High Court of New Zealand Decisions

Body Corporate 199380 v Cook [2018] NZHC 1244 (30 May 2018)

Last Updated: 6 June 2018

IN THE HIGH COURT OF NEW ZEALAND AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA TĀMAKI MAKAURAU ROHE

CIV 2017-404-1852

[2018] NZHC 1244

UNDER the Unit Titles Act 2010
AND the Residential Tenancies Act 1986 IN THE MATTER of an appeal from the District Court BETWEEN BODY CORPORATE 199380
Appellant

AND ALISON COOK & MICHAEL VAN DEN BLINK
First Respondents

AND MARY WEBB
Second Respondent

Hearing: 30 October 2017

Appearances: S Price and I Stephenson for Appellant
J P Wood and J Heatlie for Respondents

Judgment: 30 May 2018

JUDGMENT OF VAN BOHEMEN J

This judgment was delivered by me on 30 May 2018 at 3.00pm Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:

MinisterEllisonRuddWatts, Auckland Rainey Law, Auckland

BODY CORPORATE 199380 v COOK & ANOR[2018] NZHC 1244 [30 May 2018]

[1] The leaky building problem has been challenging building owners and managers for over 20 years. The challenges have been acute in the context of unit developments where the powers and responsibilities of unit owners and bodies corporate under the Unit Titles Act 1972 were not always adequate for dealing with situations that arose. The Unit Titles Act 2010 addressed some of the deficiencies of the earlier Act, notably by giving bodies corporate greater powers to repair unit property that is important to the integrity of a building. However, the new Act raises questions about responsibility for payment of repairs to unit property carried out by bodies corporate exercising these new powers because two sections, ss 126 and 138(4), provide different bases on which a body corporate can recover its costs. As demonstrated by this appeal, the two sections can produce very different results for owners of apartments in a unit development.

[2] This appeal seeks clarification of the relationship between those two sections and asks whether one section is intended to apply only when the other cannot apply, or, if they can both apply, on what basis should the body corporate decide which section to apply when it makes repairs within a unit title that have benefits for other unit titles and, possibly, for the building as a whole.

[3] Counsel for the appellant body corporate says the specific question raised on appeal is:

Does s 138(4) apply only where the repairs to an owner's principal unit do not "substantially benefit" any other units in the circumstances provided for in s 126?

[4] The body corporate says the answer to the question is "no" and it has a choice as to whether to recover the costs of repair under s 138(4) or under s 126 in circumstances where both sections apply regardless of the question of benefit to other units. Under this interpretation, a body corporate may elect to recover under s 138(4) all the costs of repair from the owners of the principal units that were repaired even if the repairs substantially benefitted one or more other principal units. The body corporate says this interpretation is consistent with the purposes of the UTA 2010 and the UTA 1972 and decisions under the earlier Act.

[5] The respondent unit owners and the District Court and Tenancy Tribunal below say the answer is "yes" and s 126 applies in circumstances where the repairs to a principal unit substantially benefit one or more other unit owners so that the costs of the repairs must be apportioned among the owners of the principal units that substantially benefitted from the repair. The unit owners say this interpretation is fair and consistent with the purpose of the UTA 2010 as compared with that of the UTA 1972, and with the intentions of Parliament when enacting the UTA 2010.

[6] Although the amount in dispute in this appeal is relatively modest – a little over $100,000 – counsel for the body corporate says the decision is likely to have wider significance because it is the first to consider the relationship between ss 126 and 138(4).

Factual context

[7] The Sebel Suites building is situated at the north-west corner of the intersection of Customs Street West and Hobson Street in Auckland and fronts onto the Viaduct Harbour on the Auckland waterfront. The respondents, Ms Cook and Mr van den Blink on the one hand and Ms Webb on the other, own Units 108 and 109 respectively on the first floor of the building. Next to them are Units 110 and 111. The four units have large outside decks which

form a single continuous whole that is divided into four separate parts, each contained within the title of the four individual units. Beneath the four units is Unit S, which operates as a restaurant. The decks of the four first- floor units form part of the ceiling of Unit S but the decks themselves are wholly within the titles of the first-floor units.

[8] It is common ground the deck is a "building element" as defined in s 2 of the UTA 2010 and serves more than one unit and under s 138(1) of the UTA 2010 the body corporate had a responsibility to maintain and repair the deck. It is also common ground the deck tiling and the membrane underneath the deck needed repair and, if not fixed, there was a risk of water getting underneath the decks and into the ceiling cavity of Unit S.

[9] On 30 March 2015, the body corporate resolved at its annual general meeting to undertake those repairs. The repairs were completed at a total cost of $104,150.90 (including GST). In accordance with the advice of its solicitors that the owners of Units 108 – 111 were required to meet these costs under the UTA 2010, the body corporate invoiced each of the owners of the four first-floor unit owners the sum of $27,187.73 for the total cost of the repair plus ancillary charges. The owners of Units 110 and 111 paid the sums invoiced. Ms Cook and Mr van den Blink and Ms Webb separately disputed the claims against them.

The Tenancy Tribunal decisions

[10] In June 2016, the body corporate brought claims to the Tenancy Tribunal seeking to recover the invoiced amounts pursuant to s 138(4) of the UTA 2010, which provides that the costs of remedial work undertaken by the body corporate to building elements contained in a unit are recoverable from the unit owners. Ms Cook and Mr van den Blink argued in response that the costs of repair should have been recovered in accordance with s 126 of the UTA 2016 which allocates liability for repair costs undertaken by the body corporate by reference to whether the repairs were substantially for the benefit of one of more units and, therefore, some of the repair costs were recoverable from Unit S.

[11] Before the Tenancy Tribunal, the body corporate argued that Unit S did not substantially benefit from the repairs which were carried out to ensure that the first- floor unit owners were not in breach of their common law obligation not to create a nuisance. The body corporate asserted that it could not be said that Unit S substantially benefitted from other unit owners complying with their common law responsibilities. Accordingly, s 126 of the UTA 2010 did not apply. The body corporate also argued that, even if Unit S did benefit substantially from the repairs, the body corporate could still recover the costs from the owners of the first-floor units under s 138(4) rather than under s 126 because all the work had been undertaken within those principal units.

[12] The Tenancy Tribunal held that Unit S did substantially benefit from the repairs because the repairs had been intended not only to allow the decks to drain adequately but also to ensure water did not leak into the ceiling cavity of Unit S. The Tribunal also held that if there was to be overlap in the operation of ss 126 and 138(4), that overlap would be understandable only if the outcome of applying one section or the other would be the same and not where, as in this case, the results would be vastly different. It said it would be contrary to the intention of the UTA2010 to allow bodies corporate to choose to require one unit holder to shoulder the entire cost of repairs when more than one unit holder substantially benefitted from those repairs. The Tribunal found, therefore, that s 126 and not s 138(4) applies where more than one unit holder substantially benefits from the repairs done.

[13] The Tribunal held that the costs of the repairs should be apportioned among the units that benefitted. As the body corporate had not decided on apportionment, the Tribunal held that the costs should be apportioned by utility interest in accordance with s 126(2)(b) of UTA 2010. The result was Ms Webb and Mr van den Blink were held responsible for 10.2 per cent

($10,623.39) of the total costs of repair and Ms Webb for 7.8 per cent ($8,123.77) of the costs, being their respective utility interests. In subsequent decisions, the Tribunal awarded costs of $6,600 in favour of Ms Webb and Mr van den Blink on the one hand and Ms Webb on the other, as determined by reference to s 102(2)(b) of the Residential Tenancies Act 1986.

The District Court decisions

[14] The body corporate appealed the Tenancy Tribunal's decisions to the District Court on the grounds that the Tribunal had:

(a) Erred in law in holding that the body corporate recovery rights under s 138(4) were constrained by or subject to s 126;

(b) Erred in fact and law in holding that Unit S had substantially benefitted from the repairs.

[15] In a decision dated 5 July 2017, Judge Harrison dismissed the body corporate's appeals. The Judge considered ss 126 and 138, as well as s 80(1)(g) of the UTA 2010, which provides that the responsibilities of principal units includes the responsibility to maintain the unit in good repair and ensure no damage is caused to common property, any building element or any other unit. The Judge stated:[1]

[1] *Body Corporate 199380 v Webb* [2017] NZDC 14783.

[14] There is an element of fairness and equality in this statutory structure whereby the owner of a principal unit must pay for the work he or she undertakes on the unit, or if the body corporate undertakes the work and it is contained within the unit then the owner must similarly pay for the cost of that work. If one or more units obtain a substantial benefit from the work undertaken then the owners of those units must contribute a properly assessed share of the cost of that work. That simple analysis is consistent with the view of Associate Judge RM Bell in *Body Corporate S73368 v Otway* [2016] NZHC 1070.

[16] The Judge cited a paragraph from Associate Judge Bell's decision in *Otway*,[2] where the Associate Judge said there was room for overlap between ss 126 and 138 and, to that extent they may allow concurrent claims, the body corporate could choose which section to use.

[17] Judge Harrison said the defining difference between s 126 and s 138(4) is whether any unit obtains a substantial benefit from the work undertaken by the body corporate and that in deciding the basis of its claim to recover cost, a body corporate must consider whether any other unit has benefitted substantially from the work undertaken. While agreeing there may be concurrent claims under both sections, the Judge considered that the decision on which section should be used depended on whether there was substantial benefit to any other principal unit. The Judge said:

[16] The body corporate therefore has a discretion as to the procedure it adopts for recovery. In passing the necessary resolution the body corporate must have decided either implicitly or consciously that there is or is not substantial benefit obtained by any other unit holder. If it determines that there is substantial benefit the unit holder from whom recovery is sought can challenge that conclusion in the appropriate forum. By the same token, if the body corporate determines there is no substantial benefit to any other principal unit, the unit holder from whom recovery is sought may challenge that claim on the basis that another unit(s) has received a substantial benefit.

