IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-3079
[2017] NZHC 966

UNDER	Section 74 Unit Titles Act 2010
BETWEEN	BODY CORPORATE 207650 Applicant
AND	KATY SPECK RYAN SPECK First Respondents
	JILLIAN HOWARD GARY STEVENSON Second Respondents
	FRANCIS MCKEAN Third Respondent
	RUDRAKAGENDRAN SIVAPALAN AND POLIMA RUDRAKAGENDRAN Fourth Respondents
	WAYNE PATRICK VAN EYSSEN, NATASHA ANN VAN EYSSEN, JAMES PETER COSSLETT and ANTONIONETTE MARIA COSSLETT Fifth Respondents
	BACHAR EL-KHATIB and NAWAR ALWESH Sixth Respondents
	KARUNA CHAWLA and SAMIR CHAWLA Seventh Respondents
	LLEWELLYN NAIDOO and VALERIE NAIDOO Eighth Respondents
	MOHAMMED KHAN and ASHRAF KHAN Ninth Respondents

STEPHEN TELFER
Tenth Respondent

FAQIANG WANG and BING LIANG
Eleventh Respondents

ZOE FROST and ROB FROST
Twelfth Respondents

EDITH BALUYUT and ARMANDO BALUYUT
Thirteenth Respondents

HENRY CHESTER FERALES DELA CRUZ
Fourteenth Respondent

DAO HUNG LY and NHI MAI CHU
Fifteenth Respondents

CHERYL SINGH
Sixteenth Respondent

YOON CHEE and MAY CHENG
Seventeenth Respondents

YUNZHEN YI
Eighteenth Respondent

VIKRANT CHAUDHARY
Nineteenth Respondent

KWAI YIU LINDA LAM and KWAI YING JUDY LAM
Twentieth Respondents

EDWARD LINTON
Twenty-First Respondent

MARK IJSSELDIJK
Twenty-Second Respondent

MARY GILDER
Twenty-Third Respondent

GURBACHAN SINGH and INDERPREET KAUR
Twenty-Fourth Respondents

KAHUERA NEPIA and SHARON NEPIA
Twenty-Fifth Respondents

JENNIFER RANDONICH and AGNES RANDONICH
Twenty-Sixth Respondents

GEORGE DONNOLLY and AMY COLE
Twenty-Seventh Respondents

LEELA NAIDU
Twenty-Eighth Respondent

ESTHA SIMPSON and EDWARD SIMPSON
Thirtieth Respondents

WESTPAC BANKING CORPORATION
Thirty-Second Respondent

ANZ BANK NEW ZEALAND LIMITED
Thirty-Third Respondent

BANK OF NEW ZEALAND
Thirty-Fourth Respondent

ASB BANK LIMITED
Thirty-Fifth Respondent

MORTAGE HOLDING TRUST COMPANY LIMITED
Thirty-Sixth Respondent

TSB BANK LIMITED
Thirty-Seventh Respondent

Hearing:	2 and 3 May 2017
Appearances:	J McBride and D A Cowan for 16th and 30th Respondents/Applicants T J G Allan and S F Powrie for Body Corporate 207650/Respondent
Judgment:	12 May 2017

JUDGMENT OF LANG J
[on application for order declaring levies ultra vires]

This judgment was delivered by me on 12 May 2017 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

[1] This proceeding concerns 30 residential units collectively known as Richmond Terraces. The units are constructed in six separate blocks situated on Dawson and Chapel Roads, East Tamaki. The affairs of the complex are conducted through a body corporate incorporated under the Unit Titles Act 2010 (the Act). The body corporate comprises the owners of each of the units in the complex.

[2] In or about 2009, weathertightness issues became apparent in relation to the complex. The body corporate and unit owners then issued proceedings against persons they considered to have been responsible for failures associated with the construction of the complex. They settled that litigation in 2013 and obtained a sum of money as a result. They then resolved to repair the complex by way of a total reclad.

[3] On 8 August 2016, this Court granted an application by the body corporate for orders under s 74 of the Act approving a scheme to carry out the necessary repairs on the complex.[1] By that stage the repairs were well advanced, having been commenced in or about August 2015.

[4] The unit owners originally believed that the repairs would cost less than $6 million to complete. Very quickly, however, it became apparent that the final repair cost would be considerably greater. The total cost of repairs may now be in excess of $13 million.

[5] Twenty of the units have now been completed, and work is progressing in respect of the remaining ten. The body corporate will not be able to apply for a code compliance certificate until the repairs to all units have been completed.

[6] In order to meet the repair costs the body corporate first used the settlement monies raised through the litigation. It then applied funds raised following a levy of all unit owners in or about June 2015. This raised the sum of $1.774 million.

