High Court of New Zealand Decisions

Body Corporate 324525 v Stent [2017] NZHC 2857 (21 November 2017)

Last Updated: 11 December 2017

IN THE HIGH COURT OF NEW ZEALAND WHANGAREI REGISTRY

I TE KŌTI MATUA O AOTEAROA WHANGĀREI TERENGA PARĀOA ROHE

CIV-2016-488-94 [2017] NZHC 2857

BETWEEN	BODY CORPORATE 324525 Plaintiff
AND	ROBYN CATHLEEN STENT First Defendant CLARRIE LAWRENCE SMALL and KM TRUSTEE SERVICES LIMITED Second Defendants ANTHONY JOHN BUTCHER and RUTH BARBARA ROGERS Third Defendants IVOR ANTONY MILLINGTON Fourth Defendant NEVILE EADE Fifth Defendant

Hearing:	2, 3, 9 and 15 February 2017
Appearances:	T J G Allan and SF Powrie (only on 2 February) for Plaintiff B E Brill for Defendants
Judgment:	21 November 2017

JUDGMENT (No.2) OF ASSOCIATE JUDGE R M BELL

*This judgment was delivered by me on **21 November 2017** at **4:00pm***

pursuant to Rule 11.5 of the High Court Rules

Solicitors:

.....

Registrar/Deputy Registrar

Grove Darlow, Auckland, for Plaintiff

Barry E Brill Limited, Paihia, for Defendants

BODY CORPORATE 324525 v STENT [2017] NZHC 2857 [21 November 2017]

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Introduction

[1] The body corporate for the unit title development at Paihia known as Bridgewater Bay Apartments sues the owners of five apartments for unpaid levies, interest and the reasonable costs of collection. It has applied for summary judgment. The claims are:

(a) Robyn Cathleen Stent, first defendant $188,380.47 (level 2 - unit 204)

(b) Clarrie Small and K M Trustee Services Ltd

second defendants $107,910.90 (level 2 - unit 206)

Anthony John Butcher and

Ruth Barbara Rogers third defendants $213,859.24 (level 3 - unit 301)

(c) Ivor Anthony Millington, fourth defendant $207,851.22 (level 3 - unit 307)

(d) Neville Eade, fifth defendant $208,908.55 (level 3 - unit 310)

[2] The body corporate says that there were resolutions imposing levies described as

SL1, SL4, SL6, SL7 and SL8:[1]

Levy	**Amount**	**Date of decision**	**Due Date**
SL1	$172,500.00	14 July 2015	31 July 2014
SL4	$57,500.00	15 February 2015	2 April 2015
SL6	$34,500.00	2 June 2015	10 July 2015
SL7	$3,000,000.00	7 August 2015	3 October 2015
SL8	$700,000.00	19 April 2016	15 May 2016

[1] There are also levies identified as SL2, SL3 and SL5, but they are not in issue in this proceeding.

Its case is that all owners were levied according to their ownership interests. A body corporate committee with delegated authority resolved to impose the levies SL1, SL4, SL6 and SL8. SL1, SL4 and SL6 were ratified at an extraordinary general meeting on

17 June 2015. SL7 was made at an emergency extraordinary general meeting on

7 August 2015. SL8 was not made at a general meeting and has not been ratified. Ms Stent has paid levies SL1, SL4 and SL6 but has not paid SL7 and SL8. The other defendants have not paid any of the levies.

[3] I have taken much longer to give this decision than I would have wanted. I apologise to the parties for the time taken.

[4] Bridgewater had water ingress problems. The owners were divided on how to deal with them. The majority favoured carrying out extensive work, whereas the minority, the defendants in this case, considered that the proposed repairs went beyond what was necessary. While the differences were aired in general meetings, the defendants have taken other proceedings challenging decisions by the body corporate to carry out the works, but were unsuccessful. Muir J described their position:[2]

... They allege “capture” of the Body Corporate by the Auckland based “leaky building industry” and cupidity on the part of individual consultants. They contend for a limited or “targeted” repair, deny that there are any systemic problems with the development and say that all that is currently required is remedial work

to the two timber-framed "penthouses" which sit on the fourth floor of the building. They say that such work should be paid for by the owners of those units and that although other elements of the building, and, in particular, deck membranes for the remaining 18 apartments, may be nearing the end of their service life, all that is, in due course, required is to lift and replace the membranes and tiles at a cost unlikely to exceed $6,000 per unit.

The levies were raised to fund the costs of investigating building defects and carrying out remedial and other work. The defendants' refusal to pay the levies is based on their disagreement with paying for repairs which they consider are unnecessary. They have apparently paid levies required to meet the body corporate's ordinary expenses.

[5] While the defendants run a number of arguments, they mainly come under two general heads:

[2] *Wheeldon v Body Corporate 324525* [2015] NZHC 884, (2015) 16 NZCPR 829 at [3].

(a) They attack the validity of a number of decisions by the body corporate: to issue a leaky building proceeding; to undertake some parts of the remedial works; to carry out remedial works by funding said to be inconsistent with ss 115 to 119 of the Unit Titles Act; and the resolution by the body corporate committee for levy SL8.

(b) They make tort claims for damages for: harmful publicity; for negligence in decision-making; and negligence in carrying out remedial works; and say that these claims can be set off against any liability to pay levies.

Background

[6] Boutique Body Corporates Ltd provides secretarial and management services to the body corporate. Its director is Mr Craig Leishman.

[7] There are 22 apartments in the complex built in 2003. The ground floor (called level 1) is a car parking area which is common property. There are ten units on each of levels 2 and 3, and two on level 4. At least since 2013, if not earlier, the body corporate and many of the owners were aware of water ingress problems affecting both common property and some unit property. During 2013, the body corporate obtained reports from consultants. In October 2013, on the instructions of the body corporate, a

proceeding was started claiming damages for damage attributed to building defects.[3]

The proceeding named the body corporate and the owners of all the apartments as plaintiffs. While a number of defendants were named, only the Far North District Council actively defended.

[8] At an extraordinary general meeting on 9 November 2013 it was resolved that the body corporate not lodge a claim with the Weathertight Homes Resolution Service, that the body corporate committee be delegated to investigate and appoint a consultant to manage the building remediation process, that the committee's appointment of lawyers to instigate defect litigation be ratified, and that the law firm be engaged to

represent the interest of the body corporate and owners in the proceedings.

[3] *Body Corporate 324525 v Far North District Council* HC Whangarei CIV-2013-488-434. I note the decision in this proceeding was given in *Body Corporate 324525 v Far North District Council* [2016]

NZHC 1506.

[9] Ms Stent, the first defendant, bought her unit in March 2014 from Mr and

Mrs Wheeldon.

[10] On 30 November 2015 the body corporate entered into a contract to repair the defects. The contract price was $2,452,344.00 excluding GST but subject to variations and provisional costs sums. The work has been completed.

[11] Mr Leishman says that by July 2016 the body corporate had incurred costs of

$3,747,584.00 (including GST) to remedy the defects. His evidence includes a copy of a building expenditure ledger showing all expenditure paid. In summary, he says that the total costs incurred in remedying the defects but excluding fees, is $2,768,903.00. The balance is taken up with consultants' fees, management fees, and sundries such as insurance.

[12] Since becoming aware of the water ingress problems, the body corporate has obtained reports from consultants:

(a) Report by AA Home Inspections Ltd dated 22 April 2013;

(b) Report by AA Home Inspections Ltd dated 18 September 2013;

(c) Preliminary weathertightness report by Origin Building Consultants Ltd dated 9 October 2013;

(d) Remedial costs report by Kwanto, quantity surveyors, dated 5 November

2013;

(e) Scope of works and methodology for proposed remedial works by

Resolution Architecture of June 2014;

(f) Passive fire protection audit report by Fire Group Consulting Ltd dated

25 October 2015.

Among other things the defendants say that the remedial work by the body corporate is more extensive and has cost much more than the initial reports indicated.

Other proceedings

[13] Part of the background is three other proceedings involving the Bridgewater Bay apartments which I will explain:[4]

(a) *Wheeldon v Body Corporate 324525* CIV-2014-488-122 (*Wheeldon*); (b) *Butcher v Body Corporate 324525* CIV-2015-488-86 (*Butcher*); and

(c) *Body Corporate 324525 v Far North District Council* CIV-2013-488-434 (the leaky building proceeding).

Wheeldon

[14] In *Wheeldon* the plaintiffs sought declarations as to the invalidity of resolutions made by the body corporate and its committee to carry out the remedial work. In a second cause of action they sought a declaration that the SL1 levy was invalid. In a counterclaim, the body corporate sought judgment for that levy. The plaintiffs in the *Wheeldon* proceeding are the second to fifth defendants in this proceeding and Mr and Mrs Wheeldon. They had sold their unit to Ms Stent. While she was not named as plaintiff, Ms Stent held a power of attorney from the Wheeldons and effectively ran the proceeding on their behalf. She was a counterclaim defendant in her own right.

[15] Muir J's decision of 30 April 2015 (*Wheeldon 1*) dealt only with the first cause of action,[5] leaving the second cause of action and the counterclaim for decision later. He gave his final decision (*Wheeldon 2*) on 7 February 2017 while this application was part-heard.[6]

[16] In *Wheeldon 1* he found for the body corporate. Amongst other things he held:

(a) Under s 138(1)(e) of the Unit Titles Act the body corporate was under a responsibility to repair and maintain building elements and infrastructure

[4] I understand that there have also been proceedings in the Tenancy Tribunal under s 171 of the Unit Titles Act, but they are not relevant to this proceeding.

[5] *Wheeldon v Body Corporate 324525* [2015] NZHC 884, (2015) 16 NZCPR 829.

[6] *Wheeldon v Body Corporate 342525* [2017] NZHC 87.

that relate to or serve more than one unit, even if the building elements and infrastructure are unit property rather than common property. That applies notwithstanding s 80(1)(g) under which an owner of a principal unit must repair and maintain the unit and keep it in good order.[7]

(b) The objective under s 3(d) of the Unit Titles Act of protecting the integrity of the development as a whole went not only to structural integrity but also aesthetic integrity.[8]

(c) The plaintiffs cannot complain that it is unfair that they must pay for the costs of repairs and maintenance to building elements and infrastructure by ownership interests in the first instance. The body corporate may decide later whether it should take action against individual owners to recover costs incurred by the general body of unit holders.[9]

(d) Any apparent conflict between ss 138(1)(d) and 80(1)(a)(ii) of the Unit Titles Act (which permits a body corporate or its agents to enter a unit for maintenance, repair and renewal of infrastructure) can be resolved by inserting the words "or the common property (or both)" into s 138(1)(d) and further, a unit could include areas of a building in separate albeit common ownership of respective proprietors.[10]

(e) The body corporate acted on bona fide advice from an expert with specialist knowledge in the area. That expert advised the body corporate that the complex did not comply with the building code when it was built, and remediation would involve reconstruction of decks with adequate falls and consequential changes to the northern façade. The body corporate was entitled to accept that advice and develop its scope of

works accordingly, notwithstanding contrary views by the minority.[11]

[7] At [26]-[54].

[8] At [48].

[9] At [52].

[10] At [58]-[64].

[11] At [76].

(f) The parts of the building requiring repair involved building elements and infrastructure that related to and served more than one unit or common property or both.[12]

(g) The decks on levels 2, 3 and 4 required repair and maintenance.[13]

(h) As repair work has to be carried out to the standard of the current building code, the body corporate proposed remedial works did not amount to betterment, but that excluded improvements such as double-glazing and adding ranch sliders to bedroom suites. On that basis the body corporate was entitled to carry out a holistic repair, rather than

targeted repairs.[14]

(i) When properly construed, the resolutions passed at the general meeting on 9 November 2013 authorised the body corporate to carry out the proposed remedial work.[15]

(j) Muir J declined to make a declaration that the body corporate must recover the cost of repairs or maintenance undertaken within any unit from the owner of that unit (except where damage is caused by water leaked from another unit).[16]

[17] The plaintiffs in *Wheeldon* appealed but were unsuccessful.[17] The Court of Appeal did not consider it necessary to read in additional words "or common property or both" into s 138(1)(d).[18] The appellants said that Muir J had not addressed an argument that s 138(1)(d) of the Unit Titles Act did not give authority to a body corporate to repair a building element, unless that building element required repair. The Court of Appeal rejected that submission.[19] The Court rejected an application to adduce

further evidence, which was directed at showing that the local authority would grant

[12] At [77]-[98]

[13] At [99]-[146].

[14] At [147]-[166].

[15] At [167]-[194].

[16] At [197]-[199].

[17] *Wheeldon v Body Corporate 324525* [2016] NZCA 247, (2016) 17 NZCPR 353.

[18] At [46]-[47].

[19] At [71]-[72].

building consent with a more limited scope of works than the body corporate had planned.[20] In all other respects it upheld those findings of Muir J which were the subject of appeal. The plaintiffs sought leave to appeal to the Supreme Court but were not successful.[21]

[18] In *Wheeldon 2* Muir J:[22]

(a) Declined to make a declaration that the body corporate had breached s 117 of the Unit Titles Act by appropriating funds held in an account described as a long-term maintenance fund;

(b) Held that payments out of that account had been made lawfully and had been ratified in a general meeting;

(c) Held that SL1 had been lawfully raised. There was no invalidity in the body corporate committee conferring by email instead of meeting in person;

(d) Gave judgment for the body corporate for its counterclaim (against the defendants in this case) for SL1.

[19] The plaintiffs appealed against Muir J's decision in *Wheeldon 2*. The Court of

Appeal dismissed the appeal with reasons to be given later.[23]

Butcher

[20] The plaintiffs in *Butcher* are the defendants in this proceeding. They differ from the *Wheeldon* plaintiffs in that Ms Stent has replaced the Wheeldons.

[21] There were three causes of action:

[20] At [103]-[114].

[21] *Wheeldon v Body Corporate 324525* [2016] NZSC 125.

[22] *Wheeldon v Body Corporate 324525* [2017] NZHC 87.

[23] *Wheeldon v Body Corporate 324525* [2017] NZCA 424.

(a) The first cause of action attacked the validity of resolutions passed at an annual general meeting on 31 January 2015, an extraordinary general meeting on 17 June 2015 and an emergency extraordinary general meeting on 8 August 2015.

(b) The second sought minority relief under s 210 of the Unit Titles Act.

(c) The third sought a declaration that the relevant resolutions were ultra vires and of no effect because the works undertaken represented voluntary upgrades unnecessary to satisfy the requirements of s 49(1) of the Building Act 2004.

First cause of action

[22] In his decision of 20 December 2016,[24] on the first cause of action Muir J held that the plaintiffs were ineligible to vote at a general meeting under s 96 of the Unit Titles Act for not having paid their levies.[25] In a minute of 21 November 2016, he had recorded other challenges to the legality of resolutions but they were abandoned.[26] At the emergency extraordinary general meeting of August 2015, all resolutions were carried by a majority of no less than 75 per cent of those voting.[27] The resolutions complained of did not require special resolutions in any event.[28] A resolution dispensing with future audits was invalid.[29] Muir J declined to declare that a unanimous resolution at the extraordinary general meeting on 17 June 2015 ratifying past resolutions by the body corporate and its committee was invalid.[30]

Second cause of action

[23] On the second cause of action Muir J declined to allow the plaintiffs to reinstate their abandoned claim under s 210 of the Unit Titles Act.[31]

[24] *Butcher v Body Corporate 324525* [2016] NZHC 3128, (2016) 17 NZCPR 708.

[25] At [74]-[87].

[26] At [73].

[27] At [88].

[28] At [90]-[92].

[29] At [93]-[97].

[30] At [98]-[99].

