

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV-2015-404-3079  
[2017] NZHC 1636**

UNDER Section 74 Unit Titles Act 2010

BETWEEN BODY CORPORATE 207650  
Applicant

AND KATY SPECK  
RYAN SPECK  
FIRST RESPONDENTS

CHERYL SINGH  
Sixteenth Respondent

ESTHA SIMPSON and EDWARD  
SIMPSON  
Thirtieth Respondents

Hearing: On the papers

Appearances: J McBride for 16th and 30th Respondents/Applicants  
T J G Allan for Body Corporate 207650 / Respondent

Judgment: 17 July 2017

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**JUDGMENT OF LANG J  
[on costs]**

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*This judgment was delivered by me on 17 July 2017 at 3.30 pm,  
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date.....*

[1] On 12 May 2017, I delivered a judgment in which I dismissed an application by the 16th and 30th respondents for an order declaring ultra vires two levies that the Body Corporate 207650 (the body corporate) had imposed on unit owners in the Richmond Terraces apartment complex.<sup>1</sup> The levies in question were approved by resolutions passed at extraordinary general meetings of unit owners in the complex.

[2] The parties have been unable to reach agreement regarding costs. I am now required to determine that issue on the basis of memoranda filed by both counsel.

[3] The body corporate seeks an award of either indemnity or increased costs. It therefore seeks costs totalling \$76,435.30. This sum includes disbursements of \$22,630.30 excluding GST. Of that sum, \$21,416.10 relates to invoices rendered by expert witnesses that the body corporate engaged in relation to the respondents' application.

[4] The respondents oppose any award of indemnity or increased costs. Although the memorandum filed by their counsel does not expressly confirm this, I take the respondents' position to be that any award of costs in favour of the body corporate should be calculated on a category 2B basis.

### **Background**

[5] On 8 August 2016, Gilbert J granted an application by the body corporate for orders under s 74 of the Unit Titles Act 2010 (the Act) approving a scheme to carry out repairs to both residential units and common areas within the complex.<sup>2</sup> The scheme reserved leave to all parties to seek further orders from the Court in the event that the implementation of the scheme gave rise to disputes.

[6] The 16th and 30th respondents took the view that two levies imposed by the body corporate related to work carried out on the complex fell outside the terms of the scheme approved by the Court. For that reason they filed an interlocutory application seeking an order that the levies were ultra vires.

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<sup>1</sup> *Body Corporate 207650 v Speck* [2017] NZHC 966.

<sup>2</sup> *Body Corporate 207650 v Speck* [2016] NZHC 1826.

[7] In my judgment I held that the scheme authorised the body corporate to undertake, and impose levies to meet the cost of, all work necessary to ensure the complex was remediated to a code compliant state.<sup>3</sup> I concluded that all of the work in respect of which the levies were imposed was done for this purpose. As a result, the work fell within the scheme approved by the Court, and the body corporate was entitled to impose levies on unit owners to meet the cost of the work. I therefore dismissed the application for orders declaring the levies ultra vires.

### **The arguments**

#### *The body corporate*

[8] In seeking indemnity costs the body corporate relies on rr 14.6(4)(e) and (f) of the High Court Rules and s 124 of the Act. Rule 14.6(4)(e) permits a party claiming costs to claim indemnity costs when such costs are payable under a contract or deed. Rule 14.6(4)(f) permits the Court to award indemnity costs where some other reason exists that justifies making such an order despite the principle that a determination as to costs should be predictable and expeditious.

[9] Section 124 of the Act provides:

#### **124 Recovery of levy**

- (1) A body corporate must fix the date on or before which payments of levies are due.
- (2) The amount of any unpaid levy, together with any reasonable costs incurred in collecting the levy, is recoverable as a debt due to the body corporate by the person who was the unit owner at the time the levy became payable or by the person who is the unit owner at the time the proceedings are instituted.

[10] The body corporate argues that the respondents' challenge to the levies amounted to a pre-emptive strike designed to prevent the body corporate from collecting the levies the respondents would otherwise be required to pay. As a result, the body corporate contends that it fell within the scope of s 124(2) and that indemnity costs are recoverable.

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<sup>3</sup> *Body Corporate 207650 v Speck*, above n 1, at [56].

### *The respondents*

[11] The respondents say this is anything but a clear case for indemnity or increased costs. They contend they utilised the leave reserved to them by the Court's order approving the scheme to seek clarity about the scope of the scheme and, in particular, whether further levies were justified having regard to the extent to which the cost of repairs had exceeded budget. They say they brought the application on a bona fide basis and produced expert evidence to support their contention that the body corporate had failed to control expenditure on the project.