[7] In June 2015 the Committee appointed by the body corporate to oversee the repair work purported to impose a further levy on all unit owners to meet the

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1 *Body Corporate 207650 v Speck & Others* [2016] NZHC 1826.

ongoing cost of repairs. It transpired that the Committee did not have the power to impose a levy, and that this needed to be done by the body corporate itself. In October and December 2015 the body corporate resolved to issue a second levy in respect of all units by which it anticipated raising a further sum of $4.982 million.[2]

[8] The owners of two units in the complex, Ms Cheryl Singh (Unit 16) and Mr and Mrs Edward and Esther Simpson (Unit 30), do not accept that the body corporate had the power to raise the second levy. They contend that much of the work that has resulted in the increased costs was not authorised by the scheme approved by the Court. The scheme permitted the parties to the original application to return to the Court in the event that the implementation of the scheme gave rise to disputes. They have therefore filed the present application seeking an order declaring that the body corporate did not have the power to raise the second levy.

[9] The body corporate opposes the application. The application has been served on each of the unit owners but none has filed documents in support of or opposition to it.

The scheme approved by the Court

[10] Those sections of the scheme that are relevant to the discussion that follows are set out for convenience in an appendix attached to this judgment.

[11] Several points can be made about the scheme. The first is that it acknowledged that the actual scope of the works to be carried out under the scheme would not be known until remedial works were under way.[3] It is now well known that even invasive testing cannot reveal the true extent of damage caused by water ingress. For that reason the scheme in the present case included the repairs necessary to remedy both defects that had already been identified and damage that was discovered once remedial work commenced. In each case the repair work was

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2 During the hearing I was advised that a further levy in the sum of $2 million was discussed at a general meeting of the body corporate on 29 April 2017.

3 Clause 1.4.

to be carried out to a standard sufficient to enable the complex to obtain a code compliance certificate.[4]

[12] Secondly, the cost of the repairs was to be met by unit owners in accordance with the actual costs incurred in repairing individual units.[5] This scheme differed from others in which, for example, the cost of repairs is met according to unit entitlement.

[13] Thirdly, the cost of repairs was to be met by using the settlement sum obtained from the litigation supplemented by levies (Top Up Amounts) imposed on unit owners.[6] Where a unit owner failed to pay a levy, the body corporate could recover it as a debt due by the unit owner.[7] In that event the body corporate could meet any resulting shortfall by imposing a further levy on the remaining unit owners.[8] Before doing so, however, the body corporate was required to consider exercising its powers to borrow funds to make up the shortfall.[9] In either case, the funds raised or borrowed would be recovered from the unit owner in default.[10]

[14] The scheme also contained provisions emphasising that the repairs had to be undertaken as a single project in order to be carried out in the most efficient and cost effective manner.[11] The repairs were also to be undertaken in a co-ordinated manner, irrespective of whether they were in respect of common property or individual units.[12] Ordinarily, the body corporate would be responsible for work carried out to the common property and unit owners would be responsible for repairs required in respect of their units. To deal with this issue the body corporate was to be responsible for repairs to both the common property and individual units.[13]

[15] To give effect to this arrangement the owners appointed the body corporate, with the Court's sanction, as the agent of the owners "to do any things required to

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4 Clause 1.5.
5 Clauses 1.12, 3.2 and 6.2.
6 Clauses 1.12 and 6.1.
7 Clause 6.5.
8 Clause 6.4.
9 Clause 6.4(a).
10 Clauses 6.4 and 6.4(a).
11 Clause 1.7.
12 Clause 1.11.
13 Clause 2.1.

arrange, co-ordinate and complete the repairs".[14] Specific examples of the powers granted to the body corporate were then set out in Clause 3.1(a) to (i). The scheme also acknowledged it would be impractical to stop the repair process once the body corporate had entered into contractual arrangements for the repair work to be carried out.[15]

[16] The body corporate was permitted to delegate some of its powers and duties to the Body Corporate Committee. It could not, however, delegate the decisions set out in Clause 3.4. These included the power to raise and enforce payment of levies.

[17] Furthermore, the scheme ratified and confirmed all of the repair work the body corporate had already performed prior to the Court giving its sanction to the scheme.[16] It also recorded that after obtaining tenders for the repair work the body corporate had resolved to appoint Focus Remedial Limited (Focus) as the preferred contractor to carry out repairs.[17] It also stated that the repair costs had been estimated by a quantity surveyor, Kwanto Limited, and the estimate was set out in a Schedule annexed to the scheme. This stated that the estimated cost of repairs was $4.998 million.

The cost of the repairs increases

[18] The owners quickly became aware that the initial estimated cost of repairs was well off the mark. This was the result of several factors, some of which are interrelated.