[31] At [103]-[110].

Third cause of action

[24] Muir J held that the third cause of action was an abuse of process under *Henderson v Henderson*,[32] because the plaintiffs were trying to run arguments that they ought to have run in the *Wheeldon* proceeding.[33] Insofar as the plaintiffs sought to run arguments as to repairs to decks not being necessary, they were barred by issue estoppel. In any event, Muir J would have dismissed the plaintiffs' arguments. He regarded a building consent obtained by Mr Butcher as irrelevant.[34] In summary, the plaintiffs were completely unsuccessful in the *Butcher* proceeding. They appealed. The Court of Appeal dismissed the appeal with reasons to be given later.[35]

[25] There is some overlap between issues in *Wheeldon* and *Butche*r and matters raised in this proceeding. The extent to which findings in those cases can be applied here needs to be noted. The starting point is that evidence of a finding of fact in those cases is not admissible in this proceeding to prove a fact in issue in this case.[36] That is subject to the substantive rules as to *res judicata* and issue estoppel.[37] In addition as a

matter of procedural law the court may hold that it is an abuse of process for a party to run an argument that could have been raised in the earlier proceeding.[38]

[26] As all appeal rights in *Wheeldon 1* have been exhausted, that decision clearly has final effect. It binds its parties and their privies. Ms Stent was not a party to the plaintiffs' causes of action in that decision, only to the counterclaim. She is however a privy, because of a sufficient community of interest with the Wheeldons. She had bought their unit and held a power of attorney under which she conducted the litigation under their names. She stood in their place.

[27] It is otherwise with *Butcher* and *Wheeldon 2*. While an appeal is pending, the decision the subject of appeal does not have final effect for *res judicata*. The appeal

[32] *Henderson v Henderson* [1843] EngR 917; (1843) 3 Hare 100.

[33] At [49]-[62].

[34] At [63]-[70].

[35] *Butcher v Body Corporate 324525* [2017] NZCA 423.

[36] Evidence Act 2006, s 50(1).

[37] Evidence Act, s 50(2).

[38] *Henderson v Henderson* [1843] EngR 917; (1843) 3 Hare 100 as explained in *Johnson v Gore Wood & Co* [2002]

2 AC 1 (HL).

trumps the estoppel.[39] While the appeals in *Butcher* and *Wheeldon 2* have been dismissed, the Court of Appeal has not yet given its reasons. It is possible that not all of Muir J's reasons will be upheld. Because of that slight possibility I will have regard to his decisions in *Butcher* and *Wheeldon 2*, but not treat them as conclusive for issues in this case.[40]

Body Corporate 324525 v Far North District Council[41]

[28] This is the leaky building proceeding started in October 2013. The proceeding named the body corporate and all 22 owners as plaintiffs. An Auckland law firm filed the proceeding on the instructions of the body corporate committee after the firm advised that the claims were at risk of becoming time-barred. The Far North District Council was the only defendant that took an active part. Sometime after the start of the proceeding the defendants in this proceeding instructed Mr Brill, apparently because the Auckland lawyers had difficulty dealing with inconsistent instructions from the body corporate and the defendants. I case managed the proceeding during the interlocutory phase. It was set down for an eight-week hearing this year. I have been advised by the registry that the claim settled between all the plaintiffs and the district council. The council is apparently pursuing cross-claims against other defendants.

Procedural matters

The defendants' pleadings

[29] The defendants were coy about showing their grounds of opposition fully. They needed some coaxing. The full range of arguments did not become apparent until some days into the hearing. The first notice of opposition (dated 9 November 2016) made only general assertions, for example:

Each defendant has one or more valid defences to the plaintiff's claim.

[30] The next notice of opposition referred to defences in a draft statement of defence and counterclaim filed on 22 November 2016. That document was unhelpful in that it

[39] *Unilin Beheer BV v Berry Floor NV* [2007] EWCA Civ 364, [2008] 1 All ER 156 at [80]- [81].

[40] This point arises at [111] below.

[41] *Body Corporate 324525 v Far North District Council* HC Whangarei CIV-2013-488-434.

did not refer with any particularity to enactments or principles of law or judicial decisions on which the defendants relied.[42] The draft statement of defence did deal with some matters raised in argument.

[31] In a further document, the defendants filed further particulars of the draft statement of defence, which referred to paragraphs pleaded in the *Butcher* proceeding. That was not helpful as I had no idea what those paragraphs referred to. At that stage Muir J had not given his judgment in *Butcher*, but I was aware that some issues in that case were not being pursued. I did not know which ones and how they overlapped with this case. I was concerned not to give a decision inconsistent with matters which Muir J might cover in *Wheeldon 2* and *Butcher*. On 16 December 2016 I directed:

At the hearing of the summary judgment application, I will not deal with attacks on the validity of the levies or similar matters in paragraph 7 of the statement of defence. I will, however, deal with the other matters put in issue by the draft statement of defence.

[32] That was overtaken by the judgments in *Butcher* and *Wheeldon 2* so that I was able to hear argument on validity issues. All the same, the body corporate opened without knowing exactly which validity issues would be run. The defendants' opening synopsis of argument filed before the hearing did not refer to them. I found out what they were only when supplementary synopses were tendered during the hearing.

Defendants' application to use evidence in earlier proceedings

[33] As part of its case, the body corporate relied extensively on evidence in the *Wheeldon* and *Butcher* proceedings, as well as on the judgments in those cases. The defendants accordingly had clear notice of all the evidence the body corporate was relying on.

[34] In their amended notice of opposition, the defendants gave notice under r 7.32 of the High Court Rules[43] that they intended to rely on three affidavits filed in the *Wheeldon* and *Butcher* proceedings. Unlike the body corporate the defendants did not

include those affidavits as part of their evidence and they were not included in the

[42] High Court Rules, r 7.24(2)(b).

[43] There was a typographical error: they referred to r 7.31.

bundle of documents for the hearing. Instead, during the hearing, Mr Brill tendered a bundle of additional materials, comprising extracts from the affidavits referred to in the notice of opposition. I granted leave to use those materials, but I do not approve the way this was done. The body corporate was left in the dark as to the evidence the defendants were relying on and did not have the opportunity to reply to it. To a certain extent, the body corporate was ambushed. Notwithstanding that, I granted leave because I did not want the error of their counsel to prejudice the defendants. Refusing leave may have led to delay, as the defendants would have sought leave to file the evidence properly. With leave given, the body corporate would also require time to reply. The body corporate was impatient with what it saw as stalling tactics by the defendants.

No claim for relief under s 210 of the Unit Titles Act

[35] While the defendants claim to be hard done by the body corporate and the majority of the owners, they do not seek relief under s 210 of the Unit Titles Act. The section says:

210 General relief for minority where resolution required

(1) In any case where this Act requires a resolution and the resolution is passed, any person who voted against the resolution may apply to the appropriate decision-maker for relief on the grounds that the effect of the resolution would be unjust or inequitable for the minority. ...

(2) An application for relief under subsection (1) must be made within

28 days of the passing of the resolution.

[36] Relief under the section is not available for those who do not vote. The defendants here have not satisfied the voting eligibility requirement under s 96(3) of the Unit Titles Act of having paid all their body corporate levies. They were therefore not eligible to vote and could not apply under s 210.

[37] There is another aspect that bars any claim under s 210. The levies in this case are payable by all owners under ss 121 and 124 of the Unit Titles Act according to their ownership interests. Because the levies apply equally to all owners, a minority cannot claim that the effects of resolutions for those levies are unjust or inequitable to them as a

minority. Harrison J caught this in *Young v Body Corporate 120066*, when dealing with s 43 of the Unit Titles Act 1972, which was in similar terms:[44]

As Randerson J emphasised in *Spencer-Inight* at 106, the phrase “inequitable” where used in s 43 implies material unfairness or injustice to the minority unit holder. Mr Colthart’s argument appears to proceed on the

premise that a resolution is inequitable because a minority objects to it. That does not satisfy the statutory test. The Cowley group must identify an element of the resolution which has a materially unfair or unjust effect on it as opposed to the apartment owners as a group. Its failure to do so is fatal.

[38] That is relevant to the defences in this case. On the whole the defendants do not allege that they have been hard done by as a minority, but raise matters that apply generally to all unit owners.

The body corporate's claim for "other fees"

[39] The body corporate says that the defendants should pay "other fees" of

$4,343.20:

(a) First defendant $1,589.38 (b) Second defendants $427.01 (c) Third defendants $891.74 (d) Fourth defendant $716.27 (e) Fifth defendant $718.80

[40] The body corporate has not claimed that these fees fall within any of the levies on which it has sued. The statement of claim does not plead any recognisable cause of action for the fees. There is no evidence to support these fees. In the absence of adequate pleading and clear evidence, the body corporate has not shown that the defendants do not have an arguable defence to the claims for the fees.

[41] Mr Allan explained that the claim against the five defendants totalling $4,343.20

for "other fees" was under s 127 of the Unit Titles Act. The body corporate required the

[44] *Young v Body Corporate 120066* [2007] NZHC 1401; (2007) 8 NZCPR 932 (HC) at [43]. See also *Spencer-Inight v*

Johnston [1999] 3 NZLR 103 (HC) at 106; *World Vision of New Zealand Trust Board v Seal* (2004)

1 NZLR 673 (HC) at [45]; *Hart v Body Corporate 180455* (2005) 5 NZConvC 194,147 (HC) at [8]; *Body Corporate 85403 v Magill* [2008] NZHC 225; (2008) 9 NZCPR 399 (HC); and *Tremont Holdings Ltd v Body Corporate 40180* [2015] NZCA 314 at [11]- [25].

defendants to pay the costs of a loan facility fee it had incurred in arranging finance needed because of the failure of the defendants to pay their levies. The section says:

127 Recovery of money expended where person at fault

(1) This section applies if 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, and the repair, work, or act was rendered necessary by reason of any wilful or negligent act or omission on the part of, or any breach of the Act, the body corporate operational rules, or any regulations by, any unit owner or his or her tenant, lessee, licensee, or invitee.

(2) Any expense incurred by the body corporate in doing the repair, work, or act, together with any reasonable costs incurred in collecting the expense, is recoverable 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 became payable or by the person who is the unit owner at the time proceedings are instituted.

[42] The body corporate has not pleaded that claim. The statement of claim is for contributions levied on all unit owners under s 121 recoverable under s 124 including collection costs and interest under s 128 of the Unit Titles Act. A claim under s 127 is targeted at particular owners where action by the body corporate is required because of any wilful or negligent act or omission on the part of those owners. No defendant

reading the statement of claim would understand that they were facing a claim under s 127.

[43] The body corporate's evidence is insufficient. It has not shown any contractual document under which it was required to pay a loan facility fee and has not proved the amount of the fee. It is also not apparent how the fee has been apportioned amongst the defendants. Another matter to be explored is whether the interest payable under s 128 of the Unit Titles Act may be adequate compensation to the body corporate for being kept out of the levies payable to it.

[44] Mr Allan accepted that he could not sustain the application for summary judgment for the "other fees". The ordinary course would be to dismiss the summary judgment application for that aspect and give directions for a hearing on the merits in this court. Mr Allan acknowledged that that was impractical. The amount in issue is easily within the jurisdiction of the Tenancy Tribunal under s 171(4) of the Unit Titles Act. There is, however, no provision under which a claim started in this court for less

than $50,000 can be transferred to the Tenancy Tribunal. While s 175 of the Act allows the Tribunal to move proceedings to the District Court or the High Court, there is no provision for transfer the other way.

[45] Given the obvious inefficiency of hearing a claim for $4,000 in this court, Mr Allan sought an order dismissing the claim in this court but without prejudice to the body corporate's right to claim afresh in the Tenancy Tribunal. I do that by recording that that aspect of the claim has been discontinued in this court, but without prejudice to the body corporate's right to recover that sum in the Tenancy Tribunal.

The claim for SL1

[46] In *Wheeldon 2* Muir J gave the body corporate judgment on its counterclaim for SL1 against the defendants. As the body corporate already has judgment for that levy, the defendants have an arguable defence that the body corporate cannot obtain judgment against them again. The matter is *res judicata*. The body corporate accepted the overlap and did not seek judgment for SL1. There is no sense in keeping that part of the body corporate's claim alive. It is struck out.

Invalidity arguments

[47] The defendants' invalidity arguments are:

(a) All the levies are invalid because the works for which they were raised are outside the powers of the body corporate under the Unit Titles Act;

(b) All the levies are invalid because the expenditure for the works was not made through any of the funding mechanisms under ss 115 to 117 of the Unit Titles Act; and

(c) The committee decision of 19 April 2016 to impose SL8 is invalid because the committee did not meet.

[48] These arguments go directly to the validity of the levies. The defendants also

say that the committee's decision to issue the leaky building proceeding was invalid.

They run that argument as part of their damages claim against the body corporate, not to attack the levies. I deal with that argument later.

Unauthorised work

[49] The defendants say that the levies were raised to fund works, much of which were ultra vires the body corporate. The works they attack can be grouped:

(a) elements on or adjoining the decks, including nib walls; (b) balustrades;

(c) replacement of the internal stormwater reticulation system; (d) roof and gutters; and

(e) the passive fire system.

[50] If work to be funded by levies is ultra vires the body corporate, that may provide an arguable defence to a claim to pay those levies. If all work is ultra vires, the defendants may properly argue that they should not be required to pay anything for work the body corporate has no power to carry out. It may be arguable for the body corporate that if the extent of any ultra vires component in work to be funded is insignificant, any relief might be confined to restraining the body corporate from carrying out the ultra vires component of the work, but leaving the levy intact. In this case, the defendants gave indicative figures to suggest that the scope of ultra vires work was extensive, even if it was not the entire scope of the work. If they can establish that the unauthorised element of any works is more than insignificant, they may have an arguable defence which should be left for a full hearing.

[51] The body corporate's general response is:

(a) In *Wheeldon 1* this court and the Court of Appeal ruled against the defendants on those parts of the remedial works which the defendants alleged were ultra vires;

(b) It is an abuse of process for the defendants to raise fresh ultra vires arguments based on other parts of the scope of works; and

(c) The works are within the body corporate's powers.

Wheeldon 1

[52] While they plead that the work on the decks was ultra vires, in submissions the defendants accept that in *Wheeldon 1* this court and the Court of Appeal found the work was within the body corporate's powers. The defendants save their attack on the decisions to carry out work on the decks and associated elements for a negligence claim.[45]

[53] In the first cause of action in *Wheeldon 1*, the focus of the ultra vires allegation was the work on decks and cladding frames, including the provision of a nib wall.[46]

Declarations were sought that the body corporate does not have the power to carry out construction work on the cladding frames and on the decks without the consent of apartment owners, and that the work proposed was not warranted. Muir J held that the body corporate was acting within its powers in undertaking that work. To reach that conclusion, he resolved the relationship between ss 80 and 138 of the Unit Titles Act. He considered the meaning of "building elements" and "infrastructure" under the Act and the requirements under s 138 for building elements and infrastructure to relate to or serve more than one unit, and the general scope of the repair and maintenance responsibility under s 138. He held that the decks were both building elements and elements of infrastructure that related to or served more than one unit, as did the "small in-fill panels". He found a requirement for repair. It was not for the court to determine which repair option was better – holistic or targeted. He also held that the scope of works set out in the Origin report did not

constitute betterment, leaving aside improvements of individual units such as double-glazing, the addition of ranchsliders to bedroom suites and the like. Those findings create an issue estoppel for the decks and

cladding, which the defendants acknowledge.

[45] See [192] below.

[46] Statement of claim, paragraphs 15, 16, 17, 18, 19 and 20.

Abuse of process?