[17] I therefore conclude that the two sections are essentially exclusive and that the existence or not of "substantial benefit" triggers the applicable section.

[18] The Judge also upheld the Tenancy Tribunal's decision that Unit S substantially benefitted from the repairs.

[2] *Body Corporate S73368 v Otway* [2016] NZHC 1070.

[19] The Judge held that the respondents were entitled to costs on a 2B basis. Because the parties were not able to agree costs, in a subsequent decision dated 13 July 2017 the Judge awarded costs of $10,000 against the body corporate based on:

(a) Scale costs claimed of $4,272 as against costs incurred of $15,068;

(b) An uplift of 50 per cent because of a failure by the body corporate without reasonable justification to accept an offer of settlement from the respondents; and

(c) A further increase to reflect the obligations the respondents would incur as unit owners to pay their shares of the body corporate's costs.

[20] The body corporate also appeals the costs decision.

The relevant sections

[21] Section 126 of the UTA 2010 provides:

126 Recovery of money expended for repairs and other work

(1) This section applies where the body corporate does any repair, work, or act that it is required or authorised to do, by or under this Act, or by or under any other Act, but the repair, work, or act—

(a) is substantially for the benefit of 1 unit only; or

(b) is substantially for the benefit of some of the units only; or

(c) benefits 1 or more of the units substantially more than it benefits the others or other of them.

(2) Any expense incurred by the body corporate in doing the repair, work, or act is recoverable by it as a debt in any court of competent jurisdiction (less any amount already paid) in accordance with the following:

(a) so far as the repair, work, or act benefits any unit by a distinct and ascertainable amount, the owner at the time when the expense was incurred and the owner at the time when the action is instituted are 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), it must be apportioned among

the units that derive a substantial benefit from the repair, work, or act rateably according to the utility interest of those units, and in the case of each of those units, the owner at the time when the expense was

incurred and the owner at the time when the action is instituted are jointly and severally liable for the amount apportioned to that unit.

(3) Despite subsection (2)(b), if the court considers that it would be inequitable to apportion the amount of the debt in proportion to the utility interest of the unit owners referred to in that paragraph, it may apportion that amount in relation to those units in the shares as it thinks fit, having regard to the relative benefits to those units.

[22] Section 138 of the UTA 2010 provides:

138 Body corporate duties of repair and maintenance

(1) The body corporate must repair and maintain—

(a) the common property; and

(b) any assets designed for use in connection with the common property; and

(c) any other assets owned by the body corporate; and

(d) any building elements and infrastructure that relate to or serve more than 1 unit.

(2) [Repealed]

(3) ...

(4) Any costs incurred by the body corporate that relate to repairs to or maintenance of building elements and infrastructure contained in a principal unit are recoverable by the body corporate from the owner of that unit as a debt due to the body corporate (less any amount already paid) by the person who was the unit owner at the time the expense was incurred or by the person who is the unit owner at the time the proceedings are instituted.

(5) ...

[23] The body corporate says there is nothing on the face of the sections or elsewhere in the UTA 2010, or in the scheme, purpose or history of the UTA 2010 that requires the interpretation given to the sections by the District Court – namely, that when a body corporate is recovering costs incurred in repair and maintenance of an owner's principal unit, s 138(4) applies only where the repairs or maintenance do not "substantially benefit" other units. The body corporate says that where recovery is possible under both ss 126 and 138(4), a body corporate has a choice as the section under which it seeks recovery from the relevant unit owners.

[24] In oral argument, counsel for the body corporate went further and said that where the repairs are within the title of a principal unit, the history and purpose of the UTA 2010 is that the owner of that unit should bear the cost, even if the repairs and maintenance confer a substantial benefit to other unit owners. Counsel argued that position was consistent with established authority on the interpretation of the Unit Titles Act 1972 (UTA 1972), the predecessor Act to the UTA 2010.

Preliminary analysis of ss 126 and 138(4)

[25] I agree there is nothing on the face of ss 126 and 138(4) to indicate whether they are intended to apply to different factual circumstances or, if they can both apply to the same circumstances, whether there is a statutory policy or preference to be applied in favour of

one over the other. Both provisions are emphatic and comprehensive, even though, as I discuss later, both confer a discretion on the body corporate as to whether to seek recovery of repair costs in circumstances in which they apply:

(a) Section 126(1): This section *applies* where the body corporate does *any* repair, work, or act that it is required or authorised to do, by or under this Act, ...

(b) Section 138(4): *Any* costs incurred by the body corporate that relate to repairs to or maintenance of building elements and infrastructure contained in a principal unit *are recoverable* ...

(Emphases added)

[26] If the standard principle of statutory interpretation that the specific provision qualifies the general is applied, arguably s 126, which applies only when there is substantial benefit to one or more units, should qualify the general situation covered by s 138(4) which applies to all work carried out within a principal unit. However, counsel for the body corporate said that the policy of the UTA 2010 as carried over from the UTA 1972 and confirmed in decisions under the UTA 1972 is that repairs to a unit are an obligation on the unit owner that confer no "benefit" in terms of s 126 to other unit owners.

[27] Counsel for the body corporate also argued that even if there is a benefit to other unit owners in terms of s 126, the body corporate has a discretion as to whether to seek recovery under s 126 or s 138. He cited the same observation by Associate Judge Bell in *Otway* referred to by Judge Harrison in the District Court that if ss 126 and 138 allow concurrent claims, it is open to the body corporate to opt for one section rather than the other.

[28] Associate Judge Bell's observation was made in the context of an application by a body corporate for summary judgment, which was declined. After the hearing of this appeal, counsel for the body corporate filed a memorandum enclosing a copy of the decision of Woolford J on the substantive determination of the body corporate's claim, *Body Corporate S73368 v Otway*,[3] and drew attention to observations made by Woolford J in that decision about the relationship between ss 126 and 138(4). Woolford J said:

> [40] Counsel for the defendants submits that s 138(4) is limited to circumstances where s 126 does not apply. I am of the view, however, that the natural meaning of the words of s 138(4) are not capable of restraining the application of the provision in that way. They are alternative modes of recovery. Section 138(4) specifically addresses the costs of repair and maintenance of building elements contained in a building unit while s 126 provides a broad basis for recovery on the basis of substantial benefit.

[29] I discuss these observations and other aspects of the *Otway* decision later. For now, I note these comments by Woolford J were made about the specific question of responsibility for repairs to joinery units within two units in that development and should be considered in the context of the decision as a whole.

[30] Moreover, as counsel for the respondent unit owners said in his memorandum in reply, there was no suggestion in Woolford J's decision that the recovery under ss 126 and 138(4) would have produced starkly different outcomes as is the result in

[3] *Body Corporate S73368 v Otway* [2017] NZHC 3265.

the present case. To the contrary, Woolford J held that the unit owners were obliged under both s 126 and s 138(4) to pay the sum he assessed for the new joinery units.

[31] Given the above and the lack of guidance in the sections themselves as to the circumstances in which each is to apply, I have considered the legislative history of ss 126 and 138(4), which includes the UTA 1972 and decisions under that Act, before reaching a decision on the specific question posed in this appeal regarding the relationship between the two sections.

UTA 1972

[32] The UTA 1972 was the legislative basis upon which unit title developments took place in New Zealand. For present purposes, the relevant sections of the UTA 1972 were:

(a) The Title:

An Act to facilitate the subdivision of land into units that are to be owned by individual proprietors, and common property that is to be owned by all the unit proprietors as tenants in common, and to provide for the use and management of the units and common property.

(b) Section 15 setting out the duties of the body corporate. These included:

15. **Duties of body corporate**

(1) The body corporate shall—

(a) subject to the provisions of this Act, carry out any duties imposed on it by the rules:

...

(f) keep the common property in a state of good repair:

...

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

(2) 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.

(c) Section 16:

16. **Powers of body corporate**

Subject to the provisions of this Act, the body corporate shall have all such powers as are reasonably necessary to enable it to carry out the duties imposed on it by this Act and by its rules: ...

(d) Section 33 which for all material purposes was identical to s 126 in the UTA 2010.

(e) Section 34 which provided for the Body Corporate to recover from a unit owner the costs of repairs that had been carried out to remedy a fault of that unit owner.

(f) Section 37 which, in subsection (1), provided that the control, management, administration, use, and enjoyment of the units and the common property were to be regulated by the rules of the body corporate. Subsections (2)-(4) provided that the rules of the body corporate were those set out in the Second and Third Schedules, unless amended as provided for in the Act.

(g) Section 37(5) which defined the scope of permitted amendments to the body corporate and was subject to the proviso that:

... no powers or duties may be conferred or imposed by the rules on the body corporate which are not incidental to the performance of the duties or powers imposed on it by this Act ... .

(h) Section 48 which provided that, where a unit development had been destroyed or damaged, a body corporate could apply to the High Court for orders giving effect to a scheme for the repair of the development. Subsection (5) conferred a wide discretion on the Court in the exercise of its powers to give effect to a scheme.

The theme of the UTA 1972

[33] In a passage approved by the Court of Appeal in *Tisch v Body Corporate No 318596*,[4] Heath J in *Fraser v Body Corporate S63621* identified the fundamental theme of the UTA 1972 as follows:[5]

A fundamental theme of the [Act] is the distinction between individual units (for which each registered proprietor takes responsibility) and common property (the domain of the body corporate). Individual registered proprietors can deal only with individual property, whereas "common property" is owned by all proprietors and must be managed for the common good.