Error in calculating provisional sums

[19] The successful tender priced the repair work at $4,998,884.06 plus GST. In part, this was a fixed sum tender. The tender also, however, allocated provisional sums for aspects of the repair work. A provisional sum is the tenderer's estimate of the amount that an aspect of the repair work will cost. It is subject to correction once the actual cost of the work is known. One of the items in respect of which the tender

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14 Clause 3.1.
15 Clause 1.8.
16 Clause 4.1.
17 Clause 7.1.

contained provisional sums was the replacement of timber found to have been damaged by water ingress. Those who submitted tenders were required to price this aspect of the repair costs on the basis that 80 per cent of the timber in each unit would need to be replaced.

[20] The successful tender was quickly found to contain a major error in relation to this issue. This occurred because the tender used an incorrect formula for pricing the replacement of damaged timber within the complex. The tender had taken the estimated quantity of timber to be replaced in respect of each unit and priced it on the basis of $1 per metre. By way of example, if a unit was estimated to require 48 metres of replacement timber, the tender provided a provisional sum of $48 in respect of the replacement timber for the unit. Regrettably, the body corporate's professional advisers did not pick up this major and seemingly obvious error until after the tender had been accepted. This immediately increased the estimated repair costs by more than $1.2 million.

Intertenancy walls

[21] Each of the blocks within the complex is constructed in a terrace house style with each unit sharing one or more common walls with adjoining units. These are known as intertenancy walls. Whilst carrying out the remedial work the Body Corporate Committee discovered that the intertenancy walls in the complex no longer meet the current fire standards. This became apparent in late 2015. The Body Corporate Committee then obtained an amendment to its building consent to replace the existing intertenancy walls with walls that met current fire safety requirements.

[22] This issue produced two consequences. First, work on the repairs needed to stop between December 2015 and February 2016 whilst the body corporate obtained the necessary amendment to its building consent to enable the intertenancy walls to be replaced. Secondly, the cost of repairs has increased by between approximately $720,000 and $966,000.

Damage to roof trusses

[23] It transpired that the water ingress damage to the two blocks in respect of which repairs are still in progress was much greater than anticipated. In particular, the damage to roof trusses in these blocks required the roof of each block to be replaced. It also created a delay between November 2016 and February 2017 as the body corporate obtained a further amendment to its building consent for this unanticipated aspect of the remedial work.

Extension of time claims

[24] The issues that arose in respect of both the intertenancy walls and the roof trusses has led to claims by the contractor for extra payments totalling more than $800,000 to reflect the delays that have occurred. These are being disputed but may well require the body corporate to pay a significant sum.

Other variations

[25] The cost has escalated further as a result of other variations to the original contract. Although these have not been itemised, the amount involved is significant. Some of these items remain in dispute and are yet to be resolved.

The argument for the applicants

[26] As I have already observed, the applicants contend that the scope of the remedial works has changed to the extent that it now goes well beyond the work that was subject to the scheme approved by the Court in August 2016. For that reason they say the body corporate has no ability to impose levies in respect of those works in reliance on the scheme approved by the Court.

[27] Before dealing with that submission I propose to refer, albeit relatively briefly, to other submissions advanced in support of the application. For the applicants, Mr McBride made wide ranging submissions designed to persuade me that the Court needs to intervene at this stage to protect the interests of unit owners as a whole. First, he submitted that the Body Corporate Committee responsible for overseeing the repair work had failed miserably in its responsibility to ensure the

repair work was undertaken in a cost effective and economical manner. In particular, he submitted that the Committee failed to impose adequate cost controls, and failed to adequately challenge or dispute claims for extra payment made by Focus.

[28] It is difficult, however, to see what motive the Committee would have had to spend the unit owners' money in a profligate manner. The Committee members were all unit owners themselves, and they stood to lose from such an approach in the same manner as the remaining owners. The fact that many items remain the subject of a dispute with Focus also tells against this submission.

[29] It is neither necessary nor appropriate for me to reach any conclusion in relation to these issues because they are not relevant to the present application. Furthermore, Clause 14.1 of the scheme leaves open the prospect that members of the Committee may be liable to unit owners for wilful misconduct or gross negligence. The manner in which the Committee has carried out its task may therefore yet need to be tested in another forum.

[30] Mr McBride also submitted that the Committee has failed to communicate with owners in an adequate manner. This meant the owners were effectively left in the dark regarding the extent to which costs had increased and the reasons why that occurred. Furthermore, Mr McBride suggested that unit owners may not even have been aware that the scheme was approved by the Court in August 2016. He pointed out that the body corporate resolved to apply for orders under s 74 at its annual general meeting on 18 February 2015. The Minutes of that meeting record that the body corporate also resolved to authorise the Body Corporate Committee and Body Corporate Chairperson "to take such further action as necessary and incidental to the above resolutions to enable the Body Corporate to make the said application to the Court".