### **Decision**

[12] I do not accept that the respondents filed their application in order to seek clarity about cost overruns. The wording of the interlocutory application makes it clear that the respondents were challenging the validity of the levies the body corporate had approved by resolutions passed at extraordinary general meetings of unit owners held on 25 October and 5 December 2016. That was the issue the Court was ultimately required to decide.

[13] For that reason I consider the body corporate is entitled to rely on the approach taken in several recent cases, including *Black v ASB Bank Ltd*.<sup>4</sup> In that case a debtor had challenged the right of a bank to enforce securities it held in respect of the debtor's property. The bank successfully defended the claim and then sought indemnity costs on the basis that it had a contractual right to such costs under lending documentation the debtor had signed. This permitted the bank to recover all costs and expenses associated with enforcement of the bank's rights. The Court of Appeal upheld an award of indemnity costs made in the High Court.<sup>5</sup>

[14] In *Body Corporate 162791 v Gilbert*, the Court of Appeal permitted a body corporate to recover indemnity costs from a defendant in a claim brought to recover unpaid levies.<sup>6</sup> In that case a body corporate sought to recover the levies from the receiver of a company that owned units in a complex administered by the body corporate. The Court of Appeal held that the receiver was liable to pay the levies,

<sup>4</sup> *Black v ASB Bank Ltd* [2012] NZCA 384.

<sup>5</sup> At [77]-[98].

<sup>6</sup> *Body Corporate 162791 v Gilbert* [2015] NZCA 185, [2015] 3 NZLR 601.

and that the body corporate was also entitled to recover its reasonable solicitor/client costs. The Court observed:

[77] Costs were sought in relation to the first cause of action relating to unpaid levies in the amended statement of claim. We do not consider that it is necessary to spell out the basis on which a costs claim will be advanced. The agreement which we have found to exist requires unit holders to abide by the body corporate rules. The body corporate rules provide for the recovery of solicitor/client costs. In such circumstances this Court can order a party to pay indemnity costs.

[78] Section 124(2) of the Unit Titles Act provides that the amount of any unpaid levy, together with any reasonable costs incurred in collecting that levy, is recoverable as a debt due to the body corporate. The use of the words “reasonable costs” does not compel the conclusion that solicitor/client costs cannot be recovered. Rather it compels the conclusion that it is only reasonable solicitor/client costs, objectively assessed, that can be recovered.

[15] More recently, Muir J took a similar approach in *Butcher v Body Corporate 324525*.<sup>7</sup> After referring to the approach taken in *Black v ASB Bank Ltd*, Muir J said:

[8] I accept that, in principle, the same approach should be available to pre-emptive proceedings designed to challenge the validity of an unpaid levy. Rule 14.6(f) of the High Court Rules indicates that the categories of a case where indemnity costs are appropriately awarded is not closed and the analogy with the availability of indemnity costs under contract or deed is in my view sufficiently close to recognise such recovery.

[16] Muir J found that the *Black* principles were not easily applied to the facts in *Butcher* because not all of the pleaded causes of action related to a challenge to, or the collection of, unpaid levies. This led the Judge to observe:

[15] In my view any application of the *Black* principle to the [Unit Titles Act] context should be carefully limited to pre-emptive strikes directed specifically to the collection of levies. Section 210 represents a useful safety valve against abuse by a majority of its dominant position and the Court should, I consider, be reluctant to impose the chilling effect of a potential indemnity costs order other than in the clearest case.

[17] In the present case no such difficulty arises. The respondents have unsuccessfully challenged the validity of levies imposed by the body corporate to meet remedial work that fell within a scheme approved by the Court. Adopting the approach taken in both *Black* and *Butcher*, I am satisfied that an award of indemnity costs is appropriate. The award of costs is to extend to all necessary disbursements,

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<sup>7</sup> *Butcher v Body Corporate 324525* [2017] NZHC 1061.

including the cost of obtaining reports and affidavits from experts in relation to the respondents' claim.

### **Result**

[18] I make an order that the respondents are jointly and severally liable to pay to the body corporate its reasonable solicitor/client costs, together with its reasonable disbursements.

[19] I do not fix the quantum of costs and disbursements at this stage. The parties are to endeavour to reach agreement on that issue. If they cannot, the costs sought by the body corporate are to be taxed under Subpart 2 of Part 14 of the High Court Rules. Rule 14.23 provides a right of review of the Registrar's decision.<sup>8</sup>

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Lang J

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<sup>8</sup> See in this context *Lewy v Lewy* HC Whangarei AP56/90, 15 June 1993.