[54] The judgment also refers to other building elements, for example, balustrades[47] but those references are obiter and not fundamental to the decision.[48] The *Wheeldon 1* judgment does not deal with balustrades, replacement of stormwater reticulation system and gutters and fire system as subject to an ultra vires challenge. There is no issue

estoppel on those points. While the general principles in *Wheeldon 1* apply, *res judicata* does not stand in the way of the defendants saying that under those principles other work is ultra vires.

[55] The body corporate says that the defendants cannot contest vires for these parts of the remedial work, because that is an abuse of process under the well-known dictum of Sir James Wigram V-C in *Henderson v Henderson.*[49]

In trying this question, I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

[56] The House of Lords reviewed the *Henderson* rule in *Johnson v Gore Wood & Co*.[50] Lord Bingham noted that while abuse of process under *Henderson v Henderson* is separate and distinct from issue estoppel, there are elements in common. The underlying interests are the same. There should be finality in litigation and parties should not be twice vexed in the same matter. That public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation in the interests of the parties and the public. The bringing of a claim and the raising of a defence in

later proceedings may, without more, amount to an abuse if the court is satisfied that the

claim or defence should have been raised in the earlier proceedings if it was to be raised

[47] See *Wheeldon 1* at [48].

[48] *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28 (CA) at 38.

[49] *Henderson v Henderson* [1843] EngR 917; (1843) 3 Hare 100 at 114-115.

[50] *Johnson v Gore Wood & Co* [2002] 2 AC 1 (HL).

at all. Merely because the matter could have been raised in the earlier proceeding does not mean that it should have been, so as to make the later proceeding necessarily abusive. Rather than adopt a dogmatic approach, Lord Bingham considered that there should be a broad merits-based judgment, which takes account of the public and private interests involved, and takes account of all the facts of the case, focusing attention on the critical question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it issues which should have been raised before. Just as it is not possible to list all possible forms of abuse, it is not possible to formulate any hard and fast rule to determine whether, on given facts, abuse is to be

found or not.[51] Lord Millett's speech is to similar effect. He recognised that whereas

res judicata is a matter of substantive law, this head of abuse of process is procedural.[52]

[57] A common element of the defence now under consideration and the first cause of action in *Wheeldon 1* is the challenge that the holistic repairs undertaken by the body corporate were ultra vires. In the first proceeding, objection was taken to decks and cladding and associated elements, whereas here the attack is on balustrades, guttering systems and fire systems. While different aspects of remedial works are raised, the overall contention is the same, that the body corporate was acting without authority. That is to be decided by the principles laid down in *Wheeldon 1*.

[58] It is arguable for the defendants that their objections to other parts of the work cannot be abusive if they did not have the opportunity to raise them in the earlier proceeding. That turns on when they found out about the other work and their opportunities to refer to it in earlier proceedings.

[59] The defendants had the opportunity to raise challenges to roofs and rainwater systems in *Wheeldon*. They say that in the Origin report of 2013 costs had been allocated towards these elements but that these aspects were expanded considerably under the "Resolution plan". They became aware of this before the *Wheeldon* hearing. The rainwater system systems were the subject of evidence by the body corporate's architect filed in February 2015, as were the roof-gutter extensions. They had time to

deal with these matters in the hearing that began on 2 March 2015.

[51] At 31.

[52] At 59.

[60] I accept, however, that the defendants could not have found out about the balustrades and fire systems in time to raise them in *Wheeldon*. They obtained information about the balustrades only in December 2015, and about the fires systems when the body corporate commissioned a report as to fires systems in November 2015. By then Muir J had already given his decision. It is accordingly arguable for the defendants that they could not be required to raise balustrades and fire safety in *Wheeldon* because they arguably did not find out about that within time to put it in issue.

[61] The matter is otherwise with the *Butcher* proceeding. In that case, the defendants claimed that the body corporate's holistic repair represented betterment or a voluntary upgrade and was accordingly ultra vires. Muir J dismissed that claim on the ground that it was an abuse of process within *Henderson v Henderson*.[53] The close of pleadings date in *Butcher* was 20 November 2015.

[62] Given that one of their claims in *Butcher* was to have the holistic repair undertaken by the body corporate ruled invalid as ultra vires, the defendants had the opportunity to include these elements in that proceeding. The case was heard from

29 August to 1 September 2016. An amendment could have been accommodated, even after the close of pleadings date. Given that challenge to the repair plan, that was arguable ammunition they could have used in support of their complaint, which might possibly have had a better chance than re-running arguments they had raised in *Wheeldon*.

[63] Seen in the light of the *Wheeldon 1* and *Butcher* judgments, this proceeding is the defendants' third challenge to the vires of the holistic repairs. Having failed in attacking the decks, and having failed in an improvement argument, they have cast around for other matters to repeat their arguments. A body corporate must be able to plan its affairs with some confidence. Equally, lawful challenges to whether it is acting within its powers under the Unit Titles Act must be considered and determined. But that does not mean that the body corporate should be subject to repeated challenges by the same group of owners, who dress up their attacks with arguments based on different

particulars but the same objects. Such repeated objections are abusive.

[53] *Butcher v Body Corporate 324525* [2016] NZHC 3128 at [42]- [62].

Are the works within the body corporate's powers?

[64] In case I am wrong in finding an abuse of process I consider the substantive merits of the defendants' objections.

Balustrades

[65] The defendants object that the remedial work involves installing new glass balustrades with stainless steel fittings and handrails, which I accept may be more expensive than aluminium fittings. The existing balustrades had to be removed. The defendants say that the Origin plan provided that the existing balustrades would be removed, stored and reinstated. They say that there are no balustrade issues in the claim against the Far North District Council, no balustrade-related leaks or damage occurred and there is no suggestion of Council balustrade-related negligence. Balustrades were arguably unit property rather than common property.

[66] In *Wheeldon 1* Muir J said:[54]

Exterior components of the building, like decks and associated balustrading that relate in an aesthetic sense to other units (or indeed upon my analysis to common property), properly, in my view, fall within the provisions of s 138.

[67] That was in the context of his finding that the purpose of the Unit Titles Act of protecting the integrity of the development as a whole[55] is not just structural but also aesthetic. His reference to balustrading was illustrative only. The Court of Appeal upheld his finding as to integrity.[56] I find that balustrading comes within the body corporate's repair and maintenance responsibilities under s 138. Clearly work on the decks required removal of the balustrades. Whether the old balustrades should be put back or replaced with new balustrades was a matter of design choice. The body corporate had professional advice throughout. It was entitled to act on that advice, even if there were alternatives. The question whether existing balustrades should be put back or new balustrades installed goes to different views as to how repairs should be carried

out. The decision to replace existing balustrades with new ones during remedial works

[54] *Wheeldon v Body Corporate 324525* [2015] NZHC 884, (2015) 16 NZCPR 829 at [48].

[55] Unit Titles Act, s 3(d).

[56] *Wheeldon v Body Corporate 324525* [2016] NZCA 247, (2016) 17 NZCPR 353 at [44].

is within the body corporate's responsibilities under s 138 even if there are different

views on how the remedial work may be carried out.

Replacement of stormwater reticulation system and gutters

[68] In *Wheeldon 1* at [88]-[96], Muir J made factual findings as to the internal stormwater reticulation system, but these were not fundamental to his decision and therefore cannot give rise to any issue estoppel. Under s 50(1) of the Evidence Act factual findings in the earlier proceedings cannot be used as evidence in this proceeding.

[69] The Bridgewater apartments have an internal stormwater reticulation system which in part involves pipes that penetrate the tenancy walls of each unit. Mr Gray, a building surveyor, found that at the base of every inter-tenancy wall there were extremely high moisture readings. When he drilled, he found that "many of them had simply turned to mush". He concluded that over a prolonged period water had not been channelled inside the drainage system but down the outside of the pipes within the inter- tenancy walls. In his opinion, this internal reticulation system should be capped and bypassed, as this would provide easy and cost-effective access to inspect and maintain.

[70] Mr Bullen-Smith, the architect who designed the remedial works, says that there were design choices between cutting open concrete inter-tenancy walls and slabs to make a connection to the existing encased frame/downpipe or providing a new externalised stormwater reticulation system which would ensure trouble-free future repairs and maintenance. The second was chosen.

[71] The defendants criticise this because these problems had not been identified at the Origin report stage. The external reticulation system was criticised as being a voluntary upgrade rather than a necessary repair.

[72] The defendants' case does not amount to a serious challenge that the internal stormwater reticulation system was defective in 2013-2015. The contest is as to the appropriate repair. Given the expert advice to the body corporate that an external system would allow trouble-free future repairs and maintenance, that was an option the body corporate was entitled to adopt. That work was accordingly not ultra vires.

Roof/gutter extensions

[73] There is undisputed evidence that the roof and gutters are building elements within the definition in s 5 of the Unit Titles Act 2010. The roof is explicitly named as a building element. No survey evidence has been included, although I understand that evidence from a surveyor has been provided in other proceedings. For the defendants it is arguable that the roof and gutters are unit property rather than common property. All the same, they relate to or serve more than one unit. Roofs are required to shed precipitate moisture (Building Code E2.3.1). In this development, a defective roof stands to cause damage not only to the unit below it but also other units and common property.

[74] The defendants' attack on repairs to the roof and guttering is that the proposed work went beyond the defects identified in the Origin report. The Origin report said that during times of heavy rainfall or a combination of heavy rain and wind, water may be driven below the up-stand into the roof cavity potentially causing damage to the metal and timber framework. The architect, Mr Bullen-Smith, said that there was a

defect to membrane gutters and that in his experience when dealing with the Auckland Council, a failure in a roof membrane required the entire membrane to be replaced. To carry out a proper repair the metal roof would have to be lifted because the metal roof overlaps the gutter membrane. The function of the membrane gutter is to prevent the possibility of moisture ingress into structures below by channelling water into the reticulation system. The point raised by the defendants is that the Origin report did not identify any defect to the membrane gutter.

[75] Any doubts about the matter were removed by Mr Grey's later affidavit of

19 April 2016, made after remedial works had started. He noted these defects with the roof and gutters:

(a) poorly bonded lap joints to gutters; (b) poorly installed gutter outlets;

(c) fascia joints not weatherproof;

(d) poor membrane installation at fascia beams;

(e) the roof underlay terminating shorter fascia and gutter; (f) roof gutters do not shed water.

[76] The Origin report did not purport to be exhaustive. In the way of building defects cases, more defects and damage came to light as the building was opened up. Mr Gray's evidence following the opening up of the roof provides support for the body corporate accepting the advice of Mr Gray and Mr Bullen-Smith to undertake work on the roof and gutters. That work was within the body corporate's powers.

Fire protection systems

[77] In late 2015, the body corporate commissioned a report from consultants in passive fire protection. Their report dated 25 October 2015 identified passive fire protection issues:

(a) fire-rated walls within the ceiling space in level 4 may not have been installed;

(b) there were holes in fire separations;

(c) service penetrations through fire separation were defective as: (i) they were not fire-stopped; or

(ii) they were fire stopped using incorrect systems or products; or

(iii) they were not installed according to the manufacturers'

requirements; or

(iv) risers were not fire-stopped; or

(v) fire dampers were not installed correctly.

The areas where the consultants found these defects were: carpark, garages, selected apartments on levels 2, 3 and 4, the office/store cupboard, the switchboard room, the lift plant-room and the lift motor-room, and risers, stairwell. The report identified non- compliance with specific fire safety clauses of the Building Code effective as at October

2005, and which broadly matches the time of construction of the apartments. The body corporate accepted the report and arranged for remedial work to attend to the defects identified by the consultants.

[78] The defendants characterised this as a voluntary upgrade of fire surface separations, which was not required. They base their argument on s 112 of the Building Act 2004:

112 Alterations to existing buildings

(1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration,—

(a) the building will comply, as nearly as is reasonably practicable, with the provisions of the building code that relate to—

(i) means of escape from fire; and

(ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and

(b) the building will,—

(i) if it complied with the other provisions of the building code immediately before the building work began, continue to comply with those provisions; or

(ii) if it did not comply with the other provisions of the building code immediately before the building work began, continue to comply at least to the same extent as it did then comply.

(2) Despite subsection (1), a territorial authority may, by written notice to the owner of a building, allow the alteration of an existing building, or part of an existing building, without the building complying with provisions of the building code specified by the territorial authority if the territorial authority is satisfied that,—

(a) if the building were required to comply with the relevant provisions of the building code, the alteration would not take place; and

(b) the alteration will result in improvements to attributes of the building that relate to—

(i) means of escape from fire; or

(ii) access and facilities for persons with disabilities; and

(c) the improvements referred to in paragraph (b) outweigh any detriment that is likely to arise as a result of the building not complying with the relevant provisions of the building code.

[79] They say that when an alteration is made to an existing building, the building consent authority requires that the building will comply with the current building code requirements for means to escape fire, but they point out that the consultants' report deals with something different – passive fire protection. They submit that the body corporate manager misleadingly referred to s 112 to justify the upgrade of the fire protection systems.

[80] Much of the fire protection work – although not all of it – was on common property. Section 112(1)(b) allows a building consent authority to grant a building consent if, subject to subparagraph (a), the building complied with other provisions of the building code immediately before the building work began, and will continue to comply with those provisions, or will continue to comply, at least to the same extent as it did then. The defendants make the point that the passive fire protection report was commissioned after the building consent for other remedial work had issued.

[81] The defendants misconceive the scope of a body corporate's repair and maintenance responsibilities under s 138 of the Unit Titles Act 2010. A body corporate is not limited in its repair and maintenance functions to achieving only compliance with the building code as it stood at the time of original construction. A body corporate is entitled to take appropriate advice as to the condition of the building. If that advice shows that further work is appropriate to protect the integrity of the development as a whole – even by way of upgrade – the body corporate may undertake that work. That is especially the case in the matter of fire protection. In that area, it is hardly prudent to wait for the damage to occur before deciding whether to take fire protection measures.

It is consistent with the body corporate's repair and maintenance function that it take a

preventative approach to fire protection.

Summary on unauthorised work

[82] In summary, the body corporate has shown that the defendants do not have any defence based on their arguments that any of the works undertaken were ultra vires the body corporate. There was also a loose pleading that there were other unauthorised works, but these were never particularised in evidence or pleadings and therefore do not require consideration.

Invalidity of expenditure

[83] The defendants say that the levies in this proceeding are unauthorised because they are for expenditure which exceeds the amount specified in the long-term maintenance plan by more than 10 per cent and were not authorised by special resolution, with the result that s 117(3) of the Unit Titles Act 2010 was not satisfied.

[84] Part 2 Subpart 13 of the Unit Titles Act deals with financial and property management. Under s 121, body corporate levies are allocated to specified funds: the operating account, the long-term maintenance fund, the optional contingency fund and the optional capital improvement fund.[57]

[85] The operating account under s 115 is held for the following expenses:

115 Operating account

...

(2) The expenses are—

(a) those relating to the management and governance of a unit title development:

(b) those relating to provision of services and amenities for the benefit of the unit title development:

(c) costs associated with statutory or regulatory compliance:

[57] Definition of "funds" under s 5.

(d) any ground rental or licence fees relating to the base land:

(e) those incurred at least once a year relating to the maintenance of the unit title development.

The defendants submit that this account cannot be used for remedial works as it may be applied only for annual maintenance under s 115(2)(e).

[86] Section 116 provides for a long-term maintenance plan covering a period of at least 10 years. The purpose of the plan is:

116 Long-term maintenance plan

...

(3) The purpose of a long-term maintenance plan is to—

(a) identify future maintenance requirements and estimate the costs involved; and

(b) support the establishment and management of the funds; and

(c) provide a basis for the levying of owners of principal units; and

(d) provide ongoing guidance to the body corporate to assist it in making its annual maintenance decisions.