[31] The application seeking orders under s 74 was filed by the body corporate's solicitors on 18 December 2015. There was then a delay caused by the need to serve the application on all unit owners. Over the next six months it became increasingly obvious that the actual cost of repairs was going to be well above the amount originally estimated in the successful tender. At its meeting on 20 June 2016 the

Body Corporate Committee noted that the required top up for all units had increased from $1.77 million to $6.4 million. The Minutes of that meeting also record:

> **8.0 SECTION 74 ORDER**
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> The hearing date for the Scheme had been enlarged as a result of difficulties effecting service. In light of the progress on matters to date it was queried as to whether or not the Body Corporate needed to expend further funds in regards to the Section 74 Scheme.
>
> **RESOLVED**
>
> **"That this be put on hold until further discussion with the owners."**

[32] Unit owners were sent a copy of these Minutes together with a memorandum from the body corporate manager dated 28 June 2016. As a result, Mr McBride suggested it was likely that unit owners would have been under the impression by July 2016 that the application for orders under s 74 was on hold. They would also have been under the impression that the issue was to be discussed at a meeting of owners. Despite this, the Minutes of the next general meeting of the body corporate on 10 July 2016 contain no reference to the s 74 application being discussed at that meeting.

[33] I accept Mr McBride's submission that unit owners may not have been aware in July 2016 that the Court was going to determine the s 74 application the following month. I therefore draw no inference either way from the fact that the s 74 application was neither supported nor opposed by any of the unit owners. However, minutes of meetings of the body corporate on 11 August 2016 and 5 December 2016 both refer to discussions relating to the orders the Court had made on 8 August 2016. Unit owners were therefore obviously aware that the orders had been made shortly after the event.

[34] More importantly, however, the issue of whether or not unit owners were aware that the s 74 application was about to be determined by the Court has no relevance to the decisions I am required to make. The orders made on 8 August 2016 remain in force until such time as they are set aside by this Court or the Court of Appeal. As a result, the body corporate retains the ability to levy unit owners for the cost of repairs undertaken pursuant to the scheme. It makes no difference for

present purposes whether or not the unit owners knew about the orders the Court made on 8 August 2016. Furthermore, the more general issue of whether or not the Committee communicated adequately with the unit owners is not a matter that relates to the issue of whether or not the body corporate had the power to impose the second levy.

[35] Mr McBride also submitted that unit owners have never had an informed opportunity to make a decision on what they should do once the repair costs began to escalate significantly. He contended that if they had been given that opportunity at an early stage, they may have resolved to abandon the repairs and to demolish the complex. That may have enabled them to emerge from the project with a more valuable asset and with much greater certainty as to cost. Mr McBride asks the Court to craft a solution that will enable the unit owners to now have a discussion that ought to have occurred long ago. This may result in the unit owners seeking further orders from the Court under s 74. That would permit disaffected unit owners to find out why the repair costs have escalated so much.

[36] Mr Allen for the body corporate disputes the alleged lack of opportunity for the unit owners to discuss the issues that have arisen. He points out that the escalating cost of repairs has been discussed at numerous general meetings of the body corporate held during 2015, 2016 and 2017.

[37] Mr Allen also points out that Ms Singh was a member of the Body Corporate Committee throughout the period when the increases in costs were coming to light. In addition, Ms Singh had suggested to the other members of the Body Corporate Committee in February 2016 that some owners were interested in the possibility of halting repairs and selling the land. At a meeting on 3 April 2016 the Body Corporate Committee also gave consideration to halting work on one block "given the rapidly shrinking gap between the cost to repair and the cost to rebuild".

[38] I consider this issue is likely to have been laid to rest at an Emergency Extraordinary Meeting of the body corporate held on 10 July 2016. The Minutes of that meeting show that Mr Paul Grimshaw, a solicitor whose firm specialises in leaky buildings litigation, told attendees that the owners should make it their priority "to

get on and get the complex fixed". Mr Grimshaw also "reinforced that you cannot suddenly stop" repairs, and that owners needed a code compliance certificate in order "to restore at least minimal value to the complex". I consider these comments are likely to have persuaded unit owners that stopping the repair works and/or demolishing the units was not a realistic or viable prospect.

