

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-002361
[2012] NZHC 1512

BETWEEN	BODY CORPORATE 95035 Applicant
AND	RONG YU CHANG, KAN HSIN HUNG CHANG AND KENNETH AH KEN KOO First Respondents
AND	CBD INVESTMENTS (NZ) LIMITED Second Respondent
AND	MARK DANIEL WATSON Third Respondent

Hearing: 7-10 May 2012

Appearances: P D Sills for Plaintiff
S A Grant and M S Gilmour for 1st, 2nd, 4th, 6th, 14th, 15th, 17th,
22nd, 24th and 30th Respondents
G A Muir for 19th Respondent
M C Harris and Z A Brentnall for 28th and 29th Respondents

Judgment: 29 June 2012

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 29 June 2012 at 3:00 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

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AND ANDREW MILLWARD PAYNE AND
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Fourth Respondents

AND ROGER HAMILTON STEWART
Fifth Respondent

AND SUE CROCKFORD GALLERY LIMITED
Sixth Respondent

AND PATRICK JAMES LOO
Seventh Respondent

AND JING GANG WANG
Eighth Respondent

AND BARRY MARSH
Ninth Respondent

AND CLAYTON JOHN HILLS AND
MICHELLE YVETTE WILSON
Tenth Respondents

AND LLOYD MARK GILMORE AND GRANT
JAMES FOX
Eleventh Respondents

AND RICHARD FRED ACKE
Twelfth Respondent

AND MARILYN LOIS REYNOLDS
Thirteenth Respondent

AND PROPERT-ABILITY LIMITED
Fourteenth Respondent

AND MUHAMMAD SHAHRIR BIN
MUHAMMAD ARIFF AND GEOK LEE
YEO
Fifteenth Respondents

AND JONOTHAN NORRIS BRISCOE AND
PATRICIA ANNE BRISCOE
Sixteenth Respondents

AND IAN ASHLEY PAUL MILLS AND
ANNETTE JOAN MILLS
Seventeenth Respondents

AND	VANESSA JEANNE JEANDIN Eighteenth Respondent
AND	HARRY ROY LAW AND SUK CHING LIAUW Nineteenth Respondent
AND	ANNE ELIZABETH MOLLOY AND BRIEN HERBERT CREE Twentieth Respondents
AND	LINDA MARGARET BRADY AND BARRY MARSH Twenty-first Respondents
AND	PETER IAN HILMER AND BEVERLY JOY KOHN Twenty-second Respondents
AND	NOEL ALLAN PLAYLE AND MARGARET PLAYLE Twenty-third Respondents
AND	PATRICIA ANNE NELSON Twenty-fourth Respondent
AND	FLOTSAM LIMITED Twenty-fifth Respondent
AND	MICHELLE JOY O'HALLORAN AND KELVIN HILL Twenty-sixth Respondents
AND	MALCOLM CRAIG SMELLIE, ROBERT ROBERT PHILIP SMELLIE AND LYNDSAY ANN SMELLIE Twenty-seventh Respondents
AND	TAN CORPORATE TRUSTEE LIMITED Twenty-eighth Respondent
AND	GABRIELLE THERESE WILSON, MICHAEL ERIC MARRIS AND TRUSTS SB LIMITED Twenty-ninth Respondents
AND	ROSS NEVIN JOHNSON Thirtieth Respondent

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Introduction

[1] The Endeans Building has stood at the corner of Queen and Quay Streets in Auckland for over a century. Originally an office block, it was redeveloped in 1994 as a mixed use unit title complex and now comprises commercial units on the ground floor and residential units above.¹ The Auckland City Council has issued the Body Corporate with a Notice to Fix which relates mainly to the roof.² This work alone will cost approximately \$2 million. There is also serious cracking to the façade which poses a threat to the building's structure.

[2] The unit owners are locked in dispute over who should bear the cost of the work. The reason for the dispute is the unusual configuration of the unit titles: the building has very little common property, with the boundaries of the units extending to the outside of the exterior walls and the vertical boundaries of the units on the top floor (level 6) extending above the roof. Most of the roof comprises terraces which are accessory units to the units on the top floor (level 6). However, although the exterior walls and almost all of the roof are private property, the Body Corporate rules require them to be repaired and maintained by the Body Corporate.

[3] There is doubt over the validity of the relevant Body Corporate rules and, notwithstanding their apparent effect, most of the unit owners consider that the cost should be borne by the owners whose properties are directly affected. This would require the owners of the level 6 units to fund most of the cost of complying with the Notice to Fix. A smaller group of unit holders think that the cost should be shared among all owners through the Body Corporate.