Section 117 provides for a long-term maintenance fund:

117 Long-term maintenance fund

(1) A body corporate must establish and maintain a long-term maintenance fund unless the body corporate, by special resolution, decides not to establish a long-term maintenance fund.

(2) The fund may only be applied towards spending relating to the long- term maintenance plan.

(3) The body corporate must, by special resolution, approve any amount to be spent on any 1 maintenance item if the amount exceeds the amount specified for that item in the long-term maintenance plan by more than

10%.

The defendants say that the expenditure under the various levy resolutions was more than the 10 per cent limit in s 117(3).

[87] They also refer to the 10 per cent limit under reg 29(2)(b) of the Unit Titles

Regulations 2011:

29 Operating account

(1) This regulation applies to a body corporate that has not established an optional contingency fund under section 118 of the Act.

(2) A body corporate to which this regulation applies may meet an unbudgeted expense out of its operating account provided that,—

(a) after paying the unbudgeted expense out of the operating account, the body corporate will be able to continue to pay its debts as they become due in the normal course of operation; and

(b) the amount required to meet the expense is less than 10% of the amount determined by the body corporate to be raised for the operating account under section 121 of the Act in that financial year.

[88] Section 118 provides for an optional contingency fund:

118 Optional contingency fund

A body corporate may establish and maintain 1 or more contingency funds to provide for unbudgeted expenditure.

[89] Section 119 provides for an optional capital fund:

119 Optional capital improvement fund

A body corporate may establish and maintain a capital improvement fund to provide for spending that adds to or upgrades the unit title development if that spending is not provided for in the long-term maintenance plan.

Under the defendants' case none of the expenditure was authorised as falling under the purposes of any of these funds, especially because it was for maintenance costing more than 10 per cent under s 117(3).

[90] The body corporate relies on two resolutions made at annual general meetings. On 28 January 2012 this resolution was passed:

The body corporate should not be bound by the provisions of s 117 of the Act. It shall be at liberty to determine from year to year the level of saving in expenditure in regards to the long-term maintenance plan as the body corporate shall from time to time determine.

That was a resolution under s 117(1) not to establish a long-term maintenance fund.

[91] At the extraordinary general meeting on 17 June 2015, a special resolution was passed:

Without prejudice to any of its rights in any proceeding between the body corporate and the Wheeldons, Small, Butcher, Billington, Eade and/or Stent, the body corporate hereby ratifies and confirms by *special resolution* that the account styled or previously referred to as the "long-term maintenance fund" is and always has been an optional contingency fund for the purposes of and as defined under section 118 of the Unit Titles Act 2010 ("the Act").

[92] It is open to a body corporate to opt out of s 117 and this one did so. While the body corporate may not have a long-term maintenance fund, it must still carry out repair and maintenance work which may not fall within annual maintenance under s 115(2)(e). A fund to meet that expenditure is an optional contingency fund under s 118. It is a fund from which the body corporate can meet expenditure which does not fall within the operating account, the long-term maintenance fund (if there is one) or the optional capital improvement fund. The effect of the special resolution of 17 June 2015 was to correct a miscategorisation of accounts. On this I respectfully follow and adopt the

reasoning of Muir J in *Butcher* at [99].[58] The defendants' argument for invalidity under

this head fails.

Challenge to the levy of 19 April 2016 – SL8

[93] The defendants challenge the process to impose the levy SL8. They accept that power to impose levies had been delegated to the body corporate committee, but they say that the committee's process was flawed,

because it did not meet to pass a resolution.

[94] In April 2016 there were four people on the committee: Margaret Gray, Viv Bath, John Nimmo and Phillip Andrews. On 19 April 2016 Mr Leishman of Boutique Body Corporates Ltd sent an email to each committee member. The copy of the email in evidence refers to attachments, a financial report, accounts to date, a spreadsheet summarising costs and a summary of costs to complete and cash flow. The

attachments were not however put in evidence.

[58] *Butcher v Body Corporate 324525* [2016] NZHC 3128, (2016) 17 NZCPR 708.

[95] Ms Gray replied, advising that she was in favour of the recommendations to the committee outlined in the report, including:

the "levy for 700,000k on an OI basis due 15th May".

[96] Mr Andrews replied saying:

"I support the proposed actions below but I did discuss with Craig that the proposed $700K levy be taken as $500K net receivable in the short term due to minority and other possible non-payments on time".

[97] John Nimmo replied:

"I support the recommendations but with the proviso that 'we borrow the maximum up to $800,000 first' so we don't subsidise the minority".

[98] Viv Bath replied:

"Yes I support this but just a bit confused as thought we were levying to avoid owners who can pay, paying the interest. I think we need to be careful while we so want the minority out of our hair, we don't want to have less equity in their apartments than what they owe us...".

[99] On the same day Boutique Body Corporate Ltd made a document called "Approved levy posting", showing that a "Building Account Levy 4" had been determined on 19 April 2016 for $700,000 plus GST, apportioned according to ownership interests amongst the 22 units. The levy was payable on 15 May 2016.

[100] The defendants say that the powers of committee members are limited to voting on resolutions at duly constituted meetings. It was not open to the committee to make resolutions by email. The question of delegation is not in issue. Instead, the question is whether what happened on 19 April 2016 was effective to impose the levy which was the subject of Mr Leishman's posting.

[101] Before dealing with the Unit Titles Act, here is a reminder of the common law requirements for a decision by an incorporated body. Resolutions are how members of an incorporated body exercise their will. In *Macarthy v Wellington Corporation*

Denniston J said:[59]

[59] *Macarthy v Wellington Corporation* (1889) 8 NZLR 168 (CA) at 178, followed in *Tauranga Borough v Tauranga Electric Power Board* [1943] NZGazLawRp 101; [1944] NZLR 155 (CA) at 223.

The only way I know of by which the collective assent of the membership of a corporate body could be proved would be by a resolution embodied in a minute.

There are two aspects, substantive and evidential. The substantive is the resolution by the members (or the required majority). A decision is made by the members assenting to a motion, which when passed is called a resolution. The evidential is the permanent record of the resolution in a minute. That entails that a resolution must be expressed in words and figures. No doubt in Denniston J's time minutes were recorded on paper, but other forms of permanent record are acceptable now.[60] For many incorporated bodies legislation has added to these requirements, but where members of a group are to decide on a matter, they must still meet these requirements. The Unit Titles Act directs how bodies corporate are to conduct business, but it does not relax the requirements for resolutions recorded in minutes.

[102] It is helpful to consider how the SL8 levy could have been imposed by the body corporate in the absence of any delegation to the committee. A body corporate may make decisions in general meetings. Sections 88-103 of the Unit Titles Act deal with meetings. A meeting under these provisions is a gathering of the owners at one place to conduct business of the body corporate. There are quorum (s 95) and voting eligibility (s 96) requirements. Absentee owners may cast postal votes (s 103) or appoint proxies (s 102). For any matter which cannot be delegated under s 108(2), a special resolution is required – with a 75 per cent majority (s 101(1)). For all other matters, an ordinary resolution will suffice – a 50 per cent majority (s 101(2)). Every resolution must be recorded in writing.[61] The business of the meeting must be included in an agenda.

There may not be a vote on a matter not on the agenda, unless all eligible voters are present.[62] The duties of the body corporate chairman include preparing the agenda for each general meeting, chairing each general meeting, preparing the minutes of each general meeting and recording resolutions voted on and whether they were passed.[63]

[60] See for example the Electronic Transactions Act 2002, Part 3, subpart 2.

[61] Unit Titles Act, s 101(4), Unit Titles Regulations 2011, reg 11.

[62] Section 101(3).

[63] Reg 11(1)(b)(c)(d) and (e).

[103] In *Wheeldon 2*, Muir J quoted Rod Thomas's text *Unit Titles Handbook* on the importance of general meetings:[64]

Traditionally, meetings serve an important part in any democratic process, even if the conclusion appears foregone. A meeting provides a venue for dialogue. In such a setting, the minority have the opportunity to express their views and an opportunity to argue their case to the majority. One calls to mind the dicta of Potter J in *Spencer-Inight v Johnston* where Her Honour, referring to the 1972

Act, expressed her thoughts as follows:[65]

There is clear provision under the [1972] Act and Rules for Body Corporate members to take decisions. Consent in my view requires a positive determination. All members of the Body Corporate are entitled to the opportunity to take part in that decision-making, whether or not they avail themselves of the opportunity. That is the very reason why the legislation provides for meetings of proprietors, the Body Corporate members, and a ritual of calling and convening those meetings.

[104] Notwithstanding the importance of general meetings for the body corporate, s 104 gives a body corporate the option of making decisions without a general meeting:

104 Passing of resolution without general meeting

(1) A resolution may be passed without a general meeting in accordance with this section.

(2) Notice of the resolution must be given to eligible voters in accordance with the regulations.

(3) A resolution in writing signed by a majority of eligible voters in respect of an ordinary resolution, and not less than 75% of eligible voters in respect of a special resolution, is as valid as if it had been passed at a meeting of those voters.

Under reg 11(1) (j) and (k) of the Unit Titles Regulations, the chairperson is responsible for preparing and issuing notices of resolutions to be passed without a general meeting, and notifying unit owners of the results of any votes on resolutions passed without a general meeting. Unit title rules may provide how a body corporate is to give notice to unit holders. There is a requirement for notice to be given to voters under reg 16(1) which includes instructions on how to vote, to whom the vote must be returned and the

date by which the vote must be cast.

[64] *Wheeldon v Body Corporate 324525* [2017] NZHC 87 at [35]; Rod Thomas *Unit Titles Handbook*

(Brookers, Wellington, 2011) at 26-27.

[65] *Spencer-Inight v Johnston* HC Auckland, M2169/98, 23 December 1998 at 7.

[105] The process envisaged under s 104 is that notice of a resolution is given to eligible voters. Instead of voting in a general meeting, eligible voters vote remotely by giving written notice of their vote to the body corporate chairman. While a resolution might be recorded on a single piece of paper to be circulated amongst all the unit owners for signature, that is not required. Communications between the body corporate chairman and unit owners to make a resolution under s104 may be electronic, so long as that complies with body corporate rules allowing notice to be given electronically. Eligible voters may cast their votes with electronic signatures under s 22 of the Electronic Transactions Act 2002. The resolution voted on must be sent with notice of the resolution. Reg 16(3) provides for the counting of votes and notification to owners.

[106] Now for body corporate committee decisions. Section 109 of the Unit Titles Act deals with the body corporate committees performing delegated duties and exercising delegated powers:

109 Delegated duties and powers of body corporate committee

(1) A body corporate committee to which any duties or powers are delegated under section 108(1) may, unless the delegation provides otherwise, perform the duties and exercise the powers in the same manner, subject to the same restrictions, and with the same effect as if it were the body corporate.

(2) The body corporate committee must not delegate any of its delegated duties or powers.

(3) The body corporate committee, when purporting to perform a duty or exercise a power under a delegation,—

(a) is, in the absence of proof to the contrary, presumed to do so in accordance with the terms of that delegation; and

(b) must produce evidence of the body corporate committee's

authority to do so, if reasonably requested.

Under s 113 at a committee meeting matters are decided by a simple majority.

[107] The defendants argue that as a body corporate can make decisions only by resolution in general meeting, the body corporate committee must do likewise. Informal email exchanges are not equivalent to a gathering of all the eligible committee members in the one place at the same time to discuss and, if thought fit, approve any resolutions which have been already circulated and recorded in an agenda. That submission misses

the point that if a body corporate can pass resolutions without a general meeting under s 104, a body corporate committee can also. That meets the requirements of s 109.

[108] To pass a resolution without a meeting, a body corporate committee must follow the procedures under s 104 of the Act and the associated regulations. At this stage, the evidence for the body corporate does not satisfy me to the summary judgment standard that there was a levy resolution and that it was properly passed in accordance with ss 104 and 109 of the Unit Titles Act and Regulations:

(a) Notice of the resolution must be given to eligible voters – in this case, the committee members. The actual motion to be voted on must be given.[66]

As the attachments to Mr Leishman's email of 19 April 2016 have not been put in evidence, the text of any motion is not in evidence. It might be possible to draw some inferences as to what was proposed from the reply emails, but amongst the committee members there is a mixture of responses. The absence of the text of any motion sent out by Mr Leishman leaves it open to speculate what the motion said.

(b) The mixed responses by the committee members contrast with standard meeting procedure where after discussion those attending vote for or against a motion: "Aye" or "No" without any qualifications. Each vote must be unequivocal. Mr Andrews refers to a discussion with Mr Leishman about taking $500,000. Mr Nimmo added a proviso. Ms Bath's "I support this but just a bit confused..." also suggests a proviso. Discussion and voting have not been kept apart. It is not clear that a majority has assented without qualification to a motion to impose a levy.

(c) There is no evidence that Mr Leishman's email contains the information required under reg 16(1). I regard this aspect as less critical. While owners ought to be properly informed as to a proposed resolution and the procedures for voting, some relaxation for committee members who

confer frequently may be in order.

[66] Reg.16(2).

(d) The responsibility for sending out the notice lies with the body corporate chairman or, in the case of a body corporate committee, the committee chairperson. Mr Leishman sent the notice out. There is no evidence that he was the committee chairperson or that he was acting as agent of the chairperson. The committee chairperson is not identified in the evidence.

(e) Records of resolutions are required, whether passed in general meeting or under s 104. Here, there is no written record of the resolution in evidence. The document issued on 19 April is called an "Approved Levy Posting" but it is hard to read it as a record of a resolution of the body corporate committee.

[109] The body corporate relied on the judgment in *Wheeldon 2* on issue 3.[67] There was a levy of 13 July 2014 for $150,000 which was passed by committee. Again, Mr Leishman communicated with the committee members by email. One committee proposed increasing the amount suggested by Mr Leishman. Mr Leishman confirmed the increase with the committee before notifying body corporate members. Muir J said:[68]

[36] In the absence of some clear legislative requirement, I would be reluctant to conclude that a body corporate committee was not entitled to reach decisions based on an exchange of views by email. The new Act was intended to relieve much of the sclerosis which had afflicted its predecessor, and it seems to me inconceivable that a delegated committee ought not to be able to avail itself of routine technology in coming to a decision about the necessity for a levy to meet accrued accounts. Significantly, s 113 does not *mandate* committee meetings; it simply says that at such meetings decisions should be taken by a majority of votes. The section does not in my view preclude decision making by other means.

[37] This is also consistent with the proxy and postal ballots permitted in general meetings. So although Mr Thomas is undoubtedly correct in emphasising the importance of general meetings, the legislation recognises that, even in that context, members may have the ability to vote without being party to an in-person discussion. And within a committee context the arguments in favour of some relaxation seem to me overwhelming. This is particularly so given that, as in this case, unit holders may not be permanent occupants and committee members may be scattered geographically.

[67] See [18](c) above.

[68] *Wheeldon v Body Corporate 324525* [2017] NZHC 87 at [36].