[34] This fundamental theme or distinction between unit and common property was reflected in the duties imposed on bodies corporate by s 15 to raise funds from all owners rateably and to repair and maintain the common property.

[35] Importantly, the UTA 1972 conferred no power or responsibility on a body corporate to repair or maintain unit property except pursuant to a scheme made under s 48 following destruction or damage to unit property. It was accepted that it was permissible under an approved scheme for a body corporate to undertake repairs of unit property as well as common property. As the Court of Appeal noted in *Tisch*[6] – again citing Heath J with approval, this time in *Body Corporate 172108 v Meader*:[7]

Section 48 is an exception to the general rule that a body corporate may only undertake tasks associated with common property.

[4] *Tisch v Body Corporate No 318596* [2011] NZCA 420, 3 NZLR 679 at [29].

[5] *Fraser v Body Corporate S63621* [2009] NZHC 1100; (2009) 10 NZCPR 647 (HC) at [34].

[6] *Tisch v Body Corporate No 318596* [2011] NZCA 420, 3 NZLR 679 at [30].

[7] *Body Corporate 172108 v Meader* HC Auckland CIV-2009-404-6868, 3 March 2010 at [18].

Relevant decisions under UTA 1972

[36] Most of the decisions cited by counsel on the interpretation and application of the UTA 1972 concerned damage and the responsibility for resultant repairs to unit developments affected by the leaky-building crisis. The dispute was usually over the allocation of responsibility and costs between unit owners and the body corporate. Many related to schemes under s 48 or to remedial actions proposed under amendments to the standard body corporate rules made under s 37. In the latter situation, attention was focused on the proviso to s 37(5) and whether rules that provided for the body corporate to maintain and repair unit property were ultra vires the Act or could be said to be "incidental to the performance of the duties or powers imposed on it by this Act".

[37] As both counsel acknowledged, a considerable divergence developed in the application of the UTA in those leaky building decisions. One strand emphasised the distinction in the respective responsibilities of unit owners and the body corporate for unit property and common property, while the other took a more pragmatic stance that looked to deal with the practical realities of the situations faced by various bodies corporate. The divergence was epitomised in the decisions of Heath J in *Body Corporate 188529 v North Shore City Council*[8] and of Harrison J in *Young v Body Corporate 120066*.[9]

[38] The decision of Heath J in *Body Corporate 188529,* usually referred to as the *Sunset Terraces* decision, arose in the context of the Body Corporate suing the local territorial authority for damage that occurred to both common property and unit property in the Sunset Terraces development. The decision covered many issues, some of which went on appeal to the Court of Appeal and the Supreme Court.[10] One issue that did not go further, however, was the validity of an amendment to a Second Schedule rule providing that the Body Corporate would keep and maintain in good repair the exterior and roof of which the units formed part. Heath J held that the UTA 1972 contemplated corporate responsibility for the maintenance and repair of

[8] *Body Corporate 188529 v North Shore City Council* [2008] NZHC 2300; [2008] 3 NZLR 479 (HC).

[9] *Young v Body Corporate 120066* [2007] NZHC 1401; (2007) 8 NZCPR 932 (HC).

10. *North Shore City Council v Body Corporate 188529* [2010] NZCA 64, [2010] 3 NZLR 486; *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289.

corporate property only. He found the rule as amended to be ultra vires the Act because it purported to confer an obligation on the body corporate inconsistent with the powers and duties conferred by the Act, namely to maintain and repair unit property.

[39] In *Young*, there was a dispute between two groups of unit owners over what repairs should be made to a leaky building in Herne Bay, with one group seeking an injunction to restrain the other from proceeding with repairs that had been authorised by hotly contested body corporate resolutions adopted by narrow majorities. The party seeking the injunction challenged the validity of the resolutions on various bases including that they were made pursuant to a rule that was outside the powers conferred by the UTA 1972. The rule in

question had been added to the standard Second Schedule body corporate rules and authorised the body corporate to repair and maintain the exterior of the building of which the units formed part in all respects.

[40] In other words, the rule under consideration in *Young* was like that considered by Heath J in *Sunset Terraces*, although the configurations of the two developments were very different. Sunset Terraces was a linear townhouse development whereas the building in *Young* had a "wedding cake" configuration that had similarities to the facts in this appeal where the decks of the units above formed part of the ceilings of the units below. As in this appeal, the decks were unit property and part of the building exterior. The only part of the exterior that was common property was the roof of the top apartments.

[41] Harrison J held that the rule was not ultra vires the UTA 1972 and was not excluded by the proviso to s 37(5). He considered that the rationale for the rule lay in the wedding-cake construction of the development under which the decks of upper apartment were the roofs of the apartments below. Referring to the duties imposed on a body corporate by s 15 of the UTA 1972 and to s 16, under which the body corporate has all powers as are reasonably necessary to carry out the duties imposed on it by the Act and its rules, Harrison J held that this included the power to repair parts of the external structure, the condition of which might expose the common property to consequential physical damage. Accordingly, Harrison J stated:[11]

[11] *Young v Body Corporate 120066* [2007] NZHC 1401; (2007) 8 NZCPR 932 (HC).

[32] ... The power conferred by rule 2(d) is, in my judgment, reasonably necessary to allow this body corporate to carry out the statutory duties imposed by s 15 and Schedule 2, in that it is expressly directed towards meeting the requirements imposed by the unorthodox configuration of this complex.

[42] The decision in *Young* meant that, even outside a s 48 scheme, a body corporate could undertake repairs to unit property provided such repairs were undertaken pursuant to a body corporate rule and were reasonably necessary to enable the body corporate to carry out its duties under the Act and its rules. The decision appeared to ameliorate one of the main difficulties that had faced bodies corporate under the UTA 1972 during the leaky building crisis: namely that under the pre-*Young* view of the law, they had no power to undertake or to compel repairs to unit property. That was one of the issues addressed by the UTA 2010. However, after the UTA 2010 had been enacted but before it had entered into force, the Court of Appeal had occasion in *Tisch* to consider the situation where there was a clash between rules made pursuant to s 37 and a scheme proposed under s 48.[12]

[43] The unit development in *Tisch* was another wedding cake construction where the balconies of the upper level apartments formed a part of the roofs of the apartments below. The development had leaky building issues and court approval was sought for a s 48 scheme involving the replacement of the roof, the recladding of the walls and the re-sealing and re-tiling of the balconies. As in the present case, the balconies were unit property and were within the titles of the units they served and were not within the titles of the units below of whose roofs the balconies formed part.

[44] The body corporate rules stated that unit owners had the responsibility to repair and maintain their units including balconies. Under the proposed scheme, however, the body corporate would be responsible for the costs of repairs to the roofs, exterior walls and balconies. The scheme was adopted by a majority of unit owners over the objection of some owners to the requirement that they contribute on a unit entitlement basis to the repairs of other owners' unit property. When the scheme came to the High Court for approval, Andrews J declined to approve the scheme. The Judge held the scheme was not consistent

with the Act because it made the body corporate responsible

[12] *Tisch v Body Corporate No 318596* [2011] NZCA 420, 3 NZLR 679.

for repairing balconies that were unit property. She declined to approve the scheme because, by making the body corporate responsible for the costs of repairs to private property, it did not apportion costs in a fair and equitable manner.

[45] The issue for the Court of Appeal was whether Andrews J had approached s 48 correctly. As noted above at [33], the Court of Appeal cited with approval the observation of Heath J in *Meader* that s 48 was an exception to the general rule that a body corporate may only undertake tasks associated with common property. However, the Court of Appeal went on to comment:[13]

This is obviously correct. But it does not follow that the s 48 exception is to be used without regard to the general rule. The situation must be one justifying departure from the general rule, and the departure should only be to the extent necessary to achieve what is fair as between unit holders in the circumstances.

[31] The rationale for the general rule must be that unit holders purchase knowing the property is subject to the [UTA 1972]. They purchase also knowing they are subject to the Body Corporate Rules. Those Rules are a contract between the unit holders. The starting point must be that unit holders should adhere to the statutory scheme they bought into, and to the Body Corporate Rules they agreed to abide by. We see the scope of s 48 as limited to a situation where the best interests of unit owners as a whole dictate a departure from the scheme of the Act and from the Body Corporate Rules.

[46] The Court of Appeal in *Tisch* identified the steps that a court should take when considering an application to settle a scheme and the guiding principles to be applied to achieve an outcome aimed at balancing the interests of each unit holder in a way that imposed terms that achieved the outcome fairest to all unit holders. The last of those principles was that the scheme should depart from the scheme of the Act and from the body corporate rules no more than is reasonably necessary to achieve what is fair as between unit owners in the circumstances.

[47] In considering the application of that last principle to the facts of the case, the Court of Appeal found that repairing the tiled balconies would benefit the owners of the units below by removing or minimising the risk of damage to the roofs of their units. However, the Court considered that did not undermine the tenability of Andrews

[13] *Tisch v Body Corporate No 318596* [2011] NZCA 420, 3 NZLR 679 at [30].

J's view that the scheme did not apportion costs in a fair and equitable manner. The Court stated:

[64] ... There are two considerations. First, assessing a scheme in terms of who will benefit from it may lead to outcomes that are completely inconsistent with the Act and the Body Corporate Rules. Relative benefits are not, of themselves, a sufficient reason to depart from the Act and Rules. Balconies are a good example. Repair of a leaky balcony that is the roof of the unit below may be of no benefit to the balcony's owner, but of considerable benefit to the owner of the unit below. But if the Act and the Body Corporate Rules assign responsibility to owners, the relative benefits just spelt out must be assumed to have been taken into account. That is, there has been a conscious decision to assign responsibility for remedial work to owners even though in some situations at least they may derive little or no

benefit from that remedial work.