[4] The Body Corporate applied on 15 April 2011 for declarations that the relevant rules are ultra vires. It also seeks orders under s 37(12) of the Unit Titles Act 1972 (the Act) identifying the unit holders responsible for undertaking the work required by the Notice to Fix and compelling them to do so. Although the Act was repealed by the Unit Titles Act 2010 with effect from 20 June 2011, s 227 requires

¹ The land was originally leased by the Auckland Harbour Board to a businessman, John Endean, and interests associated with him, until the mid-1980s. The freehold was acquired in 1994 by the property developer responsible for the redevelopment.

² Notice to Fix No. 3078 issued 23 February 2009.

proceedings commenced prior to that date to be determined under the provisions of Unit Titles Act 1972.

[5] A group of unit owners to whom I refer, for convenience, as the Chang respondents,³ support the Body Corporate's application for orders under s 37(12). Alternatively, they support the application by another unit owner, Mr Law,⁴ to have a scheme settled under s 48 of the Act.

[6] Two other respondents,⁵ the owners of the level 6 units, have cross-applied for an order settling a different scheme under s 74 of the Unit Titles Act 2010. They have brought their application under that Act on the basis that their cross-application is a separate proceeding commenced after its introduction. The wording in both provisions is the same so there is no practical difference in determining the application under s 74 but I consider that the cross-application is part of the existing proceeding, and therefore to be determined under the 1972 Act.

[7] The following issues arise:

- (a) Are the Body Corporate rules relating to repair and maintenance of the building and the levying of unit proprietors ultra vires?
- (b) Can the work that is required be undertaken pursuant to orders under s 37(12)?
- (c) Should a scheme be settled under s 48?
- (d) If a scheme should be settled what should the terms be?

Are the Body Corporate rules relating to repair and maintenance of the building and levying of proprietors ultra vires?

How the current rules came to be adopted

[8] On the deposit of the unit plan creating a unit title development,⁶ the Act provides that the registered proprietor of the land becomes a body corporate.⁷

³ These are the 1st, 2nd, 6th, 14th, 15th, 17th, 22nd, 24th, and 30th respondents.

⁴ The 19th respondent.

⁵ The 28th and 29th respondents.

⁶ Unit Titles Act 1972, s 4.

Proprietors of the various units subsequently constitute the body corporate.⁸ The area comprising each unit is owned by the unit holder. The unit holders also own the common property in an undivided share. That share is determined by the “unit entitlement” assigned to every principal and accessory unit.⁹ In general, unit owners are responsible for maintaining and repairing private property and the body corporate for common property, though there are circumstances in which a body corporate will be authorised to carry out work to private property.

[9] Body corporates must have rules that provide for “the control, management, administration, use and enjoyment of the units and the common property”.¹⁰ Schedules 2 and 3 of the Act contain the rules that constitute the body corporate rules unless amended or repealed.¹¹ These are commonly referred to as the default rules. Body Corporate 95035 was established in 1982.¹² It operated under the default rules from then until 1994, when a property developer, Arthur Morganstern, acquired the freehold interest in the building through his company, Allrich Investments Ltd.

[10] The then lessee of the first floor, John Stubbs, agreed to purchase the ground floor commercial units once freehold unit titles were issued. This he did through his company, Stubbs Investments Ltd. Mr Stubbs did not want to incur costs beyond those directly relating to the commercial units. For this reason Mr Morganstern directed that the unit plan be prepared with as little common property as possible. At the same time as the unit plan was deposited Allrich Investments Ltd and Stubbs Investment Ltd, then the sole members of the Body Corporate, unanimously agreed to repeal the default rules and adopt new rules.

The Body Corporate’s obligations to repair and maintain – are rules 2.2(c) and 2.1(a)(iv) ultra vires?

[11] The first issue to be decided is whether the new rule 2.2(c), which imposed the obligation for repairing and maintaining the exterior walls and roof on the Body Corporate, is incidental to the powers and duties imposed by the Act.

⁷ Section 12(1).

⁸ Section 12(2).

⁹ Section 6.

¹⁰ Section 37(1).

¹¹ Section 37(2).

¹² Leasehold strata titles were created in 1982.

[12] Although amendment and repeal of the default rules are permitted by s 37, there are limitations on the nature of any amendment or replacement rule. Section 37(5) and (6) require that:

- (5) Any amendment of or addition to any rule shall relate to the control, management, administration, use or enjoyment of the units or the common property, or to the regulation of the body corporate, or to the powers and duties of the body corporate (other than those conferred or imposed by this Act):

Provided that no powers or duties may be conferred or imposed by the rules on the body corporate which are not incidental to the performance of the duties or powers imposed on it by this Act or which would enable the body corporate to acquire or hold any interest in land or any chattel real or to carry on business for profit.

- (6) No rule or addition to or amendment or repeal of any rule shall prohibit or restrict the devolution of units, or any transfer, lease, mortgage or other dealing therewith, or destroy or modify any right implied or created by this Act.