[110] Muir J went on to say that even if he were wrong in that decision he would still not be persuaded to exercise his discretion in favour of a declaration of invalidity. In that case he was satisfied that there was a consensus reached, which would mean that any intervention by the court would be on technical rather than on substantive grounds. He also noted that any procedural irregularity had been cured by ratifying a special resolution at the 2015 extraordinary general meeting.[69]

[111] There is no cause of action estoppel because different levies are in issue. While the Court of Appeal has dismissed the appeal against Muir J's decision in *Wheeldon 2*, I do not know whether it will uphold all his reasons. His judgment may be confirmed only because of the ratification in general meeting, a point of distinction with this case. In the absence of reasons by the Court of Appeal I cannot say that there is a binding issue estoppel.[70]

[112] For summary judgment purposes I have taken a stricter view of the requirements under s 109 than Muir J did in *Wheeldon 2.* In part that is because of the procedural differences between *Wheeldon 2* and this case. Muir J was asked to make a declaration as to invalidity of a resolution at a final hearing. That involved not only assessing compliance with the procedural requirements of the legislation but also exercising a discretion as to relief (even if non-compliance was found). In a summary judgment application to recover unpaid levies, the court needs to be satisfied that there is no reasonable argument as to the invalidity of any levy resolution. An argument which relies on favourable exercise of a discretion as to relief, when there is apparent non- compliance, is not standard fare in a summary judgment application. If non-compliance with procedural requirements is to be waived in the court's discretion, it is safer to leave that to a full hearing on the merits. *Wheeldon 2* can also be distinguished because the levy resolution was later ratified by a general meeting of the body corporate. There is no evidence of any such ratification here. It may be that the matters could be cured by further evidence.

[113] The defendants' pleading of invalidity of the resolution is not particularly

informative. It is included in particulars of a draft statement of defence:

[69] At [38]-[39].

[70] See [27] above.

Particulars in respect of the building levy of $700,000 raised by Committee

members on 15 May 2016 ("SL7") are as follows:

(a) SL7 is unlawful and/or invalid and of no effect for the same reasons as are set out at paragraphs 24 to 30 and 81 to 84 of SASoC in relation to SL4 and SL6.

I did not understand what that meant until I heard Mr Brill's oral submissions. The plaintiff cannot expect to be any better informed. I did not have a copy of "SASoC". The paragraph references meant nothing.

[114] There are three ways of dealing with this:

(a) not consider the defence because of opaqueness of pleading;

(b) give the body corporate extended time in which to file further evidence;

or

(c) give a decision based the pleading, as enlightened by oral submissions, and on the current evidence.

[115] I take the third course. The matter on which I have found against the body corporate is a matter it was required to prove for its summary judgment application: the passing of a resolution by the requisite majority recorded by minute. It can hardly complain at a finding of inadequate proof. There are also practical reasons. A decision on the summary judgment application needs to be given sooner rather than later – and this has taken much longer than I would have liked. This matter affects only one part of the case. There is little injustice to either side in declining summary judgment on this part of the case, while giving the body corporate time to adduce further evidence, and, if it wishes, pass a ratifying resolution in general meeting. Accordingly the application for summary judgment for levy SL8 is dismissed.

Tort claims

[116] The defendants run three sorts of tort claims: (a) for harmful publicity;

(b) for negligence in decision-making; and

(c) for negligence in carrying out remedial works.

They have asserted large damages for all their tort claims. Their purpose is to say that their unliquidated damages claims in tort are defences to the claims for the unpaid levies because they have equitable set-offs. Alternatively, they say that if there is no set-off, they have counterclaims which should be heard first before any judgments against them are enforced.

[117] I have put the tort claims into three groups for ease in dealing with them. The defendants did not address them that way. There is some overlap among these categories. Matters considered under one group may also apply to another.

The harmful publicity claims

[118] "Harmful publicity" is generic. I have not used technical terms because the defendants allege various causes of action. Here are the basic facts. On 4 October 2013 the body corporate committee instructed Auckland lawyers to begin the leaky building proceeding. The statement of claim named the body corporate and all the owners as plaintiffs. On 18 October 2013 the body corporate received the Origin preliminary report as to weathertightness and remediation. On 22 October 2013 Mr Leishman gave the owners notice of an extraordinary general meeting and sent copies of the statement of claim, the Origin report as well as an agenda. At the meeting Mr Gray, author of the Origin report, spoke to his report. The only defendant present was Mr Butcher.

Resolutions[71] passed at the general meeting on 9 November 2013 included these:

(a) The body corporate would not make a claim with the Weathertight

Homes Resolution Service;

(b) The body corporate committee was enlarged by adding three members.

Mr Butcher, one of the defendants, was one of them;

[71] Muir J dealt with the interpretation of the resolutions in *Wheeldon 1*: see *Wheeldon v Body Corporate 324525* [2015] NZHC 884, (2015) 16 NZCPR 829 at [167]- [194].

(c) The committee was authorised to investigate and appoint a lead consultant to manage the building remediation process;

(d) The committee's appointment of lawyers to take the leaky building

proceeding was ratified.

[119] The defendants say that the committee's decision to begin the leaky building proceeding was unauthorised and invalid for non-compliance with regs 17 and 29 of the Unit Titles Regulations, was ultra vires the body corporate, and was made negligently. The committee and indeed the body corporate itself had no authority to issue a proceeding naming the defendants as plaintiffs without their consent. Even though the decision to issue the proceeding was ratified at the extraordinary general meeting, the defendants say that they suffered irreversible damage through adverse publicity arising from the issue of the proceeding.

[120] To put this into context I start with the alleged harmful publicity. The defendants say that upon the body corporate committee authorising the leaky building proceeding in early October 2013, the proceeding had to be notified under the pre-contract disclosure requirements under reg 33 of the Unit Titles Regulations 2011. They allege damage by stigma associated with leaky buildings.

[121] Part 2 Subpart 14 of the Unit Titles Act deals with disclosure of information. For this judgment it is necessary to consider only two matters: pre-contract disclosure to a prospective buyer under s 146 and pre-settlement disclosure to a buyer under s 147. Additional disclosure under s 148 and turnover disclosure under s 157 are not relevant for this decision.

[122] Disclosure under Subpart 14 is mandatory. It is not possible to contract out.[72]

Under s 146, a seller must provide a pre-contract disclosure statement to a prospective buyer before they make an agreement for sale and purchase. Reg 33 sets out the information required in the pre-contract disclosure statement, including:

(e) whether the unit or the common property is, or has been, the subject of a claim under the Weathertight Homes Resolution Services Act 2006 or

[72] Unit Titles Act, s 146.

any other civil proceedings relating to water penetration of the buildings in the unit title development;

Only the seller is required to disclose, not the body corporate.

[123] Under s 147, once there is an agreement for sale and purchase of a unit, no later than the fifth working day before the settlement date the seller must provide the buyer with a pre-settlement disclosure statement. The information requirements for a pre- settlement disclosure statement are in reg 34 of the Unit Title Regulations. That regulation does not require disclosure of information relating to water ingress proceedings of the sort required under reg 33(e). A pre-settlement disclosure statement under s 47 must have a certificate by the body corporate to the effect that the

information in the statement is correct.[73]

[124] While a body corporate is required to vouch for the information it gives in a pre- settlement disclosure statement under s 147, under s 146 only the seller is required to provide the information as to leaky building proceedings and to ensure that it is correct.

[125] The defendants say that the body corporate was negligent in starting the leaky building proceeding against the District Council because that proceeding triggered the disclosure obligations under s 146 with the result that their units immediately suffered a loss of value arising from the stigma attached to unit title developments with water ingress problems. The body corporate's negligence lies in it having done something – beginning the proceeding – which someone else had to report (an owner proposing to sell a unit to a prospective buyer), and that report caused damage by devaluing the defendants' units.

[126] A difficulty for the defendants is that there is no evidence showing that any owner did make a pre-contract disclosure statement under reg 33 to a prospective buyer between the issue of the proceeding and the general meeting of November 2014. If such a pre-contract disclosure statement was made, we do not know what it said. At this stage, the defendants' complaint is based on nothing more than speculation. The alleged

loss is theoretical only.

73. Under s 147(4) a body corporate may withhold a certificate while any debt due to the body corporate by the unit-owner is unpaid.

[127] Another difficulty is that any disclosure by a seller under s 146 would have been truthful. There really was a leaky building proceeding. That was not information that the defendants could require to be hushed up. Moreover, there was undisputed evidence that the complex did have water ingress defects, even if the extent was disputed.

The challenges to the validity of the decision to begin the leaky building proceeding

Reg 17

[128] The defendants say that the issue of the proceeding against the District Council in October 2013 was unauthorised, because the decision was made by the body corporate committee, not by the body corporate in general meeting. For that, it relies on reg 17 of the Unit Titles Regulations 2011:

17 Method of contracting

(1) Subject to subclause (2), a body corporate may not enter into an

obligation without the body corporate's approval by ordinary resolution.

(2) Subclause (1) does not apply if the body corporate is required to enter into an obligation urgently for the purpose of avoiding serious damage to property or preventing injury.

(3) Subclause (4) applies to the following obligations:

(a) an obligation that, if entered into by an individual, is required to be by deed; and

(b) an obligation that, if entered into by an individual, is required to be in writing.

(4) An obligation to which this subclause applies may be entered into on behalf of the body corporate in writing by the chairperson, or by the committee chairperson if this power has been delegated to a body corporate committee, and must be witnessed by—

(a) 1 member of the body corporate committee; or

(b) if no body corporate committee has been elected, 1 member of the body corporate; or

(c) if there is only 1 member of the body corporate, a person who is not a member of the body corporate and who is not a party to, or otherwise interested in, the obligation.

(5) An obligation that, if entered into by an individual, is not required to be in writing may be entered into on behalf of the body corporate in writing

or orally by the chairperson, or by the committee chairperson if this power has been delegated to a body corporate committee.

(6) In this regulation, **obligation** means a contract or other enforceable obligation.

[129] While the marginal note says "method of contracting", a body corporate may come under an obligation without entering into a contract – see reg 17(6). Clearly the regulation is directed only at obligations that are assumed voluntarily. A decision to begin legal proceedings entails incurring enforceable obligations: court filing fees, lawyers' fees, consultants' costs and potentially cost orders if the proceeding is unsuccessful. The defendants therefore have an argument that the body corporate committee's decision involved entering into an obligation under reg 17(1).

[130] On the defendants' interpretation of reg 17(1), a decision to enter into an obligation can be made only by ordinary resolution of the body corporate. Resolutions can be made only in general meetings or by using the procedures under s 104 – still an involved process. If a body corporate had to call a general meeting or to circulate all unit owners with a resolution every time it wished to enter into a contract – for example to buy a stamp to post a letter – a body corporate would quickly become unmanageable and inefficient. In practice, many body corporates deal with reg 17 by passing resolutions at their annual general meetings in which they confer powers on their committees to incur obligations for which provision has been made in the budget or to similar effect. But this delegation of powers to incur obligations should be unnecessary, if the body corporate exercises its powers of delegation under s 108:

108 Delegation of duties and powers

(1) Except as provided in subsection (2), a body corporate may delegate any of its duties or powers, either generally or specifically, to the body corporate committee by special resolution and written notice.

(2) The body corporate must not delegate any of the powers or duties set out in—

(a) subsection (1) (which is the general power of delegation):

(b) section 41 (which provides for the reassessment of ownership interests and utility interests):

(c) section 105(3) (which requires the body corporate to comply with the body corporate operational rules):

(d) section 136(4) (which relates to the application of insurance monies in or towards reinstatement of the development).

[131] It is standard practice for bodies corporate to delegate to their committees all powers except those which may not be delegated under s 108(2). The body corporate in this case did that. Mr Brill accepted that the body corporate had delegated its duties and powers to the committee under s 108(1). Such a wide delegation under s 108(1) involves a delegation of powers to incur obligations which would otherwise be caught by reg 17. Accordingly, reg 17 can apply only if the body corporate has not otherwise delegated its powers to enter into obligations under s 108(1). The regulation being subordinate legislation cannot be interpreted to apply contrary to the provisions of the Act. Section 217, which confers the power to make regulations, does not have a "Henry VIII" clause.

[132] Accordingly, because the body corporate had generally delegated to the committee under s 108(1) its powers, including its power to enter into obligations, reg 17(1) did not apply to the body corporate committee's decision to start the proceeding in October 2013. Moreover, even if reg 17(1) applied, it was satisfied when the body corporate passed the resolution in the extraordinary general meeting in November 2013 to ratify the committee's decision to start the proceeding.

[133] Mr Brill cited this dictum of Toogood J in *Body Corporate 198900 v Dhana*:[74]

A resolution which does no more than set a budget would not, in general, be sufficient to meet the requirements of the regulation (reg 17).

In that case defendants challenged the body corporate's decision to issue proceedings. The body corporate had approved a budget which included provision for legal fees. It also passed a resolution giving approval for the committee to enter into all necessary obligations to give effect to any expenditures in the budget. Toogood J held that the proceeding had been authorised in terms of reg 17. The dictum the defendants rely on is accordingly obiter. The decision is not directly on point for this case, because here the

committee was acting under authority delegated under s 108(1).

[74] *Body Corporate 19800 v Dhana* [2015] NZHC 1620 at [88].

Reg 29

[134] The defendants also attack the decision to issue proceedings under reg 29 of the

Unit Titles Regulations:

29 Operating account

(1) This regulation applies to a body corporate that has not established an optional contingency fund under section 118 of the Act.

(2) A body corporate to which this regulation applies may meet an unbudgeted expense out of its operating account provided that,—

(a) after paying the unbudgeted expense out of the operating account, the body corporate will be able to continue to pay its debts as they become due in the normal course of operation; and

(b) the amount required to meet the expense is less than 10% of the amount determined by the body corporate to be raised for the operating account under section 121 of the Act in that financial year.

[135] The defendants say that the decision to sue involved expenditure of more than

10 per cent under reg 29(2)(b). That regulation applies only if the body corporate has not established an optional contingency fund under s 118 of the Unit Titles Act. In fact there was an optional contingency fund.[75]

[136] Moreover to show an arguable case, the defendants need to provide some evidence whether the expenditure incurred in the 2013-2014 year on the proceeding was more or less than 10 per cent of the funds to be raised for the operating account. Presumably the financial accounts are available, but the defendants have not put them in evidence. At this stage, there is not an arguable case for breach of reg 29(2)(b).

The proceeding ultra vires the body corporate

[137] The defendants say that the body corporate did not have standing to bring the leaky building proceedings as the claim was outside its powers under the Unit Titles Act. Section 77 of the Unit Titles Act provides that a body corporate may do anything authorised by that Act or any other Act, and it may do anything a natural person of full

age and capacity may do, except as provided for in that Act or any other Act. While the

[75] See paragraphs [88]-[92] above.

Unit Titles Act does not confer an express power to sue on a body corporate, a natural person of full age and capacity may sue. Accordingly, a body corporate may also.

[138] The defendants refer to s 78. A body corporate may do an act under s 77 only to perform its duties or exercising its powers. They say that the proceeding had nothing to do with the body corporate's duties or powers. They claim that the leaky building proceeding is not related in any way to the body corporate's common property. They submit that it has no duty or power to make tort claims for damage to unit property in which it holds no legal interest. It is also not able to sue as agent or trustee for owners who have not authorised it to sue on their behalf.

[139] In leaky building litigation involving unit title developments, it is standard practice to name as plaintiffs the body corporate and the owners of all units which have suffered damage. It is usually not necessary to join owners whose apartments have not suffered any damage. In the typical case, damages recovered for the plaintiffs are applied to costs of remedial work or reimbursement of those costs if already incurred. It makes sense to join both the body corporate and all affected owners to ensure that anyone with an interest in property suffering damage is before the court as a plaintiff. Having all affected plaintiffs before the court makes it unnecessary to enquire deeply into whether any defect has damaged common property or unit property. So long as there are no internal differences within the plaintiffs, there are usually no difficulties.

[140] In the typical building defects case, the body corporate and its committee have a co-ordinating role. The owners authorise the body corporate to start the proceeding and do everything necessary for the proper conduct of the proceeding, including instructing lawyers and consultants, raising funds for the case, arranging property inspections, obtaining expert evidence, authorising the filing and service of the proceeding, and taking it through to trial or settlement.