[65] Secondly, and a related point, the owners of the eight units with balconies must be taken to have purchased knowing the balconies were their property and their responsibility under the Act and the Body Corporate Rules. While they may well not have anticipated the "leaky building" problem that necessitates the balcony repairs, the unexpected nature of that problem is neither a logical nor a sound reason for shifting some of the repair costs to the owners of the units below, who equally may not have anticipated "leaky building" problems above. ...

[48] The above passage resonates strongly with the facts in this appeal and the body corporate placed considerable reliance on it.

[49] Tisch was followed a year later by *Berachan Investments Ltd v Body Corporate 164205*[14] in which a differently constituted Court of Appeal considered directly the differences in approach between *Young* and *Sunset Terraces*, on which the Court of Appeal in *Tisch* had not considered it necessary to express a view.[15]

[50] In *Berachan*, the question at issue was the responsibility of the body corporate to replace the whole roof of the unit development when 80 per cent of the roof fell within the title of a single unit while the remaining 20 per cent was common property. It was recognised that the roof functioned as a single entity and, as a practical matter, had to be replaced as a whole. When the unit development had been brought under the UTA 1972, the body corporate rules had been amended to provide that:

[14] *Berachan Investments Ltd v Body Corporate 164205* [2012] NZCA 256, [2012] 3 NZLR 72.

[15] *Tisch v Body Corporate No 318596* [2011] NZCA 420, 3 NZLR 679 at [33].

(a) the body corporate had the responsibility to "repair and maintain *the roof and common property*, together with all fixtures and fittings; and

(b) unit owners were responsible to "repair and maintain the interior of the unit and its fittings, fixtures and equipment ...".

[51] Despite these rules, when the roof needed repair, the body corporate said it should be responsible for the repair of only the 20 per cent of the roof that was common property. The unit owner disagreed, and the body corporate brought the matter to Court for determination.

[52] In the High Court, Ellis J found for the body corporate on the basis that the amended rule in question was invalid to the extent it required the body corporate to repair or maintain the roof other than that part that formed the common property. In reaching that conclusion, the Judge had regard to the *Young* and *Sunset Terraces* decisions and to the Court of Appeal decision in *Velich v Body Corporate 164980*,[16] which Heath J had applied in holding the rule at issue in *Sunset Terraces* to be ultra vires the UTA 1972.

[53] The Court of Appeal reached a different view and reversed Ellis J's decision. It considered *Velich* to be far removed from the circumstances before it and it considered and generally approved of Harrison J's decision in *Young*. It endorsed Harrison J's reasoning that an assessment of what is "incidental to the performance of the duties or powers imposed on the body corporate" by the Act under s 37(5) must consider the nature of the particular building or complex. The Court stated:[17]

[37] ... We agree with the view. We do not consider that Parliament intended that a "one size fits all" approach be taken. Rather, what is "incidental" is to be considered in light of the characteristics or features of the building or complex at issue, so that what might properly be regarded as "incidental" in one context may not be in another.

[16] *Velich v Body Corporate 164980* [2005] NZCA 108; (2005) 5 NZConvC 194,138 (CA).

17. *Berachan Investments Ltd v Body Corporate 164205* [2012] NZCA 256, [2012] 3 NZLR 72 at [37].

[54] The Court concluded its consideration of the approach to be taken in such cases as follows:[18]

[46] To summarise, then, while we accept that the duties of a body corporate in this context relate principally to the maintenance and repair of common property, we consider that a body corporate is entitled to assume responsibility in relation to the repair and maintenance of unit property provided that the duty can fairly be seen as incidental to the duty to maintain and repair common property. Whether a body corporate's assumption of responsibility in a particular case can fairly be seen as incidental will depend on all the circumstances, including the characteristics of the building or complex at issue.

[55] The Court of Appeal in *Berachan* went on to hold that the features in that case meant that the amended rule could fairly be regarded as incidental to the body corporate's responsibility under s 15(1)(f) of UTA 1972 to maintain and repair common property and did not fall foul of the proviso in s 37(5), even though 80 per cent of the roof was unit property.[19]

[56] Some of the s 48 and body corporate rules decisions under the UTA 1972 referred to s 33 but did not take the discussion far. For example, the Court of Appeal in *Berachan* noted but did not discuss an argument made by counsel for Mr Berachan that the question of who paid for the roof was a different question from who should carry out the work, and that if the body corporate considered Mr Berachan and other upper floor owners benefitted disproportionately from the work, it had the ability under s 33 to seek a remedy. The Court of Appeal in *Tisch* noted that s 48 seemed to sit alone and was not expressly linked to other sections such as s 33.[20]

[57] Ellis J in *Body Corporate 198245 v Wong*[21] considered the relationship of s 33 to s 48. In this leaky building case, repairs had been carried out by the body corporate under an approved s 48 scheme which authorised the body corporate to effect repairs to unit property as well as common property, and empowered the body corporate to levy unit owners for the costs of repairs on a unit entitlement basis. The owners of ground floor shops objected to having to pay on a unit entitlement basis for repairs to

[18] *Berachan Investments Ltd v Body Corporate 164205* [2012] NZCA 256, [2012] 3 NZLR 72.

[19] The Court of Appeal in *Berachan* referred to *Tisch* only in a footnote and as an example of the contentiousness that can arise when disputes are referred to Court: *Berachan Investments Ltd v Body Corporate 164205* [2012] NZCA 256, [2012] 3 NZLR 72 at [51], footnote 28.

[20] *Tisch v Body Corporate No 318596* [2011] NZCA 420, 3 NZLR 679 at [25].

[21] *Body Corporate 198245 v Wong* [2012] NZHC 2676.

corridors and lifts that were common property but which they did not use. They alleged the body corporate should have raised the levies or taken steps to recover the repair costs under s 33 and relevant body corporate rules which provided for recovery of the costs of repair to common property in proportions differing from a strict unit entitlement basis.

[58] Ellis J held that neither s 33 nor the rules could apply in the face of the scheme approved under s 48 and cited the Court of Appeal's decision in *Tisch* at [25] in support of this view. In case she was wrong in concluding that s 33 could not apply, Ellis J went on to consider whether the section should apply and decided that, even if the section could apply, the body corporate could not be said to have been wrong not to have sought recovery of the costs of repair of common property on a substantial benefit basis. In coming to that conclusion, Ellis J identified several considerations, including:

(a) The wording of s 33 did not require a body corporate to apply the section when seeking to recover costs but conferred a discretion on the body corporate.

(b) There was room for doubt as to whether s 33 applied to the recovery of costs relating to the repair of common property.

(c) Even if s 33 did authorise recovery of the costs of repair to common property other than on a unit entitlement basis, it was difficult for the court to make a determination of that issue that could affect the interests of other unit owners who were not parties to the proceeding.

(d) The case concerned fundamental defects to the original construction of the main structures of the units built in a block; the weathertightness of the building was interlinked and indivisible and all owners had a mutual interest in keeping the building weathertight and in good repair.

[59] I do not share Ellis J's doubt about whether s 33 might have applied to the recovery of costs of repair to common property. While the decisions under the UTA 1972 established that a body corporate could undertake repairs to unit property when authorised by a scheme approved under s 48 or where such repairs were made pursuant to a rule made under s 37 that was not ultra vires the Act, the primary focus of the body corporate necessarily was on the repair and maintenance of common property. Outside of the ss 37 and 48 contexts, for s 33 to mean anything, it had to apply to the recovery of costs of repair to common property.

UTA 2010

[60] According to the Explanatory Note on the Unit Titles Bill when it was introduced into the House of Representatives in 2008, the UTA 2010 was intended:

... to provide a modern legal framework for the joint ownership and management of land, buildings and facilities on a socially and economically sustainable basis by communities of individual owners. ...

[61] The Explanatory Note went on to identify key features of the Bill as including:

- clarifying how land is surveyed to provide clear legal framework [sic] for ownership by different parties, simple and clear processes for building unit title developments and technical detail for developers, surveyors and territorial authorities:
- a holistic approach to the management and maintenance of unit title developments to clarify the responsibilities of unit owners and bodies corporate, ensure sound management practices and protect long-term capital value:

...

- a robust disclosure regime so unit owners, bodies corporate and prospective buyers have accurate and comprehensive information to allow them to make informed and confident decisions regarding purchase, financial commitments and participation in body corporate matters: ...

[62] The Bill carried forward ss 33 and 34 of the UTA 1972 into ss 126 and 127 of the UTA 2010 and introduced clause 122 setting out the duties of the body corporate for repair and maintenance. Clause 122 eventually became s 138 of the UTA, with s 138(4) added at the Committee stage of the Bill.
[63] The UTA 2010 as enacted covered a wider range of issues and went into considerably more detail than the UTA 1972. For present purposes, it is sufficient to highlight the following provisions:

(a) Section 5 which defines “building elements” and “infrastructure” as follows:

building elements includes the external and internal components of any part of a building or land on a unit plan that are necessary to the structural integrity of the building, the exterior aesthetics of the building, or the health and safety of persons who occupy or use the building and including, without limitation, the roof, balconies, decks, cladding systems, foundations systems (including all horizontal slab structures between adjoining units or underneath the lowest level of the building), retaining walls, and any other walls or other features for the support of the building

infrastructure includes pipes, wires, ducts, conduits, gutters, watercourses, cables, channels, flues, conducting, or transmission equipment necessary for the provision of water, sewerage, drainage, stormwater removal, gas, electricity, oil, shelter, protection from fire, security, rubbish collection, air, telephone connection, Internet access, radio reception, television reception, or any other services or utilities to or from a unit or to or from the common property

(b) Section 3 which sets out the purpose of the Act:

3 Purpose

The purpose of this Act is to provide a legal framework for the ownership and management of land and associated buildings and facilities on a socially and economically sustainable basis by communities of individual owners and, in particular,—

(a) to allow for the subdivision of land and buildings into unit title developments comprising units that are owned in stratum estate in freehold or stratum estate in leasehold or licence by unit owners, and common property that is owned by the body corporate on behalf of the unit owners; and

(b) to create bodies corporate, which comprise all unit owners in a development, to operate and manage unit title developments; and

(c) to establish a flexible and responsive regime for the governance of unit title developments; and

(d) to protect the integrity of the development as a whole.
(c) Section 74 which provides for a court-approved scheme in the event of destruction or damage to a unit development in terms very similar to s 48 of the UTA 1972.

