (3.23 per cent of $725,049);

(e) CIL's contribution to the private consultancy repair costs would then be pro rated to its own private repair costs thus:

(i) CIL's total private repair costs were $13,855 which equates to 35 per cent of the total private repairs costs of $4,006,182;

(ii) 35 per cent of the "private" consultancy costs is $3652.

(f) CIL's total required contribution to the consultancy costs would therefore be $23,419 + $3652, or $27,071. This is some $56,929 less than the amount it has been levied in that regard.

[88] The same analysis would yield broadly similar reductions for the other defendants.

[89] I accept that it would have been open to the Body Corporate to apportion the consultancy costs as now proposed by the defendants. There is nothing in the Scheme that appears directly to preclude that. Equally, however, there is nothing in the Scheme that requires apportionment on that basis and the decision taken that the consultancy costs should be borne on a unit entitlement basis cannot therefore be said to be invalid. Nor, for the reasons I have already given, do I consider that the defendants can invoke s 33 here. There is therefore no basis upon which I can properly interfere with this aspect of the levies.

Has there been inadequate accounting by the Body Corporate (in the form of missing underlying invoices or arithmetical errors) such that the debt has not been established?

[90] On the basis of the evidence at the hearing it must necessarily be accepted that:

(a) there are aspects of the FWC that cannot now be wholly explained;

(b) some of the underlying invoices are now missing; and

(c) the FWC contains arithmetical errors.

[91] I also accept and acknowledge that Mr van Delden has gone to a very considerable amount of trouble checking the underlying bases for the FWC. Equally, however, his endeavours (and the resulting queries and challenges) have cost the Body Corporate and the FSC members a considerable amount of further time and money, in circumstances where the defendants could have chosen to become involved in this kind of detail while the project was on foot (and prior to the FWC) by participating in the FSC. Ultimately, I do not consider that this ground of defence has merit. In summary:

(a) the foundation of the plaintiff's debt claim is the levies that were issued to the defendants based of the FWC;

(b) the FWC was, in turn, based on the process of monthly approvals and apportionments contemplated and authorised by the s 48 Scheme; and

(c) although the FWC may not be completely immune from challenge, I consider that a robust approach to such challenges is required, particularly in light of the evidence about the thoroughness of the underlying processes.

Was Mr van Delden right to reject the Body Corporate's claim against CIL on the grounds that it lacks the detail required by s 304 of the Companies Act.

[92] Section 304 of the Companies Act relevantly provides:

> (1) A claim by an unsecured creditor against a company in liquidation must be made in the prescribed form and must -
>
> (a) Contain full particulars of the claim; and
>
> (b) Identify any documents that evidence or substantiate the claim.

[93] Subsection (2) provides that the liquidator may require the production of a document referred to in subss (1)(b) and (3) provides that the liquidator may accept or reject a claim made under subs (1).

[94] It follows from my conclusions above that I do not consider that the Body Corporate's claim was rightly rejected by Mr van Delden in the present case. All that is required to substantiate that claim is the levy that has been raised in accordance with the s 48 Scheme. For the reasons already given my view is that the levies issued to the defendants did accord with that Scheme.

Conclusion

[95] For the reasons I have given the plaintiff's claims against all defendants succeeds. There shall be judgment:

(a) Against the first defendant in CIV 2010-404-7992 in the sum of $52,211.71 with interest at the rate of 10% per annum calculated from 10 May 2010 until the date payment is made.

(b) Against the second defendant in CIV 2010-404-7992 in the sum of $48,139.44 together with interest at the rate of 10% per annum calculated from 10 May 2010 until the date payment is made.

[96] As regards CIL I make orders:

(a) Directing the Liquidators to admit the plaintiffs claim for unpaid levies;

(b) That the plaintiff's costs in this proceeding are to be a cost of the liquidation.

[97] Costs follow the event. Memoranda may be submitted if agreement cannot be reached.

[98] Leave is reserved to counsel for the plaintiff to file a further memorandum in the event that any further or consequential orders in relation to the liquidators of CIL are required.

Rebecca Ellis J