[141] Ordinarily, to be able to sue for damage to property, a plaintiff must have a relevant legal interest in that property. In *Leigh & Sillavan Ltd v Aliakmon Fishing Co*

Ltd (The Aliakmon) Lord Brandon said:[76]

[76] *Leigh & Sillavan Ltd v Aliakmon Fishing Co Ltd (The Aliakmon)* [1985] UKHL 10; [1986] AC 785 (HL) at 809.

...there is a long line of authority for a principle of law that, in order to enable a person to claim in negligence for a loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it.

[142] Some parts of the Bridgewater building are solely common property – for example the rear elevation stairs/liftwell, which suffered water ingress damage. As the sole owner of the common property, the body corporate clearly has standing to sue for damage to its own property. Likewise, owners of unit property have standing to sue for damage to their property. Where there is damage in an apartment to both common property and separate property there can be no difficulty when both the body corporate and the apartment owner are named as plaintiffs.

[143] A proceeding by a body corporate must be authorised by resolution in general meeting or by the decision of someone acting with delegated authority. It is improbable that the body corporate would issue a proceeding to which most of the owners were opposed.

[144] The defendants, however, say that insofar as there is any damage to their apartments, the only parts affected were unit property, not common property. As they were the sole owners of those damaged assets, only they have standing to sue, not the body corporate. And they add that they were made plaintiffs without their consent.

[145] For this part of the case it is arguable for the defendants that in their apartments only unit property was damaged, not common property. There is no surveying evidence identifying what parts are unit property and common property. All the same that does not mean that they have an arguable case that the body corporate cannot sue for damage done to their unit property. The principle stated by Lord Brandon in *The Aliakmon* does not apply immutably.

[146] The question of a body corporate's powers to sue for damage to property came up under the Unit Titles Act 1972. In *North Shore City Council v Body Corporate*

188529 (Sunset Terraces) the Supreme Court considered whether a body corporate could sue for damages suffered by the common property in a multi-unit building when

the common property was not owned by the body corporate. The High Court and Court of Appeal had held that the body corporate could bring a claim in respect of the common property on behalf of unit owners, and could recover damages on behalf of unit owners who were not parties to the proceeding. The Supreme Court said:[77]

[57] The foundation for a body corporate's ability to sue in circumstances such as the present is s 13 of the Unit Titles Act 1972. Section 13(1) provides that a body corporate shall be capable of suing and being sued in its corporate name and of doing and suffering all that bodies corporate may do or suffer. Section 13(2) provides that, without restricting the generality of subs (1), the body corporate may sue for and in respect of damage or injury to the common property caused by any person, whether that person is a unit proprietor or not.

[58] With respect to the arguments advanced by the Council on this part of the case, it is hard to see why the body corporate cannot do what, on the plain words of s 13(2), it is empowered to do. The subsection is obviously intended to enable bodies corporate to sue on behalf of unit holders who, as tenants in common, own the common property. How the body corporate deploys the fruits of any successful proceeding pursuant to s 13(2) is not an issue that arises on the appeals, nor is it an issue which should lead to any reading down of the plain terms of s

13(2). While the loss caused by damage to common property may be suffered by the unit owners rather than by the body corporate itself, s

13(2) allows the body corporate to sue for that loss on behalf of the unit

owners.

That turned in part on a provision of the 1972 Act, s 13. The 2010 Act provides that common property is owned by the body corporate (but owners of units are beneficially entitled to it as tenants in common).[78] All the same the recognition that the body corporate could sue in respect of property belonging to unit owners is significant. It would be odd if the 2010 Act gave a body corporate less extensive powers than the 1972

Act.

[147] Under the 2010 Act the body corporate has repair and maintenance responsibilities both for common property and for building elements and infrastructure in principal units.[79] In *Wheeldon 1* Muir J and the Court of Appeal held that those responsibilities extended to work on the defendants' apartments. The body corporate must be able to fund its work under s 138. Where it has incurred or will incur expenses

for that work, it ought to have the means to recoup those expenses from those

[77] *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289.

[78] Unit Titles Act, s 54.

[79] Unit Titles Act, s 84(1)(p) and s 138(4).

responsible for causing damage, including by suing for recovery. It would short change a body corporate to give it repair and maintenance powers and duties under s 84(1)(p) without also recognising that it may recoup its expenses, including by suing tortfeasors.

[148] That is reinforced by the insurance provisions of the 2010 Act. Under s 135 a body corporate must insure and keep insured all buildings and other improvements on the base land to their full insurable value. That includes all unit property. Money paid by an insurer under a policy must be applied towards reinstatement (unless the body corporate decides otherwise by special resolution).[80] A mortgagee cannot require

money for reinstatement to be used to repay mortgage debt.[81] An insurer who has paid

for reinstatement of damaged unit property has an interest in recovering from anyone responsible for causing the damage. Its subrogation rights will be more effective if it can sue in the name of its insured, the body corporate.

[149] These repair and insurance considerations need not be defeated by the principle Lord Brandon stated in *The Aliakmon*, once its purpose is considered. One of the founding cases he cited is *Cattle v The Stockton Waterworks Company*.[82] The plaintiff was a contractor who had been engaged by a landowner to dig a tunnel under the turnpike that ran through the owner's land. A water main belonging to the defendant ran along the road. A leak, for which there was liability in negligence and under *Rylands v Fletcher*, disrupted the plaintiff's work and caused him pecuniary damage. In the absence of any interest in the land, floodgates arguments were held to bar the contractor from suing although the Court was unsympathetic to the argument:

In the present case the objection is technical and against the merits, and we should be glad to avoid giving it effect.

Clerk and Lindsell on Torts states the principle:[83]

To allow all claims for such economic loss would lead to unacceptable indeterminacy because of the ripple effects caused by contracts and expectations. Proximity requires some special relationship between the defendant and the person suffering relational economic loss, one which goes

[80] Section 136(4).

81. Section 136(6). That is debt secured against unit property. A body corporate cannot give a mortgage or charge over common property – s 130(2).

[82] *Cattle v The Stockton Waterworks Company* (1875) LR 10 QB 453 (DC).

83. Michael Jones, Anthony Dugdale, and Mark Simpson (eds) *Clerk and Lindsell on Torts* (21st ed, Sweet & Maxwell, London, 2014) at 8-140.

beyond mere contractual or non-contractual dependence on the damaged property.

[150] Such a floodgates argument directed at unacceptable indeterminacy does not apply in the case of damage to a unit title development. A tortfeasor stands to be sued for damaging property by anyone with a sufficient interest in the property. It should matter little to a tortfeasor whether the plaintiff is the body corporate or a unit owner. The body corporate's interest is more than contractual. Its repair and maintenance responsibilities and insurance obligation give it sufficient interest to have standing to sue for damage to unit property covered by s 138(4). In this case the body corporate had standing to sue for damage to the defendants' apartments even if the defendants had not been joined as plaintiffs in the leaky building proceeding, as the damage was within the body corporate's responsibilities under s 138. The proceeding was not ultra vires the body corporate.

Suggested judicial review

[151] The defendants suggested that the committee's decision to start the leaky building proceeding could be judicially reviewed. Any judicial review application would not rely only on ultra vires grounds. They cited *Velich v Body Corporate*

164980:[84]

There is, however, a public law dimension to the case which seems to have been overlooked. A decision by a body corporate to grant or withhold consent under either rule 2.1(f) or default rule 1(f), would involve the exercise of a statutory power of decision for the purposes of s 3 of the Judicature Amendment Act

1972. This does not mean that the body corporate must act as if the rules provided that consent not be declined unreasonably. But we think it elementary

that the body corporate, when exercising its statutory power of decision, must

give proper effect to the rules and the statutory scheme is as a whole. It follows that there is jurisdiction to review as irrational and indeed invalid a decision

which cannot sensibly be supported in light of that regulatory and statutory

scheme.

Relying on that, the defendants say that the decision to issue the proceedings can be reviewed as *Wednesbury* irrational. The proceeding was not taken for a proper purpose. There was secrecy, indicating a lack of good faith. The effect was to deprive the

defendants of many of their property rights.

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

[152] None of this was signalled in the pleadings or the evidence. The plaintiff was not given fair opportunity to answer it. The defendants' submission can be discounted for that reason alone. The defendants' submission was not supported by any evidence directed at issues of secrecy, lack of proper purpose and irrationality. The submission was accordingly no more than speculative.

[153] The complaint as to deprivation of property rights goes not to the issue of the legal proceeding, but to the decisions of the body corporate to carry out repairs, decisions which have been upheld by Muir J and the Court of Appeal.

[154] There are discretionary factors which count against the defendants now mounting a case to have the decision for the issue of the leaky building proceeding set aside under a judicial review application, if the defendants were now to issue a proceeding under the Judicial Review Procedure Act 2016. Relief under that Act is discretionary – ss 16 and 18. The defendants have delayed. It is now more than three- and-a-half years since the issue of the proceeding. They have known of the proceeding and done nothing to challenge it. Instead they have taken an active part in the proceeding as plaintiffs, to the extent of arranging separate representation.

[155] A decision to set aside the decision to issue the proceeding would invalidate the proceeding. But that would be absurd, now that the claim has settled. If a new proceeding were started, it would be out of time under s 393 of the Building Act 2004. That grave consequence far outweighs any hardship to the defendants through the decision to sue remaining undisturbed. Accordingly the suggestion of judicial review does not need to be taken seriously.

[156] It is not clear to me how these invalidity arguments could help the defendants, even if there were any merit in them. Simply establishing any of these alleged heads of invalidity would not by themselves prove a cause of action in tort and they would not be necessary parts of a claim in tort.

Proceeding not authorised

[157] As well as attacking the validity of the decision to bring the leaky building proceeding, the defendants say that it was not authorised. By that they mean that the body corporate did not decide to begin the proceeding. For that they rely on the period up to the extraordinary general meeting on 9 November 2013. As a second point they say that they did not consent to being named as plaintiffs in the proceeding.

[158] As to the first, the defendants' submissions acknowledge that Mr Leishman instructed the body corporate's lawyers to begin the leaky building proceeding and that two committee members concurred with that action. There is no dispute that the committee had delegated authority under s 108(1) and that there were only two members before the extraordinary general meeting. Besides, the complaint about lack of authorisation loses any traction once the resolution ratifying the issue of the proceeding is taken into account. The defendants speculated that the committee members kept their intentions secret until the eve of filing because they suspected that most owners would reject the triggering of disclosure obligations under s 146. Those conjectures have no bearing on the committee's authority to start the proceeding.

[159] The defendants' second point is that the committee could only authorise a proceeding in the name of the body corporate but it could not give instructions to sue in the names of unit owners. The defendants were named as plaintiffs without their consent. To put that into context the start of the proceeding has to be seen in light of the imminent deadline under s 393 of the Building Act 2004 for starting a claim against the local authority. The agenda for the extraordinary general meeting on 9 November 2013 included a copy of the statement of claim with all owners shown as plaintiffs. The owners (including Mr Butcher) who attended the meeting and ratified the decision to start of the proceeding can be taken to have approved the start of the proceeding.

[160] It is arguable for any defendant in this proceeding, except Mr Butcher, that they did not attend the meeting and therefore did not vote for or against taking the proceeding. Notwithstanding that, this is a clear case of ratification by acquiescence. A principal will be treated as having ratified action by an agent if he or she knew all the material steps and that they would be regarded as having accepted the position of

principal but they take no steps to disown that position within a reasonable time or to assert their own rights.[85]

[161] The defendants knew of the proceeding taken against the District Council and that they had been named as plaintiffs. The proceeding continued to run, with them named as plaintiffs to their knowledge, without their taking any step to have themselves removed as plaintiffs from the proceeding. The election by the defendants later in the proceeding to have separate representation highlights their acquiescence at the issue of the proceeding in their own names.

[162] The defendants say, however, that their later ratification by acquiescence does not count for the issue they are now raising. Their point is that the proceedings were issued in their name before they had been given the opportunity to consent to that. Their later acquiescence does not cure any harm caused by it. The defendants cite *Suncorp Insurance and Finance v Milano Assicurazioni Spa*, and *Re ING Ltd (UK) v*

R & V Versicherung AG, and *Delco Australia Pty Ltd v Arlington Features Ltd*.[86] These

decisions recognise that while a principal may ratify a transaction for commercial reasons (for example, to preserve his commercial reputation), ratification as against the third party does not mean waiver of any breach of duty against the agent. That is because they are two distinct but connected contractual relations.

[163] The defendants' point is that they suffered damage between 4 October 2013 and

15 November 2013 as a result of the issue of the proceeding. They are entitled to maintain a claim against the body corporate for breach of duty in issuing the proceeding, even though they have acquiesced in the running of the proceeding since the general meeting of November 2013. That argument leads to the question what causes of action may be available to the defendants against the body corporate. Before dealing with the causes of action, a preliminary point as to causation can be noted. Because the body corporate satisfied the interest requirement for standing to sue for damage to unit property, the defendants were not necessary parties to the proceeding.

The body corporate could sue without them as plaintiffs in the proceeding. It is hard to

[85] *Laws of New Zealand* Agency (online ed) at [50].

[86] *Suncorp Insurance and Finance v Milano Assicurazioni Spa* [1993] 2 Ll R 225; *Re ING Ltd (UK) v R & V Versicherung AG* [2006] 2 All ER 870; *Delco Australia Pty Ltd v Arlington Features Ltd* [1986] SASR 519.

see that their being named as plaintiffs caused them any harm. Any damage would have occurred even if they had been left out.

The defendants' causes of action

[164] The causes of action considered here come under the harmful publicity head. They are claims of negligence, injurious falsehood and breach of the Fair Trading Act.

Negligence

[165] The defendants say that the decision to start the leaky building proceeding was flawed. The committee members are alleged to have been clearly reckless and highly imprudent because it was absurd to slash the value of the building by over $2,000,000 when only one leak had been identified and any remedial costs were less than $100,000. The committee "gambled" that a plethora of defects would be discovered once the building was opened up. There was no need to rush. An extraordinary general meeting could have been

called to consider whether to sue while still meeting the limitation deadline.

[166] The committee's alleged negligence is said to have triggered a loss of value of the defendants' apartments because the disclosure requirements under the Unit Titles Act were triggered. As I have noted above at [126]-[127] that loss is theoretical only.

[167] The question here is whether the defendants have a claim in negligence against the body corporate for triggering adverse publicity about the defendants' apartments. In the hearing I queried how there could be a claim in negligence, given the Court of Appeal's consistent decisions that claims for damage resulting from harmful publicity are governed by the law of defamation and injurious falsehood, not by the law of negligence.[87] Mr Brill acknowledged the point.

[168] In *Bell-Booth Group Ltd v Attorney-General*, there was a claim for harmful publication in negligence, where a claim for defamation had failed because the

[87] *Bell-Booth Group Ltd v Attorney-General* [1989] NZCA 9; [1989] 3 NZLR 148 (CA); *Balfour v Attorney-General* [1991] 1 NZLR 519 (CA); *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd* [2001] NZCA 321; [2002] 2 NZLR 289 (CA).

statements made by the defendants were found to be truthful. While the plaintiff succeeded at first instance, the Court of Appeal rejected the negligence claim on appeal. The court said:[88]

The common law rules, and their statutory modifications, regarding defamation and injurious falsehood represent compromises gradually worked out by the Courts over the years, with some legislative adjustments between competing values. Personal reputation and freedom to trade on the one hand have to be balanced against freedom to speak or criticise on the other.