(d) Section 80 which sets out the responsibilities of owners of principal units. Subsection (1) includes the following:

80 Responsibilities of owners of principal units

(1) An owner of a principal unit—

...

(g) *must repair and maintain the unit and keep it in good order to ensure that no damage or harm*, whether physical, economic, or otherwise, *is, or has the potential to be, caused to the common property, any building element, any infrastructure, or any other unit in the building*: ...

(Emphasis added)

(e) Section 84 which sets out the powers and duties of the body corporate:

84 Powers and duties of body corporate

(1) The body corporate has the powers and duties set out in—

...

(p) section 138 (which relates to repair and maintenance of the common property, assets designed for use in connection with the common property, infrastructure, and building elements and access for those purposes):

(f) Sections 105 and 106 which provide for the body corporate rules and the making of amendments to the rules. Unlike the UTA 1972, default rules are no longer prescribed in the Act and amendments can be made by ordinary resolution at body corporate meetings.

However, s 106(2) provides:

(2) No powers or duties may be conferred or imposed on the body corporate that are not incidental to the powers and duties conferred or imposed on the body corporate under this Act.
And s 106(4) provides:

(4) Any amendment or addition that is inconsistent with any provision of this Act or any other enactment or rule of law is invalid.

(g) Section 126 which, as noted, is the same in all material respects to s 33 of the UTA 1972.

(h) Section 127 which is the same in all material respects to s 34 of the UTA 1972.

(i) Section 138.

[64] The expansive purpose in s 3 of the UTA 2010 demonstrates an intention that the new Act should take account of the social and economic consequences of the application of the Act and that the new regime should be more flexible and responsive. At the same time, paragraph (a) of the purpose makes it clear that the basic legal structure of unit title developments as set out in the Title to the UTA 1972 is retained, as is the fundamental theme identified by Heath J in *Fraser*[22] of the distinction between individual units owed by unit owners and common property for which the body corporate is responsible.

[65] Some of the sections identified above are the same or effectively the same as their UTA 1972 equivalents, namely ss 74, 126 and 127. Section 80 has no direct equivalent in the UTA 1972 and spells out in s 80(1)(g) what was implicit in the UTA 1972 and the common law, namely that unit owners are responsible for the upkeep of unit property and must not allow their property to cause damage to common property or other unit property.

[66] The less prescriptive requirements of ss 105 and 106 on the body corporate rules are consistent with the greater flexibility signalled in s 3 but, like the proviso to s 37(5) of the UTA 1972, s 106 (2) and (4) constrain the body corporate from making rules that purport to confer on the body corporate powers and duties not conferred under the Act. The constraint is less significant, however, than was the case in the

[22] *Fraser v Body Corporate S63621* [2009] NZHC 1100; (2009) 10 NZCPR 647 (HC) at [34].

UTA 1972, at least with respect to the respective roles of unit owners and the body corporate in repairing damage to unit property because of what is provided in ss 84(1)(p) and 138.

[67] Sections 84(1)(p) and 138 are new provisions that take the UTA 2010 into territory – namely the maintenance and repair of unit property – that the UTA 1972 dealt with only in the context of schemes approved under s 48 or pursuant to rules where the repairs could fairly be seen as incidental to the body corporate's duty to maintain and repair common property. Under ss 84(1)(p) and 138, not only can the body corporate maintain and repair unit property, it is required to repair and maintain unit property where it is either building elements or infrastructure that serve more than one unit. Under s 5, "building elements" specifically includes roofs, balconies, decks and cladding systems, while "infrastructure" includes all of the utilities and services to the development.

[68] These provisions were seen as important in overcoming difficulties that had arisen under the UTA 1972, particularly in relation to leaky buildings where bodies corporate had been unable to step in to remedy defects that may have been in individual units but which adversely affected common property, other units or the building as a whole. In introducing the Third Reading of the Unit Titles Bill on 20 March 2010, Hon Maurice Williamson, on behalf of the Minister of Housing in the then National Party-led Government, explained this aspect of the Bill as follows:[23]

The key benefits that this bill will have for those New Zealanders living and working in unit title developments are the provisions that relate to management, governance and maintenance. The changes will mean that unit owners and bodies corporate will have the necessary tools to get things done quickly and efficiently. I think that is the key thing about this bill. They will be tools for the modern era which will allow things to be done quickly and efficiently for the benefit of the majority of owners. I know of too many cases already where one owner has caused huge problems for the rest of the tenants just by not being prepared to agree to what I would have thought looked like a very sensible proposal for the body corporate.

These benefits are particularly relevant for those unit owners and bodies corporate in leaky buildings, because the changes clarify their rights and responsibilities. In addition, the passing of the bill means that they will be able to act more quickly and decisively when they need to make decisions about taking claims and getting repair work done.

[23] (30 March 2010) 661 NZPD 10216.

[69] Mr Williamson was followed by Moana Macky, a Labour Party Member of Parliament who was on the Select Committee that considered the Bill. Her speech contained the following passage to which both counsel drew my attention:

I will move on to an important part which is about the rights and responsibilities of unit holders. This is an area where we have seen a lot of litigation over the years, particularly about leaky buildings. It was important that we got this absolutely right. We needed to be clear about exactly when a body corporate was responsible, and when an individual was responsible. This legislation says that, in general, where the property is common property, then it is the responsibility of the body corporate to recover the money for repairs, except in a situation where a unit holder has caused the damage to the property by his or her own actions. In that case, the unit holder will be held responsible.

That is not clear in the existing law that is about to be replaced. I want to make it very clear, because this is an area in which there has been significant litigation about leaky homes. This bill, under clause 122(2), will impose an obligation on bodies corporate to "maintain, repair or renew all building elements and all infrastructure that relate to or serve more than one unit". This is a common-sense resolution of the matter, which has been subject to considerable litigation as members will be aware. When there is a leaky building issue with the exterior of an apartment complex, this may manifest in a manner that affects only one or two apartments, and it may be tempting to say that only those people are responsible for the repairs. However, we know that the reality is that unless this is remedied, it will invariably affect the entire complex and the entire unit title development. Much of the litigation that has occurred in this area has focused on whether the body corporate should be allowed to contribute to the costs of rectifying these issues. There is competing precedent in this area because the High Court has taken two different views in the cases of *Young* and *Sunset Terraces* as to whether bodies corporate are able to do that.

I think it is important that this House makes it clear that in this legislation we have taken we have taken the approach of Young, in the High Court case, and this will shift the focus on to rectifying the problem as quickly as possible. I think it is very important to point out that where there is conflicting precedent, the High Court may look to this House to clarify the intention of Parliament where was to follow the *Young* case in the High Court, and that was the way the Select Committee went.

> [70] While Hansard can only be an aid to ascertaining what Parliament might have intended, there are several aspects to the above passages that warrant comment. First, it is apparent that both sides of the House wanted the new Act to be clear on where responsibility lay to undertake repairs in leaky building situations where there are defects that have caused or may cause damage beyond an individual unit, either to other units or to common property. On that question, s 138(1) makes it clear that the responsibility for repair lies with the body corporate where the damage is to a building
> element that serves more than one unit, notwithstanding the responsibility on the unit owner under s 80(1)(g) to maintain and repair the unit.[24]
>
> [71] Secondly, because of s 138(1), the Court no longer faces the challenge confronted by the Courts in *Sunset Terraces* and *Young* of having to decide whether body corporate could undertake repairs to unit property on the basis of a body corporate rule whose vires was under challenge. Now, the body corporate is under a positive duty to carry out the repairs. It is reasonable to infer that this significant change in the Act was made in recognition that repairs to building elements may serve the interests of a number of unit owners and not just the interests of the owner whose unit is repaired.
>
> [72] Thirdly, while the Parliamentary debate is clear on the locus of responsibility, it is less helpful on the question of "who pays?". The Minister did not address the issue. As noted, Moana Macky referred to bodies corporate contributing to repair costs, but neither s 126 nor s 138(4) is framed in those terms. The only indications that these questions were considered during the parliamentary process are in the report of the Departmental Report to the Select Committee considering the Bill.
>
> [73] As noted, the original draft of clause 122 in the Bill as introduced into the House did not have a subclause equivalent to what became s 138(4). The Department of Building and Housing report on the bill of July 2009 to the Social Services Select Committee contained the following passage regarding clauses 67-71 (clause 68 was later enacted as s 80), 111 and 112, and 122 of the draft Bill:

Clauses 67-71 Rights and responsibilities of unit owners

...