[39] I accept Mr Allen's submission that the unit owners have had ample opportunity to consider their options. More importantly, Mr McBride's submission ignores three factors. First, the Court can only make a decision based on the application that the applicants have filed. The present application does not seek an order that the unit owners attend a meeting to consider their options. Secondly, it is now far too late for the unit owners to discuss what should happen to the complex. The repairs to twenty of the units have now been completed, and those to the remaining units are well advanced. Demolition and sale or rebuild are no longer viable options. Thirdly, the unit owners retain the ability to call a meeting at any stage if a sufficient number of them believe this will provide a meaningful forum for discussions. If those owners wish to file a new application for orders under s 74 they can also pass a resolution to that effect.

[40] Mr McBride next asks me to consider the position of unit owners who do not have the means to meet the levies the body corporate has imposed. I agree that this is likely to be a serious problem for some unit owners. As unpalatable as it may be, however, the predicament in which these owners now find themselves is a product of two factors. The first is that they agreed to enter into a form of property ownership in which the decisions made by a majority of unit owners can bind a dissenting minority. The second is that the cost of repairing damage caused by water ingress to an apartment complex such as Richmond Terraces is often likely to be far in excess of initial estimates.

[41] In reality, the only way in which this issue could now be addressed is for the remaining unit owners to assume responsibility for some or all of the costs incurred by unit owners who now cannot afford to meet their levies. That is a decision the unit owners would need to make themselves, and is not an issue with which the

Court can become involved. Furthermore, it would involve a different form of cost allocation than that to which all unit owners agreed at the outset.

[42] I consider that all of these issues fall outside the scope of the sole issue before the Court. This is whether the second levy relates to repairs or expenditure falling within the scope of the scheme approved by the Court.

Does the second levy relate to repairs or expenditure falling within the scope of the scheme approved by the Court?

[43] The settlement monies obtained from the litigation and the first levy were sufficient to fund the original cost estimate contained in the successful tender. The issue is whether the remaining expenditure to which the second levy relates was made in respect of work that fell within the scope of the scheme as sanctioned by the Court.

[44] The increased expenditure necessary to compensate for the error relating to the provisional sums clearly falls within that description. It relates directly to the quantities of timber needed to replace timber that had been damaged by water ingress. The error would always have been discovered eventually and the correct sum paid in accordance with the true value of the timber used in the remedial work.

[45] The position is not necessarily so clear in respect of the remaining expenditure. By way of example, Mr McBride submits that the increased expenditure in respect of the intertenancy walls fell outside the scope of the original works because it did not form part of the work referred to in the plan annexed to the scheme. He also submits that it is impossible on the material presently available for the unit owners and the Court to know whether this aspect of the work was necessary and/or incidental to the repairs. He suggests it may have been undertaken as a result of a decision by the Body Corporate Committee to voluntarily upgrade the complex to a current fire rating standard.

[46] The evidence from Mr David Clifton, an independent building surveyor engaged by the body corporate in October 2016, is that the Council required the building consent to be amended and the intertenancy walls rebuilt after it discovered

following stripout that the existing intertenancy walls did not comply with current fire safety standards. Mr Clifton does not expressly say, however, that the work was part of the remedial measures necessary to repair damage caused by water ingress.

[47] The present application is not a particularly satisfactory method of determining factual disputes such as this because it has proceeded as a defended interlocutory application in which deponents have not been cross-examined. This means it is difficult to assess the weight to be given to Mr McBride's argument that the Body Corporate Committee should have refused to do the work because s 112 of the Building Act 1991 prevented the Council from requiring the body corporate to undertake work that was not directly related to the repair work it was undertaking to address weathertightness issues.

[48] Whether the work fell within the scope of the scheme depends on how broadly the scheme is to be interpreted. If it is construed narrowly, the scheme would only sanction the work referred to in the Plan together with repairs in respect of damage discovered during the course of that work. Two factors persuade me that this would not be a correct approach. First, Clause 1.4 of the scheme expressly stated that the scope of works required to repair the complex will only become fully apparent once remedial works are actually commenced. This makes it clear that the repair of defects that are discovered once remedial work has commenced will fall within the scope of the plan. Secondly, Clauses 1.4 and 3.1(g) of the scheme demonstrate that the overall objective of the scheme was to ensure that the complex was restored to a state sufficient to achieve code compliance. This was no doubt highly important to all unit owners because without code compliance the value of their units would remain severely impaired. I therefore consider that the scheme extended to all work necessary to ensure that the complex reached a state where it could obtain a code compliance certificate.

[49] A broad interpretation of the scheme accords with the approach taken by the courts in other cases. In *Wheeldon v Body Corporate 342525*, for example, Muir J observed that the merits of one repair plan over another "are best determined by those who are affected by it and have to fund it, have personal knowledge of it, have participated in any discussions relating to it at a properly convened meeting of the

Body Corporate, and have decided accordingly".[18] In a similar vein, if the members of a body corporate decide upon a broadly worded scheme that reflects a desire to obtain a code compliant complex, the Court should interpret the scheme in a manner that accords with this purpose. It should not adopt an approach that frustrates the clear purpose of the scheme.