In the result, the present rules are in broad terms well-known and reasonably clear. To an action for defamation, truth is an absolute defence. Privilege, where applicable, is in a few areas an absolute but in most a qualified defence. Fair comment is a qualified defence subject to rather different rules. In injurious falsehood, on the other hand, the plaintiff had the burden of proving both falsity and malice. These evolved compromises may not draw the lines in places that will always be found generally acceptable in the community. ... The important point for present purposes is that the law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element.

[169] The Court of Appeal was concerned primarily with whether a claim in negligence could be made in the case of hurtful publication when the defendant had succeeded in its defence of truth in a claim for defamation. This case does not concern damage to reputation, but alleged loss of value of units. Notwithstanding that, it is clear from the Court of Appeal's judgment in *Bell-Booth Group Ltd* that it intended its ruling to apply also to cases where the damage is not to reputation but pecuniary loss, as in injurious falsehood.

Injurious falsehood

[170] These considerations led Mr Brill to try another tack. He proposed a claim for injurious falsehood, but not until his written submissions. It was not raised in the first notice of opposition, the amended notice of opposition or the draft statement of defence. Needless to say, the plaintiff was at a disadvantage through the matter being raised so late. It was given no chance to answer the allegations with evidence.

[171] In general, the requirements for a claim in injurious falsehood are that the defendant must publish a false statement to a third person with malice. That is, with an

[88] *Bell-Booth Group Ltd v Attoroney-General* [1989] NZCA 9; [1989] 3 NZLR 148 (CA) at 156.

intent to injure but without just cause or excuse, or with a dishonest motive, so as to cause pecuniary loss to the plaintiff. The plaintiff has the burden of proving all those elements.

[172] It is not clear what publication the defendants are complaining about. In a proper pleading, the defendants would set out the words complained of, identify the author of those words and/or the person uttering them, and identify the publishee. The text of the publication is important to establish its meaning. That is particularly important where the plaintiff complains that the words published were false. The absence of particulars as to the circumstances of publication and the publishees makes the claim speculative.

[173] The defendants submitted that the body corporate committee had falsely represented that the defendants believed the units to be "leaky" and it gave instructions to start the leaky building proceeding. As to that, statements made by committee members while acting as such may be attributed to the body corporate as actions of the body corporate. And for the rest, the defendants seem to be relying on the issue of the leaky building proceeding as a publication of statements about them. It is hard to see how the pleading alleging water ingress defects in the apartments in a proceeding directed at obtaining redress could be tainted with malice. The body corporate can point to the Origin report and what was discovered during remedial work as showing that there were water ingress defects. It clearly started the proceeding for a proper purpose. The allegation of malice is absurd.

[174] Besides, statements made in a pleading in this court are subject to absolute privilege. For proceedings in defamation the privilege is stated in s 14 of the Defamation Act 1992. As a matter of common law the same privilege applies to claims for injurious falsehood.[89] The purpose of the privilege was described:[90]

The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but, because, if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be

[89] Patrick Milmo and WVH Rogers (eds) *Gatley on Libel and Slander* (11th ed, Sweet & Maxwell

London, 2008) at [21.10].

[90] *Kennedy v Hillard* (1859) 10 Ir CLR 195 at 209.

maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise numerous actions would be brought against persons who were merely discharging their duty...If such actions were allowed, persons performing their duty would be constantly in fear of actions.

That purpose applies equally to injurious falsehood. The filing of the statement of claim in court was part of a judicial proceeding.

[175] The body corporate also published the statement of claim when it sent copies of it to owners when giving notice of the extraordinary general meeting in November

2013. That publication was subject to qualified common law privilege. The body corporate had a duty to tell owners about the proceeding it had started and they had a corresponding interest in being informed of it. It is implausible that that publication could be malicious or that it could have caused any damage to the defendants.

[176] In short the claim for injurious falsehood is entirely far-fetched.

Fair Trading Act claim

[177] The defendants allege misleading conduct by the body corporate, contrary to s 9 of the Fair Trading Act. They say that the information the body corporate gave to the owners was inaccurate and misleading in claiming that one hundred per cent of the repair costs under the Origin plan would be recoverable as damages in the leaky building proceeding and that step-downs in all apartments were illegal when built.

[178] The issue here is whether the body corporate was acting "in trade" under s 9,

which says:

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

"Trade" is defined in s 2:

Trade means any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land.

[179] Clearly some activities of a body corporate under the Unit Titles Act are within

"trade" as defined. Dealings with third parties, for example, contractors engaged to

carry out work come within the definition. But this case concerns communications by the body corporate to owners of apartments. There is guidance from Australian case law under the Trade Practices Act 1974, s 52. In the Australian legislation, the relevant phrase is "in trade or commerce" which was not defined. In *Concrete Constructions (NSW) Pty Ltd v Nelson*,[91] Mason CJ, Deane Dawson and Gaudron JJ said of the Australian provision:

What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character. Such conduct includes, of course, promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers, be they identified persons or merely an unidentifiable section of the public. In some areas, the dividing line between what is and what is not conduct "in trade or commerce", may be less clear and may require the identification of what imports a trading or commercial character to an activity which is not, without more, of that character.

[180] In that case, an internal communication within a company, statements made by a foreman to a worker, which went to work safety, were held not to be "in trade or commerce". Similarly, the circumstances alleged by the defendants lack the trading or commercial character required by the definition of "trade" for s 9 of the Fair Trading Act to apply. The pleaded statements the defendant rely on were internal communications between the body corporate and owners made before and during a general meeting, dealing with alleged building defects and steps to be taken in consequence. Given the body corporate's responsibility for repairs under s 138 of the Unit Titles Act, its communications to owners as to proposed defects and the leaky building proceeding dealt with matters internal to the body corporate which were outside the scope of "trade" as defined. The defendants do not have an arguable case under s 9 of the Fair Trading Act, even if they could show that information the body corporate gave the owners was misleading.

Summary on harmful publicity

[181] For completeness, I note a cause of action where disclosure of the truth may give rise to liability – breach of confidence. There is nothing in the circumstances of this

[91] *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594 at 604.

case that suggests that information as to building defects in the Bridgewater apartments or the issue of proceedings against those alleged to be liable for those defects was confidential. Indeed, the disclosure requirements under s 146 of the Unit Titles Act and reg 33 of the Regulations point strongly to that information *not* being kept confidential. I make that point, to show that the defendants' assertions of harm arising from the disclosure of truthful information is, at heart, misconceived.

[182] The defendants' attempts to cobble together a cause of action based on harmful publication is also misdirected, once causation issues are considered. That is shown by a counter-factual. The body corporate does not issue the proceeding until after a resolution at a general meeting approving the proceeding. The operating account for the body corporate is amended to allow for any expenditure on the proceedings. The defendants voice their opposition to be joined as plaintiffs in the proceeding, and they are not included as plaintiffs. The issue of the proceeding is disclosed under s 146 of the Unit Titles Act. On those assumed facts, the matters the defendants complain about are removed, but they would still suffer their alleged damage, the loss of value of their apartments because of any leaking building stigma.

Negligence in decision-making

[183] The body corporate is said to have breached duties of care to the defendants by the actions of its committee and its agents as follows:

(a) It failed to seek consent from the defendants for the issue of the leaky building proceeding, to inform or consult with them, but presented them with a fait accompli.

(b) It recommended adoption of a remedial plan when it knew that the cost- effectiveness of the plan had not been considered and much cheaper alternatives were available.

(c) It refused to allow the defendants to carry out their own deck repairs in accordance with a building consent which one of the defendants (Mr Butcher) had obtained when they knew or should have known that

this was a much cheaper method and would dispel any leaky building stigma.

(d) It refused to undertake standard testing or to allow the defendants to undertake such testing, to assess whether the proposed scope of works was necessary, appropriate or justifiable.

(e) It refused or neglected to consult or confer with the defendants or their expert advisers regarding the scope of works or costs of other aspects of construction within the defendants' apartments.

(f) It recommended adoption of a further remedial plan when it knew that it was based on errors as to code requirements and much cheaper alternatives were available.

(g) It failed to properly appraise and critically evaluate numerous recommendations from advisors when it knew, or should have known, that those advisors had financial incentives to maximise the value of

construction work in the associated leaky building proceeding.

Mr Brill's submissions made other allegations of negligence but the above gives the

general flavour.

[184] The defendants seek damages claiming as their losses permanent stigma loss mostly at $40,000 per unit, general damages of $40,000 each, building levies claimed, while giving credit for the costs of repairs that they regard as reasonable.[92] They say that the building levies represent losses they have suffered because they are the measure of the excessive costs run up by the body corporate. While they have not quantified the amounts, they indicate that they will also claim for the costs of rectification and give

credit for any recovery from the Far North District Council. I note these features about

the damages claims:

[92] I have taken these from Table 4 of Mr Brill's submissions.

(a) the defendants have taken the overall costs to all owners and then calculated how much has been allocated to each of them – their individual levies;

(b) the loss of stigma is associated with all units, not just theirs;

(c) the rectification costs are for undoing the remedial work to which they object, not for repairing defective work.[93]

[185] These are losses that any owner could claim against the body corporate if they were disgruntled with its actions, as the defendants are. They claim their individual shares of general losses. The defendants have not claimed any losses that are special to them. This leads to what I call the circularity problem. Consider how such general claims would be met if all the owners sued the body corporate for these alleged breaches of duty. The body corporate would have to raise funds to meet the claims. The costs would ultimately fall on the general body of owners because they would come out of body corporate funds which are derived from levies. The owners would pay levies to raise the funds to pay themselves damages. Each owner would pay according to their utility or ownership interests under s 121. Any liability insurance (if it were available) held by the body corporate might provide funds in the short term but the costs of premiums would be met out of levies and would fall on owners generally. The point is that general losses fall on the owners generally. It is pointless to impose liability on the body corporate for general losses to owners because they would have to fund the payments for any damages from their pro rata levies. It would be no more than a merry- go-round.

[186] That becomes apparent in the light of ss 142 and 143:

142 General liability in tort

(1) Despite any enactment or rule of law, this section and section 143 apply to the following proceedings if the proceedings are required to be taken against an owner of a principal unit or occupier of land or premises:

(a) proceedings under the Occupiers' Liability Act 1962; and

(b) proceedings in tort; and

[93] This aspect is developed further in the part below negligence in remedial works at [192]-[195].

(c) proceedings in respect of a breach of statutory duty.

(2) For the purposes of any proceedings to which this section and section

143 apply, the common property and each of the units are separate premises.

...

143 Body corporate as defendant in tort

(1) This section applies if a body corporate is the defendant in any proceedings referred to in section 142(1).

(2) The owners of principal units at the time judgment is entered are to be treated as having guaranteed to the plaintiff the payment by the body corporate of the full amount awarded under the judgment.

(3) However, any liability of an owner under subsection (2) is limited to an amount equal to that owner's ownership interest payable by the body corporate, in accordance with the judgment, less—

(a) the amount that the body corporate can recover under any insurance policy; and

(b) any amount paid by a unit owner against whom judgment is given under section 142(5) or is recovered from that unit owner under section 142(6) in proportion to that owner's ownership interest.

(4) Any amount recovered from a unit owner under section 142(6), after satisfaction of the judgment by the body corporate, must (subject to any right of set-off) be refunded to that owner who has made a payment under subsection (3), in proportion to the amount of his or her payments.

(5) A unit owner who pays to the plaintiff any amount that the owner is liable to pay under this section is entitled to recover that amount as a debt from the body corporate but the body corporate may claim any amount due to it from that owner by way of set-off.

(6) For the purposes of this section, **principal** unit includes a future unit development unit.

[187] Under s 143, owners of units are liable pro rata according to their ownership interests for torts committed by the body corporate. It may be arguable for the defendants that s 142 applies only to owners or occupiers who are liable as owners or occupiers but the body corporate is liable independently of its ownership of common property. Even so, the burden of meeting any tort liabilities will still fall on the owners generally.

[188] To avoid the circularity the defendants would have to show that they have suffered special damage not felt by other owners, but that is not their case. Their dissatisfaction with the decisions of the body corporate is not a relevant distinguishing factor.

[189] In *Body Corporate 172108 v Gundry*[94] Andrews J accepted that the body corporate arguably owed defendants a duty to care to inform them that it intended to issue proceedings and to invite them to join in. That is an example of special damage because other owners were informed. There the defendants complained that they were treated differently from others.

[190] The circularity problem points to another difficulty for the defendants: their claims are not justiciable. As between a body corporate and owners, decisions by the body corporate to carry out repairs and related works authorised under the Unit Titles Act, the scope of works, the cost of works and their timing involve questions as to the allocation of resources. They are matters on which owners may have legitimate differences of opinion. There is rarely likely to be a single right answer. The place for resolving those

differences is through the mechanisms under Part 2 Subpart 12 of the Unit Titles Act for decision-making: a general meeting of owners or a committee with

the delegated authority of owners under a duty to report to the body corporate.[95] While

the courts can decide the validity of decisions made by an owners' meeting or a committee, it is another thing to decide the merits of particular decisions. A court is not any better suited to decide how or when remedial works are to be carried out than the owners themselves. It would undermine the effectiveness of decision-making by meeting or delegated committee if a disappointed minority were given the option of testing the merits of decisions by litigation. In short the defendants were entitled to test the validity of body corporate decisions, but challenges to the merits of decisions are not

justiciable and not suitable for the imposition of a duty of care.[96]

[191] The defendants' damages include the levies they are being sued for in this proceeding (and levies Ms Stent has paid). In *Wheeldon* the defendants argued

94. *Body Corporate 172108 v Gundry* [2014] NZHC 954 at [48]. Andrews J did not however find an arguable breach of duty.

95 Unit Titles Act 2010, s 114.

96 See, for example, *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC) at 709.

unsuccessfully that the body corporate's decisions to undertake the repairs were invalid and unauthorised, so that there was no authority to undertake those works. If they had been successful, that would have invalidated the levies. Similarly in this case they have contested the validity of body corporate decisions. Here the defendants say that even if the decisions were valid, they have a tort claim for the costs of the levies. Their complaint here involves making a tort claim to recover the levies. That amounts to an attempt to invalidate the decisions to undertake the repairs and impose levies to fund them. If that argument were sound, it would mean that the grounds for setting aside a decision by a body corporate to impose levies would be extended to include negligence in decision-making. They have already challenged the validity of the body corporate decisions unsuccessfully. Allowing them to run a negligence claim would give them a second bite at the cherry. As an example, in *Wheeldon* Muir J ruled against them on

their challenge to decks and cladding and associated elements.[97] Having failed on the

validity challenge they cannot be allowed to circumvent the findings against them by saying that the decisions were made negligently and they ought to have a refund of their levies. That would be an abuse of procedure. It would also be incongruous for the law to hold that a lawfully imposed levy could be recovered as damages because it was imposed in breach of a duty of care.

[192] In summary the defendants do not have an arguable case in tort for their claims of negligent decision-making.

Negligence in remedial works

[193] The defendants say that the body corporate was negligent in carrying out the

remedial works by constructing within each defendant's apartment:

(a) a non-compliant nib wall/bulkhead that is unnecessary, dysfunctional, unsafe and aesthetically repugnant;

(b) a vertical window that unduly restricts sliders;

(c) a frosted balustrade that blocks views of the river;

[97] See [53] above.

(d) decks with non-matching tiles that are unattractive, unsuitable and do not shed water.

[194] Mr Butcher says in his affidavit of 9 November 2016 that the body corporate did these without lawful authority. Neither he nor any other witness for the defendants says that these works have caused any actual harm to anyone or anything, including any of the defendants. Mr Butcher does however state his intention to remove the step-up from the lounge and to re-instate the windows, deck and balustrades to their original designs or as close to that as practicable. The tenor of the evidence on scope of work by Mr Maiden, an expert for the defendants, is that the remedial works are a matter of preference rather than essential repair. The defendants' evidence is directed more at whether the works were authorised than whether they were carried out negligently. They appear to object to the aesthetic aspects of the design of the remedial works.