Issue

Some submitters were confused over the link between a unit owner's responsibility to repair and maintain their unit and the body corporate responsibility to repair and maintain all building elements and infrastructure that affect more than one unit. Submitters suggest it should be made clear that the body corporate duties under section 122 [sic] of the Bill override the unit

[24] Section 138(2), which enacted clause 122(2) was later merged into an amended s 138(1) by the Unit Titles Amendment Act 2013. The Court of Appeal in *Wheeldon v Body Corporate 342525* [2016] NZCA 247, (2016) NZCPR 353 at [42] has confirmed that the obligation on bodies corporate under s 138(1) prevails over the obligation of unit owners under s 80(1)(g).

owner's duties under section 68 [sic] in the case of repairs and maintenance of common property, building elements and infrastructure, regardless of how it has been surveyed on the unit plan.

Comment

Clause 122 provides that all common property, building elements and infrastructure that relate to or serve more than one unit are maintained and repaired by the body corporate. Clause 68 provides that a unit owner must repair and maintain their unit so that no harm will be caused to common property, building elements or infrastructure. *The link between these two clauses requires clarification as does the link to clauses 111 and 112,* which provide for the body corporate to recover money expended for repairs and other work and where the person is at fault respectively.

All building elements and infrastructure that relate to or serve more than one unit ought to be maintained by the body corporate, *but costs should be recoverable from the unit owners in instances where those unit owners substantially benefit from the repair or are at fault under clauses 111 and 112.*

(Emphases added)

Recommendation

Add sub-clause to clause 122 to indicate that costs may be recovered from the owner of the principal unit if the body corporate does any repair work to the building elements or infrastructure that are contained within a unit owner's principal unit.

> [74] The above extract shows the Department recognised there was an issue regarding the relationship between clauses 111 and 112 (which became ss 126 and 127) on the one hand and clause 122 (which became s 138) on the other. It also appears from the report that, at least as far as the Department was concerned, there was an expectation that when a body corporate took steps to repair building elements or infrastructure under s 138, the costs of those repairs should be recoverable from unit owners under s 126 in circumstances where the unit owners substantially benefitted from the repairs. In that respect, the decisions of the Tenancy Tribunal and the District Court in the present case accord with the policy stated in the Departmental Report.
>
> [75] However, if that was the intention of the Departmental Report, the recommendation, which was carried through into s 138(4), did not reflect that intention. Neither the recommendation nor s 138(4) makes it clear that where a body corporate undertakes repairs to building elements and infrastructure that serve one or more units, the costs of those repairs should be recoverable from the unit owners under s 126 where the unit owners have benefitted substantially from the repairs. Rather, s 138(4) appears to set up a parallel recovery mechanism that sits beside s 126. In that regard, I do not accept the submission from counsel for the unit owners that s 138(4) merely provides a "link" back to the recovery process and prescribed allocations under s 126 and is not a stand-alone provision providing a separate and distinct right of recovery.
>
> [76] However, the Departmental Report is important in confirming that policy makers turned their minds to the relationship between s 126 and s 138 and intended that relationship to be

clarified, even if s 138(4) did not achieve that result. Even so, it is clear that when s 138(4) was enacted, it was recognised that ss 126 and 127 were relevant to the recovery of costs of repair to unit property even though their predecessor sections in the UTA 1972, ss 33 and 34, were primarily relevant in relation to repairs to common property.

[77] The net result is that the legislative history does not offer a great deal of assistance in determining how ss 126 and 138(4) were intended to operate in relation to each other. The fact that s 138(4) sits within the section that mandates bodies corporate to undertake repairs to building elements and the like suggests that it was intended that the default position was that the costs of repairs carried out within unit titles should be recovered by unit owners but it was recognised that recovery under s 126 could be also be appropriate.

Decisions under UTA 2010

[78] Apart from *Otway*, there have been no decisions in which the courts have considered the relationship of the two sections, although some reference has been made to the sections – largely in descriptive terms. For example, in *Body Corporate 208303 v ANZ Bank New Zealand*, when approving an uncontested scheme for the repair of an apartment complex with leaky building issues, Moore J referred to the duty imposed on the body corporate by s 138(1) as follows:[25]

The duty in s 138(1) is compensated with the power to recoup the cost of exercising the duty either:

[25] *Body Corporate 208303 v ANZ Bank New Zealand* [2015] NZHC 378 at [15].

(a) whether work takes place wholly or within [sic] one principal unit by levying that owner; or

(b) whether work substantially benefits one unit or some of the owners more than others, by levying those owners.

(footnotes not included)

[79] Moore J referenced ss 138(4) and 126 respectively in his footnotes to paragraphs (a) and (b). He seemed to posit the two mechanisms as alternatives but did not offer a view as to the approach to be taken if both sections can apply. Muir J referred to the two sections in similar terms in *Body Corporate v Gu*,[26] also without offering a view as to the approach to be taken in the event of overlap.

Otway

[80] In his decision in *Otway*, Associate Judge Bell suggested that in the case of overlap, it could be open to the body corporate to choose whether to proceed under s 126 or under s 138(4). However, the Associate Judge was not required to take the matter further, having concluded there was an arguable defence available to the unit owners. Woolford J took the discussion further in his decision, noting that s 138(4) is not limited to situations where s 126 does not apply but he did not indicate what approach should be taken in situations where both sections apply. However, his observations were made in a wider context that warrants consideration in the circumstances of this case.

[81] The facts of *Otway*[27] had similarities to the facts in this appeal, with the dispute focused on the responsibility of first-floor owners for repairs to large decks that formed the roofs of

ground-floor commercial units below. In *Otway*, the repairs were extensive and were required to the decks, including the surface tiles, the underlying waterproof membrane and to the concrete slab beneath, to some of the building's drains, and to the building podium and soffit. Joinery units in the first-floor apartments also had to be adjusted or replaced to fit with the other repair work. The body corporate undertook the repairs, in exercise of its powers under s 138 and sought recovery from the owners of the units which it said had benefitted from the repairs.

[26] *Body Corporate v Gu* [2017] NZHC 2191.

[27] *Body Corporate S73368 v Otway* [2017] NZHC 3265.

[82] Although there had been a dispute about whether the top of the deck was within the titles of the first-floor apartments, Woolford J held that at least the waterproof membrane and the top of the deck slab fell within the titles of the first-floor units.[28] In a legal sense, therefore, the first-floor unit owners in *Otway* were in a similar position to the first-floor unit owners in the present case.

[83] The body corporate in *Otway* did not differentiate among the sections of the UTA 2010 when seeking recovery of the costs of repair. Rather, it sought recovery from the first-floor unit owners of the same costs for repairs to the decks and to the joinery in the first-floor apartments, under both ss 126 and 138.[29]

[84] Woolford J considered the claims under each of the sections. With respect to the claims under s 126, he concluded that, except for joinery work undertaken to the first-floor apartments, the body corporate had not shown that any of the repair work had benefitted the first-floor apartments substantially more than it had benefitted other units. His reasons included:

(a) The weather-tightness of the building was interlinked and indivisible, and the membrane on the first-floor decks was an important part of the storm water system for the entire building because the decks collected rain that fell on the tower block above the first-floor apartments;

(b) While the first-floor unit owners owned the membrane, they owned only the top of the underlying concrete slab, the rest of which was owned either by the ground floor unit owners or the body corporate as common property;

(c) If part of a building is not weather tight, it affects the saleability and value of all units, whether or not they are leaky;

[28] *Body Corporate S73368 v Otway* [2017] NZHC 3265 at [14].

29. The body corporate also made claims against another first-floor unit owner and ground-floor unit owners but those claims were not part of the litigation.

(d) The first-floor unit owners would pay proportionately more than other unit owners because the calculation of their utility interest took into account the floor area of the decks.

[85] The consequence of finding that most of the repair costs were not recoverable from the first-floor unit owners under s 126 meant those costs remained the responsibility of the body corporate.

[86] Woolford J held that the first-floor unit owners should pay for the new joinery installed in their apartments, and said this could be ordered either under s 126(2)(a) on the basis that the replacement of the joinery units benefitted the first-floor units by a distinct and ascertainable amount or under s 126(3) in the exercise of the Court's general discretion to apportion repair costs as it thinks fit. It was only after making this finding that Woolford J considered s 138(4) and found that there was jurisdiction "also" under s 138(4) to order the first-floor unit owners to pay for the costs of repair to the joinery units in their apartments.

[87] Some important lessons can be drawn from the approach followed in *Otway*. First, Woodford J considered the scope of recovery of repair costs under both sections 126 and 138(4) – as well as under s 127 which was held not to apply. While that may have been the consequence of the way the body corporate put its case, the decision shows that by considering recovery under the various tools under the Act, rather than just on the basis of title, fuller account can be taken of the causes of the damage and, therefore, of the bases on which costs can be allocated. For example, a number of the reasons identified by Woolford J for deciding the major costs should remain with the body corporate rather than borne by individual unit owners – such as the role of the deck and underlying membrane in ensuring the overall weathertightness of the building and the interest of all unit owners in maintaining that weathertightness – might well have been applicable in the present case.

[88] Secondly, while Woolford J held that s 126 and 138(4) are alternatives modes of recovery, the way he applied those sections led to the same result on each case where the sections were held to apply – that is, the costs of the new joinery units.
There was not, therefore, the large difference in outcome that would arise from the application of the two sections on the facts of this appeal.

[89] Thirdly, while Woolford J held that ss 126 and 138(4) are alternative modes of recovery, he did not apply the full logic of that conclusion to the circumstances of the case before him. If s 138(4) applied in its own terms irrespective of s 126, it would have been open to Woolford J to hold that the body corporate could recover the much more substantial costs of repair to the decks from the first-floor unit owners under that section even though he held that the body corporate had not shown that the repair work had benefitted the first-floor apartments substantially more than it had benefitted other units. However, had Woolford J taken that approach he would have been imposing on the first-floor unit owners a responsibility to pay for repairs which had been for the benefit of all unit owners, even if carried out largely within their unit titles.