[50] This does not mean that the Body Corporate Committee was entitled to view the scheme as providing an open-ended authority to carry out work regardless of cost and regardless of whether it was necessary to deal with the weathertightness issues faced by the complex. To take an extreme example that I raised with counsel during the hearing, the scheme did not authorise the body corporate to build a tennis court and swimming pool even though that may have enhanced the ultimate value of the complex. Work carried out for those purposes could not have been recovered through the top up levies that have been imposed on unit owners under the scheme.

[51] I consider the criterion to be used in determining whether work falls within the scope of the scheme is whether the work in question was necessary to bring the complex to a state of code compliance. Applying that approach, if the Council required the intertenancy walls to be rebuilt to meet current fire safety standards it is likely that failure to take that step would result in the Council declining to issue a code compliance certificate. The Body Corporate Committee was entitled to adopt a conservative approach in relation to issues such as this. If it believed that failure to comply with the Council's directive could result in code compliance not being achieved, it was entitled to err on the side of caution. The unit owners would obviously not have welcomed the Body Corporate Committee saving money by not bringing the intertenancy walls up to current standard but thereby failing to achieve code compliance. The cost of replacing the intertenancy walls is undoubtedly significant. Present estimates are that it will cost between $720,000 and $966,000. I consider, however, that this work falls within the scheme.

[52] I take the same approach in respect of any expenditure the body corporate may be required to make as a result of the extension of time claims. As I have already recorded, these arise out of the delays caused by the need to obtain

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[18] *Wheeldon v Body Corporate 342525* [2015] NZHC 884 at [73].

amendments to the building consent. These were required to authorise the work necessary to deal the issues arising out of the non-complying intertenancy walls and the replacement of damaged roof trusses. Any failure by the Body Corporate Committee to obtain the required building consents was likely to have jeopardised code compliance. The repairs to the roof trusses were also rendered necessary in any event because of damage caused by water ingress. Expenditure in relation to the extension of time claims is therefore within the scope of the works covered by the scheme.

[53] On balance I consider the increased costs caused by the remaining variations also form part of the work undertaken to ensure that the complex is restored to a standard sufficient to bring the complex to a state of code compliance. There is no suggestion in the evidence that the Body Corporate Committee has elected to voluntarily undertake work that will result in the overall upgrading or betterment of the complex. It has not, for example, installed double glazing or new ranch sliders to bedroom suites as was the case in *Wheeldon v Body Corporate 342525.*[19]

[54] Instead, the tenor of the evidence for the body corporate is that it has been required to deal with a seemingly endless flow of problems that have emerged as it has undertaken the remedial work. By way of example, it became necessary to spend approximately $281,000 on drainage works. Although drainage works may not have related directly to repair damage caused by water ingress, drainage issues are nevertheless subject to strict regulatory oversight. There are a range of other similar works that have also required further I am therefore satisfied that such works fall within the scheme because they are necessary to bring the complex to a state in which it will be not only weathertight but also code compliant.

Conclusion

[55] With the benefit of hindsight, it may have been better for the unit owners in this particular complex to have decided at the outset, or shortly after they realised the likely scope of repairs, to demolish the complex and sell the land or rebuild. Once they committed to the repair project, however, it no doubt became extremely difficult

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[19] *Wheeldon v Body Corporate 342525* [2015] NZHC 884 at

for unit owners to ignore the wasted costs that would result from a decision to demolish the complex.

[56] For the reasons I have given, however, I am satisfied on the balance of the probabilities that all of the work the body corporate has carried out has been directed towards the objective of ensuring that the remediated complex is constructed to a standard that will result in code compliance. As a result, it falls within the rubric of the scheme approved by the Court, and the body corporate is entitled to levy unit owners to meet the cost of the work.

Result

[57] The application for orders declaring the second levy imposed by the body corporate on unit owners is dismissed.

Costs

[58] The body corporate has succeeded and is entitled to costs. If the parties cannot reach agreement on this issue counsel for the body corporate is to file a brief memorandum (ie no more than five pages in length) dealing with costs and I will then give directions for the filing of memoranda in response and reply.

Lang J

Solicitors:
Grove Darlow & Partners, Auckland
Doug Cowan, Auckland
Counsel:
J McBride, Auckland

APPENDIX

SCHEME UNDER SECTION 74 UNIT TITLES ACT 2010

1. **Preamble**

1.1 This is a Scheme governing remedial works to the buildings that have been built on the base land for Body Corporate 207650 ("**the Body Corporate**) and known as Richmond Terraces ("**the Building**").