[195] The defendants cannot object to the works as unauthorised. That has already been established and cannot be re-litigated. Under s 80(1)(a) of the Unit Titles Act as owners they must permit the body corporate and its agents to enter the unit to maintain, repair or renew any infrastructure for services and utilities that serve more than one unit and building elements that affect more than one unit or the common property or both and to maintain, repair or renew any common property. It would make a nonsense of that provision if the defendants could sue the body corporate in negligence for carrying out works that the courts have held to be authorised. On the other hand if the remedial work were carried out badly so as to cause other damage to the defendants' apartments (not just the inevitable effects of carrying out authorised works) the defendants may have a case for suing the body corporate in negligence.

[196] On this aspect the defendants' case is no more than assertion. They have not given any evidence of any wrongful damage caused by the remedial works. They have been assiduous in placing very full information before the court on other matters. If the remedial works had really caused damage to their units beyond the ordinary effects of carrying out authorised repairs and maintenance, they would surely have given evidence about it. In the absence of any such evidence, any claim for property damage is speculative. At its best this part of their case is tenuous.

[197] The defendants' purpose in making tort claims against the body corporate is to allege that it is liable to them in damages and that they should not be required to pay the levies while their tort claims are heard. While I do not regard any of their tort claims as reasonably arguable, I go on to the next part: whether they can assert these claims to avoid judgment being given against them for unpaid levies.

Equitable set-off

[198] The defendants' various tort claims for damages may be a defence to the body corporate's claims for unpaid levies only if they can show an arguable case for equitable set-off. Because the tort claims are for disputed claims for unliquidated amounts, statutory set-off is not available.[98] The Court of Appeal stated the approach applied in claims for equitable set-off in *Grant v NZMC Ltd*:[99]

The defendant may set-off a cross-claim which so affects the plaintiff's claim that it would be unjust to allow the plaintiff to have judgment without bringing the cross-claim to account. The link must be such that the two are in effect interdependent: judgment on one cannot fairly be given without regard to the other; the defendant's claim calls into question or impeaches the plaintiff's demand. It is neither necessary, nor decisive, that the claim and cross-claim arise out of the same contract.

[199] The context is this. The body corporate has imposed levies to fund remedial works. The levies are valid. There is no arguable basis for challenging their validity. That includes negligence-based attacks on the reasoning and/or processes which resulted in the levies imposed. The remedial works were authorised by procedures allowed under the Unit Titles Act. Similarly, the levies to fund the remedial works were likewise made under procedures recognised under the Unit Titles Act. The authority to impose the levies can be ultimately traced back to resolutions made in general meeting either authorising the levies directly or appointing a committee and delegating to the committee the power to impose levies. The burden of levies falls on owners pro rata according to the utility or ownership interests under s 121. A body corporate also has the option of borrowing. But the cost of borrowing likewise must be met out of levies funded by owners. When some owners do not pay levies, the body corporate may be

short-funded for its remedial works. The burden then falls on the remaining compliant

98. Under the Statutes of Set-Off (1728) 2 Geo 2 c 22 and (1734) 8 Geo 2 c 24, in force in New Zealand under the Imperial Laws Application Act 1988, s 33.

[99] *Grant v NZMC Ltd* [1988] NZCA 135; [1989] 1 NZLR 8 (CA) at 12-13.

owners, or must be borrowed with the costs of borrowing also to be met through levies. Owners who do not pay levies on time are required to pay interest at up to 10 per cent per annum plus the actual costs of recovery. Requiring timely payment of levies ensures the ongoing solvency of the body corporate with costs borne rateably by all owners.

[200] The cash-flow considerations that can bear on a body corporate when dissident owners refuse to pay levies for remedial works can be seen in the judgment of Harrison J in a case under the 1972 Act, *Brooker v Body Corporate 154558*:[100]

[64] ...The relationship between the body corporate and unit holders, although contractual, is imposed by the Unit Titles Act. The body corporate is a statutory entity created for the proprietors' mutual benefit. There is no commercial element to its functions. While empowered to engage a manager and secretary, the body corporate's affairs are in the hands of an owners' committee. It is a voluntary entity which must act in the best interests of members generally. The body corporate will inevitably depend upon expert advice on issues like repair and maintenance of common property.

[65] Moreover, the body corporate will not normally have sufficient funds to pay for more than routine repair work. This case illustrates the difficulties faced in attempting to levy a special rate on unit holders to pay for major repairs, especially where the largest unit holder, who also stands to gain most from the work, defaults in payment of her fixed contribution. The body corporate can only resort to the expensive, protracted and problematic process of litigation to recover levies from a recalcitrant proprietor. And it cannot commission works without the means to pay.

[201] Against that the defendants propose that their liabilities to pay levies should be put on hold while the court decides the merits of their disputed and contentious damages claims. There are marked differences between a body corporate's proceeding to recover levies and an owner's damages claim. A debt recovery proceeding by a body corporate under s 124 of the Unit Titles Act to recover unpaid levies typically involves proving that the levy was imposed, the owner was invoiced and the levy has not been paid. In unusual cases, it may also have to deal with challenges to the validity of the levy. Even in the unusual case the issues are narrow and any claim may be heard promptly, whether in the Tenancy Tribunal, the District Court or this court. Summary judgment

applications may be available. Statutory demands under s 289 of the Companies Act are

[100] *Brooker v Body Corporate 154558* [2005] NZHC 289; (2005) 6 NZCPR 953 (HC).

common. On the other hand, claims for unliquidated damages in tort are more complicated. They require more extensive preparation with discovery and other interlocutory matters. They require more evidence. The time from filing to hearing is longer and more hearing time is required.

[202] Postponing the time to decide a unit-holder's liability for levies while an unliquidated damages claim is heard creates delay and is unjust to those owners who have paid their levies on time. Correspondingly, there is no injustice in requiring an owner to pay levies due, even though that owner asserts a claim for unliquidated damages against the body corporate.

[203] The policy of encouraging prompt payment of levies can be seen in the voting eligibility requirements of s 96 of the Unit Titles Act. Under s 96(3) an eligible voter is barred from voting unless all the levies for his or her unit have been paid. On the other hand the owner's right to dispute a levy is saved under s 96(6):

The payment of any body corporate levies and other amounts that are from time to time payable to the body corporate by the owner of a principal unit and that are disputed by the owner, does not affect the right of that owner to dispute the payment if the sole purpose of making the payment was to exercise that owner's entitlement to vote.

[204] This is a pay now/argue later approach. If payment can be required (by barring voting rights at a general meeting) even though the owner disputes the validity of the levies, there is no injustice to an owner who does not or cannot dispute the validity of the levies but wishes to make a claim for unliquidated damages against the body corporate. The case for postponing payment in a damages claim when validity of levies is not disputed cannot be any stronger than resisting payment because the validity of the levies is disputed.

[205] For these reasons, it is not unjust to postpone any tort claims by the defendants against the body corporate until after their liability on the claims for levies has been determined. This is not a case for equitable set-off under the Court of Appeal's decision in *Grant v NZMC Ltd*.

Relief for counterclaim on summary judgment application

[206] The defendants say that even if their defence of equitable set-off is not recognised, the court should exercise its powers under r 12.12(2) of the High Court Rules in their favour. The rule says:

12.12 Disposal of application

...

(2) If it appears to the court on an application for judgment under rule 12.2 or 12.3 that the defendant has a counterclaim that ought to be tried, the court—

(a) may give judgment for the amount that appears just on any terms it thinks just; or

(b) may dismiss the application and give directions under subclause (1).

[207] Before the court can exercise the powers under that section, it must be satisfied that the defendant has a counterclaim that ought to be tried. So far, I am not satisfied. For that, I rely on my findings that the defendants do not have reasonably arguable tort claims against the body corporate. But even if I found the defendants had triable counterclaims, the pay now/argue later considerations that counted against equitable set- off require that the body corporate be able to enforce its judgment before the merits of any counterclaims are decided. Cash-flow considerations require the defendants to pay their levies now and to litigate their tort claims later.

[208] The defendants also ask for a stay of execution while they prosecute their counterclaims. Again the same pay now/argue later considerations count against a stay of execution. Later circumstances may give the defendants other grounds to apply for a stay. My refusal to order a stay of execution while their counterclaims are heard does not bar a later application for different grounds.

Another set-off argument

[209] The defendants also say that they are entitled to a set-off because the body corporate ought to have but did not make claims against the owners at the penthouse level under ss 138(4), 126 and 127 of the Unit Titles Act. These are provisions under

which the body corporate may in various circumstances recover the costs of works from particular owners. Here they are:

138 Body corporate duties of repair and maintenance

(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.

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.

127 Recovery of money expended where person at fault

(1) This section applies if 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, and the repair, work, or act was rendered necessary by reason of any wilful or negligent act or omission on the part of, or any breach of the Act, the body

corporate operational rules, or any regulations by, any unit owner or his or her tenant, lessee, licensee, or invitee.

(2) *Any expense incurred by the body corporate in doing the repair, work, or act,* together with any reasonable costs incurred in collecting the expense, is recoverable 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 became payable or by the person who is the unit owner at the time proceedings are instituted.

(Emphasis added)

[210] The defendants say that the penthouse owners ought to pay the costs of repairs on level 4 plus the costs of repairing the ceilings of level 3 units damaged because of their failure to maintain the level 4 decks adequately. Those repairs would cost

$750,000. The defendants say by way of defence that they should have a credit against their liability for the body corporate's unrecovered debts.

[211] The sections the defendants rely on allow the body corporate to recover costs already incurred from particular owners. They do not allow the body corporate to recover those costs before they are incurred. That is apparent from the italicised parts. To carry out works under these sections, the body corporate will use its funds derived from levies paid by all owners. It may then look to owners under ss 126, 127 and

138(4). Whether it does so is for it to decide. It may, but cannot be required to, make claims under these sections. Such claims are not straightforward.[101] Because the body corporate has to pay the costs of repair first, it may obtain funds by levies paid by all owners. It is no answer for any owner to resist paying their share of those costs by claiming that the body corporate may be able to recover the repair costs later from other owners. To allow any owner to run that argument would be an open invitation to all

owners not to pay and that would frustrate proper repair work.

[101] As an example, *Body Corporate S73368 v Otway* [2016] NZHC 1070.

[212] In *Wheeldon 1* the plaintiffs ran a similar argument. Muir J said:[102]

The position is that the Body Corporate has not yet made any decision pursuant to s 138(4) of the UTA 2010 relating to the recoverability of costs incurred for "repairs or maintenance to building elements or infrastructure contained within any principal unit". Indeed, apart from consultant's reports no such costs have yet been "incurred" within the terms of the section because of the challenge made in the present proceedings. In my view the Body Corporate should be entitled to consider this issue as and when it arises without the prior dictate of the Court. The approach it may choose to adopt in relation to a holistic repair may well be different to that which may, for example have applied if the plaintiff's have succeeded on their primary claims and the only significant repairs contemplated were those at penthouse level. Even if there was jurisdiction to make a declaration at this stage, which I doubt given the prospective nature of the expenses, I would decline to exercise the relevant discretion. The matter can be addressed at the relevant time.

[213] The defendants submitted that the relevant time is now overdue. "Recoverable" was to be read as "ought to be recovered" rather than "able to be recovered". The body corporate should seek recovery in a

timely way. It was in breach of its duty to owners in not claiming from penthouse owners.

[214] Whatever the merits of the arguments about recovering from penthouse owners they do not give any reason for the defendants to withhold all or any of their levies. Their argument asks for them to be put in a favoured position vis-à-vis other owners who have already paid for repairs by their levies. Nothing in the defendants' case justifies treating them as privileged.

Result

[215] I have found for the body corporate on its claims for levies SL4, SL6 and SL7, but not on its claims for SL1, SL8 or other fees. It has shown that the defendants do not have arguable defences based on invalidity, tort claims or set-off. The body corporate is entitled to judgment against each of the defendants for those unpaid levies. Ms Stent is not liable for SL4 and SL6 as she has already paid. Further evidence and calculations

are required to decide how much each defendant owes.

[102] *Wheeldon v Body Corporate 324525* [2015] NZHC 884, (2015) 16 NZCPR 829 at [199].

[216] The body corporate seeks interest on the levies at 10 per cent per annum until payment is made including after judgment. Section 128 gives the body corporate the right to recover interest:

128 Interest on money owing to body corporate

(1) If a unit owner owes money to the body corporate under section 121,

124, 125, 126, or 127, interest accrues in respect of so much of the debt as remains unpaid.

(2) The amount of interest charged by a body corporate in relation to any unpaid debt must not exceed 10% per annum.

The defendants do not dispute the right to recover interest at 10 per cent up to judgment. There is a question whether the body corporate can recover interest after judgment at the statutory rate, or whether the body corporate is confined to the interest rate for a judgment debt under r 11.27 of the High Court Rules. Under the merger rule, a contract debt merges with the judgment, with the result that interest runs at the rate allowed under r 11.27, instead of any higher contractual rate, unless there is a contractual provision ousting the merger rule. But that rule does not necessarily apply in the case of money payable under a statute. In *London Borough of Ealing v El Isaac*, a statute provided that a debt "shall carry interest at such a rate as may be prescribed from the

date on which it was paid by the local authority until repayment".[103] The English Court

of Appeal held that the merger rule did not apply because it could not be allowed to contradict a statute. Interest accordingly runs on the debt at the rate under s 128 notwithstanding the entry of judgment. Judgment cannot be given for a liability that has still to accrue. The court can, instead, make a declaration that interest continues to accrue on the unpaid levy at 10 per cent per annum after judgment.

[217] Under s 124 of the Unit Titles Act the body corporate is entitled to recover its reasonable costs of recovering the levies. It has not proved those costs yet. They will be fixed under the principles in *Black v ASB Bank Ltd* and *Crown Money Corp v*

Grasmere Estate Trustco Ltd.[104]

[103] *London Borough of Ealing v El Isaac* [1980] 2 All ER 548 (CA).

[104] *Black v ASB Bank Ltd* [2012] NZCA 384 and *Crown Money Corp v Grasmere Estate Trustco Ltd* [2008] NZHC 1816; (2008) 19 PRNZ 591 (HC).

[218] I make these orders:

(a) I give the body corporate judgment against the first defendant for levy

SL7;

(b) I give the body corporate judgment for levies SL4, SL6 and SL7 against the second to fifth defendants;

(c) I strike out the body corporate's claim for SL1;

(d) I strike out the body corporate's claim for other fees without prejudice to

its right to claim them in another court or tribunal;

(e) I dismiss the body corporate's summary judgment application for SL8;

(f) The body corporate may recover interest on levies SL4, SL6 and SL7 from their due dates to judgment at 10 per cent per annum;

(g) I declare that interest runs on the unpaid levies after judgment at 10 per cent per annum until payment;

(h) The body corporate will have its actual and reasonable costs in collecting the levies;

(i) The case will be called in the High Court at Whangarei on Wednesday 29

November 2017 at 9.30 am to:

(i) Fix the amounts of the levies payable by each defendant; (ii) Fix the interest payable by each defendant;

(iii) Fix the costs payable by the defendants; (iv) Enter judgment;

(v) Give directions for the plaintiff's claim for SL8, including filing a

statement of defence, discovery and hearing directions.

(j) The body corporate is to file and serve any further memoranda and affidavits by 23 November 2017. The defendants are to file and serve any further memoranda by 27 November 2017.

.....

Associate Judge R M Bell