[90] In my view, therefore, Woolford J's decision in *Otway* demonstrates that it is necessary to approach the allocation of costs under s 126 and 138(4) with some flexibility.

Conclusions of review of legislative history and case law

[91] I conclude from my review of the legislative history and case law that, as Woolford J held on in *Otway*, it would not be correct to interpret ss 126 and 138(4) as meaning that s 138(4) is limited to circumstances where s 126 does not apply. To that extent, I reach a different conclusion from Judge Harrison in the District Court and would answer the question I recorded in [3] as follows:

No, s 138(4) does not apply only where the repairs to an owner's principal unit do not "substantially benefit" any other units.

[92] However, that is not the end of the matter. Two further questions arise:

(a) Can s 126 apply in circumstances where s 138(4) applies?

(b) If both sections can apply, how does a body corporate decide which section to use?

Can s 126 apply in circumstances where s 138(4) applies?

[93] The logic of the argument advanced by the body corporate is that, at least in the circumstances of this case, only s 138(4) applies. That is that, notwithstanding the differences between the UTA 1972 and the UTA 2010, the later Act preserves the position under the earlier Act that made a conscious decision to assign responsibility for remedial work to unit property to owners irrespective of benefit. This is supported by the passage in *Tisch* quoted at [47] above.

[94] However, I consider that s 126 can apply in circumstances where s 138(4) applies for the following reasons:

(a) As noted at [25], the introductory words of s 126 are emphatic and comprehensive and apply to any situation where the body corporate has done work required or authorised under the Act. Just as Woolford J said of s 138(4) in *Otway*, the natural meaning of the words of s 126 are not capable of restraining their application only to situations where the work is in respect of common property, even if that was largely the case for s 33 under the UTA 1972.

(b) The legislative history shows that consideration was given to the relationship between s 126 and 138(4) before the UTA 2010 was enacted and there was an expectation that s 126 would apply in circumstances where repairs were undertaken pursuant to s 138.

(c) The language of both ss 126 and 138(4) is permissive, not mandatory: the expense incurred in repairs is "recoverable" not "shall be recovered.

(d) It would not be consistent with the broader purpose of the UTA 2010 as compared with the UTA 1972 to read s 138(4) as excluding the application of s 126 to situations where repairs are undertaken within a principal unit.

[95] In this regard, the observation of the Court of Appeal in *Berachan*, that Parliament did not intend that a "one size fits all" approach be taken is even more apposite to the UTA 2010 than it was to the UTA 1972 given the alternative modes of recovery now provided.

If both sections apply, how does a body corporate decide which to use?

[96] The body corporate's essential submission is that, consistently with the Act's purpose of providing for a responsive and flexible regime, the body corporate has a discretion as to which section it uses when both s 126 and 138(4) can apply. I do not accept that decision is an open as the body corporate's submission suggests.

[97] When deciding to recover funds either under s 126 or s 138(4), a body corporate is exercising a statutory power of decision. In doing so, a body corporate must give proper effect to the statutory scheme as a whole.[30] The exercise of a discretion, which in this case includes a discretion as to which section to apply, must be exercised in its statutory context even if the Act does not specify criteria. As the Court of Appeal said in *Secretary for Justice v Simes*:[31]

[50] In cases where the criteria are not exhaustive, or where none is specified, the considerations governing the exercise of discretion must be ascertained from the subject matter as well as the scope and objects of the legislation: *Keam v Minister of Works and Development*.

[98] It follows that when a body corporate is considering its approach to the recovery of costs of repairs to building elements, it does not have an unfettered discretion as to whether to apply s 126 or s 138(4).

[99] When considering whether to apply s 126 or s 138(4), a body corporate must have regard to:

(a) the purpose of the Act in s 3, in particular:

(i) The retention of the theme of the UTA 1972, as identified in *Fraser*,[32] which distinguishes between unit property for which

[30] *Velich v Body Corporate 164980* [2005] NZCA 108; (2005) 5 NZConvC 194,138 (CA) at [45].

[31] *Secretary for Justice v Simes* [2012] NZCA 459, [2012] NZAR 1044 (footnote omitted).

[32] *Fraser v Body Corporate S63621* [2009] NZHC 1100; (2009) 10 NZCPR 647 (HC) at [34].

unit owners are responsible and common property for which the body corporate is responsible;

(ii) The purpose of establishing a flexible and responsive regime for the governance of unit title developments;

(iii) The purpose of protecting the integrity of the development as a whole;

(iv) The objective of ensuring the on-going management of the unit title development on a socially and economically sustainable basis by the community of individual owners making up the development.

(b) The following principles which I derive from the UTA 2010, the decision of Woolford J in *Otway* and from decisions under the UTA 1972:

(i) Where a body corporate exercises its powers to repair unit property pursuant to s 138(1), a starting presumption is that the costs of repair should be met by the owner of the unit to which the repairs were made in accordance with s 138(4);

(ii) Account needs to be taken, however, of the nature of the particular building or complex; a “one size fits all” approach is not appropriate;[33]

(iii) The weathertightness of a building is interlinked and indivisible and all owners have a mutual interest in keeping the building weathertight and in good repair; if part of a building is not

33. *Young v Body Corporate 120066* [2007] NZHC 1401; (2007) 8 NZCPR 932 (HC); *Berachan Investments Ltd v Body Corporate 164205* [2012] NZCA 256, [2012] 3 NZLR 72.

weather tight, it affects the saleability and value of all units, whether or not they are leaky;[34]

(iv) A departure from allocation of costs of repair to unit property based on title is appropriate where reasonably necessary to achieve what is fair as between unit owners in the circumstances; the objective should be an outcome aimed at balancing the interests of unit

holders in a way that achieves the outcome that is fair to all unit holders;[35]

(v) Where the repairs result in a substantial benefit to other units in the terms of s 126, recovery under that section is likely to be appropriate;

(vi) Where the repairs benefit the building generally but do not benefit one or more units substantially more than they benefit other units, recovery from all unit owners on the basis of utility interest may be appropriate.

[100] In adapting these principles from decisions made under the UTA 1972, including *Tisch*, I do not follow *Tisch* on the point that relative benefits are not, of themselves, a sufficient reason to depart from the Act and that if the Act assigns responsibility to owners, the relative benefits must be assumed to have been taken into account. However, I consider that aspect of *Tisch* not to be apposite in the context of the UTA 2010 because:

(a) Tisch did not take account of the substance of s 33 which itself assigns cost on the basis of benefit. That was understandable in the context of that decision because under the scheme of the UTA 1972 bodies corporate had limited powers to repair unit property and s 33 was applicable primarily to repairs to common property.

34. *Body Corporate 198245 v Wong* [2012] NZHC 2676; *Body Corporate S73368 v Otway* [2016] NZHC 1070.

[35] *Tisch v Body Corporate No 318596* [2011] NZCA 420, 3 NZLR 679.

(b) The UTA 2010 introduces very different arrangements for repairs to unit property than was the case under the UTA 1972 in that s 138(4) requires bodies corporate to maintain and repair unit property where it forms part of the building elements, and s 126 applies to repairs to unit property as well as to repairs to common property. Therefore, to apply the full rigour of that aspect of *Tisch* to situations such as the present would not recognise the changes made by the UTA 2010.

Application to the facts of this appeal

[101] It is apparent from the minutes of the body corporate meeting at which the decision was made to undertake the repairs that the body corporate did not go past the first of the principles identified at [99](a)(i) above. The body corporate's approach was that the repairs took place within unit titles so the unit owners had to pay and that was the end of the matter. There is nothing to suggest any account was taken of the circumstances of the building or of benefit to other units or to the building as a whole. Indeed, the position taken by the body corporate before the Tenancy Tribunal and the District Court was that there was no benefit to other units because performance of a legal duty could not be said to confer a benefit on other unit owners.

[102] That argument was rejected by the Tenancy Tribunal and by the District Court which held that the repairs did confer a benefit on the restaurant below and that aspect of their decisions has not been challenged in this appeal. It is not apparent from the decisions whether the Tribunal or the District Court considered whether the repairs also conferred a benefit to the building as a whole and there is not enough information before this Court to take a definitive view on that matter, which was also not advanced in submissions. As noted at [87], however, some of the reasons Woolford J gave for his conclusion that the repairs in *Otway* did not benefit the first-floor unit owners substantially more than they benefitted others – with the consequence that the costs of those repairs remained with the body corporate – might have been applicable in this case as well.
[103] In any event, I consider the process followed by the Tenancy Tribunal and District Court and the conclusions they reached were broadly consistent with the approach described

at [99]. That is, the Tenancy Tribunal and the District Court:

(a) Considered the circumstances of the building and found that the repairs carried out by the body corporate conferred a benefit to the ground- floor unit as well to the first-floor units;

(b) Found that it would not be appropriate in circumstances where the repairs conferred a substantial benefit to other unit owners to require the owners of the first-floor units to bear all the costs of repair;

(c) Considered that recovery of the costs of repair was more appropriately made under s 126 rather than s 138(4) and decided accordingly.

[104] While the last conclusion was based on the erroneous finding that s 138(4) did not apply where s 126 applied, there is still no doubt that the Tribunal and the Court considered recovery under s 126 to be more appropriate to the circumstances than recovery under s 138(4). I do not disagree with that conclusion or with the result.