1.2 An assessor's report prepared in or around 2009 by an assessor contracted by the Chief Executive of the Department of Building and Housing for the Weathertight Services Group confirmed that the Building was built with design and construction defects. The report sets out the necessity of extensive repairs to the Building.

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1.3 The scope of works that will ultimately be required to repair the Building will only become fully apparent when remedial works are actually commenced.

1.4 Subsequent to the Assessor's Report, CoveKinloch has prepared plans for the proposed remedial works ("**the Plan**"), a copy of which is annexed hereto marked "**A**". The remedial works outlined in the Plan, along with any works required to repair any as yet undiscovered damage sufficient to obtain a Code Compliance Certificate for the Building (together, "**the Repairs**"), are those works intended to be governed by this Scheme.

1.5 The repairs will require work to be done to common property and all of the units (including principal and accessory units) in the Building.

1.6 In order for the Repairs to be conducted in the most efficient and cost effective manner they must be undertaken as a single project and, as such, require the sanction of the Court pursuant to this Scheme.

1.7 Once the Body Corporate has entered into a contract for the completion of the Repairs in accordance with the provisions of this Scheme and this Scheme is sanctioned by the Court, it will be impractical to stop the process as the Body Corporate will be committed to having the Repairs completed.

1.8 The cost of the Repairs, subject to the determination of the cost of any as yet undiscovered damage, has been determined by a tender process and will be funded by the settlement sum, and additional funds required ("**the Top-Up Amount**").

1.9 It will; be necessary to raise the Top-Up Amount for the Repairs from each of the registered proprietors of the units in the Body Corporate ("**the Owners**").

1.10 This Scheme is intended to ensure the Repairs proceed in a co-ordinated manner, irrespective of whether such Repairs are to common property or to unit property.

1.11 The Body Corporate has resolved that the fairest way of allocating the costs of the Repairs authorised by this Scheme is for Owners to contribute the whole of the settlement sum held on their behalf by the Body Corporate and then contribute a proportion of the Top-Up Amount that represents the quantity survey or assessed actual unit cost of such Repairs to that Owner's unit as a proportion of the total Repairs.

2. **The Body Corporate to repair the entirety of the Building**

2.1 The Body Corporate is, subject to the provisions of this Scheme, to carry out the Repairs irrespective of whether the Repairs are to Common Property or to the Principal Units or Accessory Units as designated in Deposited Plan DP207650 ("**DP207650**"), a copy of which is annexed hereto marked "**B**".

2.2 The Repairs are to be completed in accordance with the Plan or any amendment of the same that the Body Corporate may approve, as permitted below.

3. **Powers**

3.1 The Body Corporate is granted by the Owners, on the Court's sanction, the general power to act as the agent of the Owners to do any things required to arrange, co-ordinate and completion the Repairs, including but not limited to:

(a) Engage appropriately qualified persons to identify and quantify the extent of the Repairs both now and from time to time in the future until such time as the Repairs are complete;

(b) Instruct appropriately qualified advisors to develop plans and specifications for the work required to be carried out to complete the Repairs, together with such variations or additions as may be required from time to time;

(c) Approve any amendments to the Plan as may be necessary to complete the Repairs;

(d) Instruct appropriately qualified advisors to view tenders and recommend the contractor to be involved in the Repairs;

(e) Contract any such contractor(s) as the Body Corporate resolves to engage and to sign all necessary contracts and other documents to carry out the Repairs;

(f) Employ appropriately qualified project manager(s) to:

(i) oversee the Repairs carried out by contractors;

(ii) certify progress payments; and

(iii) attend payments of the cost of the Repairs as required;

(g) Apply for and obtain any consents and local body approvals and certificates of compliance required to complete the Repairs and do all things necessary to obtain a Building Consent for the Repairs (or such further defects and damage to the Building as may be identified during the course of the Repairs), complete the Repairs in accordance with the terms of any such Building Consent so as to obtain a Code Compliance Certificate for the Repairs;

(h) Borrow funds on such terms as the Body Corporate considers appropriate to pay for all or any part of the Repairs. For the avoidance of doubt, the Body Corporate may borrow to pay any costs incurred by it under this Scheme where it is unable to pay those costs as they fall due because any Owner has failed (for whatever reason) to pay levies raised under Section 121 of the Unit Titles Act 2020 ("**The Act**") to meet costs under this Scheme. The exercise of this power to fund a shortfall as a result of non-payment shall not affect the defaulting unit Owner's obligation to pay those levies (together with interest and penalties) or any subsequent owner of the unit's obligation to pay those levies (together with penalties and interest) pursuant to Section 124 of the Act;

(i) Carry out all additional matters or actions necessary to enable the Body Corporate to progress and complete the Repairs.

3.2 The costs of Repairs have been estimated by a quantity surveyor, Kwanto, and that estimate is set out in the Schedule attached hereto marked "**C**" ("**the Estimate**"). The estimate provides that actual unit cost that may be levied and collected from the Owners in accordance with the provisions of this Scheme.

3.3 Where the Body Corporate exercises the power under this Scheme to fund any shortfall in required funds arising from the non-payment of levies by the owner(s) of any unit, the Body Corporate shall be entitled to levy the owner of that unit for all costs and expenses associated with borrowing those funds (including any penalties arising from or any interest paid by the Body Corporate).

3.4 The Body Corporate may delegate all or any of its powers and duties to the Body Corporate Committee ("**the Committee**"). Nonetheless, the Committee must refer all major decisions in connection with the Scheme for decision to a general meeting of the Body Corporate, and may, in its discretion, elect to refer any matter in relation to the Scheme for decision to a general meeting of the Body Corporate. Major decisions shall include:

(a) Any decisions to engage contractors or consultants pursuant to the terms of the Scheme;

(b) Any decision to engage a project manager;

(c) Any decision to alter the Plan; and

(d) All decisions to raise and enforce payment of levies or to borrow funds to pay for the costs incurred pursuant to this Scheme.

...

4. **Work already done ratified**

4.1 All investigation and repair work the Body Corporate has already undertaken in furtherance of the obligations imposed under this Scheme are ratified and confirmed as forming part of this Scheme and are deemed to have been undertaken in accordance with this Scheme.

...

6. **Levies**

6.1 The Body Corporate is authorised to raise a levy to meet its obligations pursuant to this Scheme and such a levy shall take effect as if it was a levy raised pursuant to section 121 of the Act ("**a Scheme Levy**").

6.2 Scheme Levies shall be calculated according to a proportion of the costs represented by the quantity survey or assessed actual unit cost of such Repairs to that Owner's unit as a proportion of the total Repairs.

...

6.4 If, for whatever reason, there are insufficient funds to meet the Body Corporate's obligations under this Scheme as they fall due, then the Body Corporate may raise additional Scheme Levies pursuant to this Scheme in order to meet those obligations. It is recognised that the most likely reason for such additional Scheme Levy will be the failure of one or more Owners to pay their Scheme Levies owed. In raising such additional Scheme Levies the Body Corporate shall:

(a) Consider exercising its power to borrow funds to make up the shortfall under this Scheme and recovering the cost of such from the defaulting unit owner under Section 127 of the Act;

(b) If it considers it appropriate to raise a Scheme Levy to make up the shortfall rather than borrowing the funds to do so, raise sufficient funds to ensure (as far as foreseeable at the time the Scheme Levy is raised) that the monies actually collected from the Scheme Levy will be sufficient to meet the obligations of the Body Corporate under the Scheme as they fall due.

6.5 If an owner or owners fail to pay all or any part of a Scheme Levy the day it is due, the full amount of that Owner's Scheme Levies owed shall become payable immediately and if not paid in full within seven working days it shall be recovered as a debt due by the owner(s) in default to the Body Corporate.

...

7. **Decision to enter into the construction contract for the Repairs**

7.1 The Body Corporate has obtained tendered prices for the Repairs and the Body Corporate has resolved to appoint Focus Remedial Limited as the preferred contractor ("**the Contract**").

7.2 The Repairs has been divided into stages ("**the Repair Stages**"). The dates for the Repair Stages have been set to meet the expected work schedule and the Body Corporate's obligations to pay the contractor(s) for the remedial works.

7.3 The Body Corporate is authorised to raise Scheme Levies necessary to meet its obligations under the Contract in accordance with the Scheme.

...

9. **Reporting**

9.1 The Body Corporate will keep each Owner fully informed of details of the Repairs and progress of same over the period of the scheme by reporting every three months.

...

11. **Obligations of Owners**

11.1 Owners obliged to cooperate with the Body Corporate or the Committee in respect of the implementation of this Scheme and the progression and completion of the Repairs.

11.2 Owners are required to provide access to their unit property and vacate their unit as may be necessary, as well as comply with all health and safety directions. For the avoidance of doubt the Body Corporate, and its contractors appointed pursuant to this Scheme who are carrying out obligations and work pursuant to this Scheme, are permitted to access at all reasonable hours any unit in the Building necessary in order to carry out such obligations or work.

...

13. **Leave is reserved**

13.1 Leave is reserved to any party affected by the Scheme to apply to the Court for further orders in respect of any disputes arising under this Scheme, or in the event that the Body Corporate does not proceed with the Repairs, leave is to be granted to any party to bring the

matter back before this Court for such further orders as may be appropriate.