[105] The consequence is that although the body corporate has succeeded in part on the question of law question it posed on appeal – that the Tribunal and District Court were not correct in holding that s 138(4) applies only where s 126 does not apply – it has still lost the substantive appeal because:

(a) The body corporate was wrong in its assertion that if ss 126 and 138(4) both apply, the choice as to which is to be applied lies at the discretion of the body corporate which can be exercised solely on the basis that unit owners are responsible for the costs of repair to unit property;

(b) The body corporate failed to approach the exercise of its discretion on how the repair costs should be allocated with a sufficiently wide appreciation of the purpose and policy of the UTA 2010 and without consideration of the particular circumstances of the building and the
implications of the various cost allocation options for individual unit owners;

(c) Notwithstanding the error of law regarding the nature of the relationship between ss 126 and 138(4), the decision of the District Court, like that of the Tenancy Tribunal, was broadly consistent with the approach that should be taken when deciding how the costs of repairs by a body corporate within unit titles should be allocated.

[106] The body corporate limited its challenge to the substantive judgment to the District Court's findings regarding the relationship of ss 126 and 138(4) and did not offer an alternative basis for recovery other than utility interest as decided by the Tribunal and the District Court. Accordingly, there is no need for this Court to take that question any further.

Appeal on Costs

[107] The body corporate challenges the District Court's decision to award scale costs on a 2B basis – which amounted to $4,272 – and then increase the total costs to
$10,000 after making uplifts for the body corporate failing to accept an offer of settlement to settle or dispose of the proceeding and to take account of the fact that, as unit owners, the respondents would have to contribute their assessed shares of the body corporate's costs on appeal.

[108] I agree there are aspects of the District Court's decision that cannot stand.

Uplift for refusal to accept settlement offer

[109] First, although Judge Harrison's costs decision treats the letter written by the appellant's solicitors to the body corporate's solicitors on 25 November 2016 as an offer of settlement for the purposes of r 14.6(3) of the District Court rules and although counsel for the body corporate and the respondents referred to it as a *Calderbank* letter, the letter was not a true *Calderbank* in the terms established in *Calderbank v*

Calderbank[36] and later incorporated into r 14.10 of the District Court Rules. As Asher J said of a similar letter in *Nandro Homes Ltd v Datt*:[37]

No offer was made which was later vindicated by the quantum of damages, as occurs when orders are made on the basis of a *Calderbank* letter. Rather, one party stated, as parties often do ... that it considered the other side's case to be hopeless.

[110] The letter in this case sought to persuade the body corporate there was no purpose in pursuing the appeal to the District Court and said that if the body corporate withdrew its appeal, the respondents would not seek costs.

[111] Secondly, even if it the letter were regarded as an offer of settlement for the wider purposes of r 14.6, which is not confined to *Calderbank* letters, the body corporate's rejection of the offer could not be said to have been "without reasonable justification" in terms of the rule. Judge Harrison's characterisation of the body corporate's position – that it took the risk that its decision regarding the applicability of s 138 was correct and in so doing failed without reasonable justification to accept the respondent's offer of settlement – is difficult to understand. It is apparent the Judge considered the body corporate should not have pursued its appeal. But he did not say that the body corporate's position was hopeless, as was found of the argument advanced by the plaintiff in *Bradbury v Westpac Banking Corporation*[38] where an increase of costs on that basis was upheld by the Court of Appeal, or that the appeal was without merit. Nor would either finding have been correct. The body corporate had a credible basis for its position and could claim support from the Court of Appeal's decision in *Tisch*, albeit in the context of the UTA 1972 rather than the UTA 2010.

[112] Another element of the body corporate's position which the District Court judge did not consider is that the body corporate must act in the interests of all members of the body corporate. It is not surprising that the body corporate chose to appeal on a point that had significant long-term implications for how it would recover costs incurred in carrying out its responsibilities under s 138 to repair and maintain repair building elements and infrastructure that relate to more than one unit.

[36] *Calderbank v Calderbank* [1975] 3 All ER 333 (CA).

[37] *Nandro Homes Ltd v Datt* HC AK CIV-2008-404-0006676 at [13].

38. *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400 at [24] and [73].

[113] For these reasons, I do not consider that the body corporate's refusal to accept the respondent's offer of settlement was without reasonable justification. Accordingly, the uplift of 50 per cent of scale costs or approximately $2,100 ordered by Judge Harrison cannot be sustained and must be set aside.

Uplift for inequality

[114] Judge Harrison imposed a further uplift of approximately $3,600 principally in recognition of the fact that as members of the body corporate the appellants would also have to pay their assessed shares of the body corporate's costs. The Judge described this as an

unusual situation which should not result in further losses to the respondents. He also referred to inequality on costs matters between the appellants, whose ability to pay indemnity costs is subject to the District Court Rules and the body corporate which has a right to indemnity costs under s 124 of the UTA 2010.

[115] Counsel for the body corporate submitted that these were not permissible bases under the Rules for ordering increased costs and that the further increase ordered by the Judge was not a valid exercise of the District Court's costs jurisdiction or discretion. Counsel for the unit owners submitted that all Judge Harrison's costs orders were in the exercise of the Judge's discretion and reflected reality.

[116] That a member of a body corporate is required, by its membership, to fund litigation it does not support or which is directed at it may not be as unusual as Judge Harrison's remarks suggested. It is inherent in any situation where a body corporate takes legal proceedings in circumstances where some members of the body corporate are opposed or, as here, where the body corporate seeks to recover costs from a member of the body corporate. Examples are the Court of Appeal's decision in *Tremont Holdings v Body Corporate*[39] and the High Court decision in *Body Corporate v Bhana Investments Ltd.*[40] In both those decisions, it was recognised that an uplift in costs may be made in the exercise of the Court's general discretion under r 14.1 of the District Court Rules to compensate for unfairness in a member of a body corporate being required to contribute to the costs of litigation brought against it.

[39] *Tremont Holdings v Body Corporate* 401803 [2015] NZCA 314.

[40] *Body Corporate v Bhana Investments Ltd* [2015] NZHC 2787

[117] I do not consider that an uplift on that basis would generally be appropriate. However, as counsel for the unit owners submitted, this case has some quite unusual elements:

(a) The amount in dispute is just in excess of $27,000 which, on its face, would not justify the legal resource that have been expended on it, even before this appeal was filed.

(b) On one side are two individual unit owners who legitimately and successfully challenged the amount charged by the body corporate for the repairs to the respondents' decks.

(c) On the other side is a body corporate which is concerned at the wider implications of the decision for the longer-term operations and sees it as in its interest to secure a definitive ruling on the legal question.

[118] The result has been that even though the respondents have been successful at every stage of the proceeding, they have been required to participate in further rounds of litigation to the point that the costs involved could negate the fruits of their success. In these circumstances, I consider some uplift in costs is appropriate, in the words of the Court of Appeal in *Tremont Holdings*, to rectify the unfairness to the respondents resulting from their contributions towards the body corporate's costs in bringing the unsuccessful appeal to the District Court.

[119] In their Memorandum on Costs of 30 August 2017, the respondents sought an order that the body corporate pay the respondents 2.018 per cent of the body corporate's legal costs on appeal to the District Court, being the combined total of their respective utility interests. In submissions to this Court, counsel for the body corporate said that if that was the purpose of the uplift of $3,600 ordered by Judge Harrison, using the multiple proposed by the respondent's counsel the uplift would have equated to a total legal bill in excess of $170,000 for the body corporate.

[120] The body corporate has not disclosed its legal costs prior to this appeal. Counsel for

the unit owners said the body corporate had reportedly spent and incurred adverse costs awards in excess of $117,000 in order to recover approximately $35,600 – being the difference between the amount sought and the amount the respondents had offered to pay.

[121] Those figures are plausible but I cannot know their accuracy. In any event, I consider the additional amount awarded by Judge Harrison to have been excessive and motivated in part by a desire to bridge the gap between total actual costs incurred by the respondents and scale costs. As Mr Price submitted, such an approach is not consistent with the Court of Appeal's decisions in *Bradbury* and *Holdfast NZ Ltd v Selleys Pty Ltd*[41] where the Court emphasised the importance of adhering to the scale and not looking to award actual costs.

[122] In the interests of achieving finality, I assume the body corporate's legal costs up to the District Court's substantive decision were of the order of $100,000 and that the respondent's combined contribution to those costs were of the order of $2,000. Using these figures only as a rough guide, I consider a single uplift of $3,000 on scale costs to be appropriate amount to compensate the respondents both for their having to incur considerable legal expenses through the body corporate's pursuit of a point of law that is of considerably more importance to it than it was to individual unit owners and for the unfairness of their having to contribute towards the body corporate's costs in bringing the unsuccessful appeal to the District Court. Accordingly, I set aside Judge Harrison's costs decision of 25 September 2017 and direct instead that the body corporate pay the respondents' scale costs plus an uplift of $3,000.

Result

[123] I dismiss the body corporate's substantive appeal.

[124] I uphold the body corporate's appeal against the District Court's costs decision. I set aside the District Court's costs award and replace it as follows:

[41] *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400 at [28];

Holdfast NZ Ltd v Selleys Pty Ltd [2005] NZCA 302; (2005) 17 PRNZ 897 (CA) at [40].

In respect of the District proceeding, the body corporate is to pay the respondents' costs of $7,272, comprising scale costs of $4,272 plus an uplift of $3,000.

Costs on this decision

[125] While the body corporate can claim to have been partly successful on the substantive appeal and to have succeeded on its costs appeal, in an overall sense the respondents were the successful parties and are entitled to costs on this appeal on a 2B basis. If the parties are not able to agree costs, the respondents are to file a memorandum by 27 June 2018; any reply by the body corporate should be filed by 18 July 2018. Memoranda should not exceed 5 pages.

G J van Bohemen J

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