[13] It is settled that a rule adopted in the place of a default rule will be outside the powers of amendment under s 37 unless it is incidental to the performance of the duties or powers imposed on the body corporate by the Act in the sense of “naturally attached to, or arising from, or naturally appertaining to any of the duties or powers set out in the Act”.¹³ So a new rule that appreciably expands the powers and duties of the body corporate that are imposed by the Act cannot fairly be regarded as merely “incidental” to those existing powers and duties.¹⁴

[14] In *Berachan Investments Ltd v Body Corporate 164205*, the Court of Appeal explained that the extent of what is incidental to the performance of the duties or powers imposed on the body corporate by the Act under s 37(5) must take account of the nature of the particular building or complex; what is incidental in one context may not be so in another.¹⁵ Significantly, the Court specifically confirmed that a power or duty incidental to the obligation to maintain and repair common property can encompass responsibility in relation to unit property:

[46] To summarise, then, while we accept that the duties of a body corporate in this context relate principally to the maintenance and repair of

¹³ *Chambers v Strata Title Administration Ltd* (2004) 5 NZCPR 299 (HC) at [44].

¹⁴ *Velich v Body Corporate 164980* (2005) 5 NZ ConvC 194,138 at [29]–[31].

¹⁵ *Berachan Investments Ltd v Body Corporate 1642045* [2012] NZCA 256 approving the approach taken by Harrison J in *Young v Body Corporate 12006* (2007) 8 NZCPR 932 (HC).

common property, we consider that a body corporate is entitled to assume responsibility in relation to the repair and maintenance of items of unit property provided that the duty can fairly be seen as incidental to the duty to maintain and repair common property. Whether a body corporate's assumption of responsibility in a particular case can fairly be seen as incidental will depend on all the circumstances, including the characteristics of the building or complex involved.

[15] I have already noted the important distinction between private and common property and the fact that, in general, the body corporate is only responsible for the common areas. The body corporate's powers and obligations in relation to repairs and maintenance arise under both the Act and the default rules. Section 15(1)(f) requires a body corporate to keep the common property in a state of good repair and the default rules impose duties on it incidental to those imposed by s 15. Although the Body Corporate is not specifically authorised to undertake work on private property, provisions in both the Act and the default rules do permit it to carry out work to private property.

[16] Section 15(1)(g) requires the body corporate to "[c]omply with any notice or order duly served on it by any competent local authority or public body requiring repairs to, or work to be performed in respect of, the land or any buildings or improvements thereon". Self-evidently (as in this case) such notices or orders may relate to private property. Section 16 confers on the body corporate "such powers as are reasonably necessary to enable it to carry out the duties imposed on it by this Act and by its rules" which may include working on private property. Section 48 allows the Court to settle a scheme for work where a building is damaged or destroyed. This provision is recognised as having the potential to allow a body corporate to undertake work on private property.¹⁶

[17] Default rule 2 permits a body corporate to work on fittings connected with common property, which will necessarily involve work to private property.¹⁷ This rule relevantly provides that:

The body corporate shall –

- (a) Repair and maintain all chattels, fixtures, and fittings (including stairs, lifts, elevators and fire escapes) used, or intended, adapted or

¹⁶ *Tisch v Body Corporate 318596* [2011] NZCA 420, [2011] 3 NZLR 679.

¹⁷ *Berachan*, above n 15, at [44].

designed for use, in connection with the common property or the enjoyment thereof;

- (b) Repair and maintain all pipes, wires, cables, ducts and all other apparatus and equipment of whatsoever kind and wheresoever situate which may be reasonably necessary for the enjoyment of the incidental right which may from time to time exist by virtue of section 11 of the Unit Titles Act 1972 ...

[18] This default rule was replaced by the new rule 2.2, which also requires the Body Corporate to repair and maintain the exterior walls and roof. The relevant provisions are:

2.2 The Body Corporate shall

- (a) repair, clean, repaint, redecorate and renew when required all parts of the Common Property including entranceways, stairs, lifts, elevators, fire escapes, fences (if any), grassed areas (if any), gardens (if any), paved and sealed areas, curbing, channelling, drainage and other services used, or intended, adapted or designed for use, in connection with or enjoyment of the Common Property, and any chattels, fixtures and fittings attached to or intended for use with the Common Property;
- (b) repair and maintain all pipes, wires, cables, services, ducts and all other apparatus and equipment which may be reasonably necessary for the enjoyment of an incidental right which may from time to time exist by virtue of section 11 of the Act;
- (c) *repair, maintain, clean, repaint, redecorate and renew the exterior walls, windows and roof of the Building and any interior walls, ceiling and floors comprising part of the Common Property, and repair and maintain the fire protection systems servicing the Building when their condition so requires;*

(emphasis added)

[19] It was not seriously contested that the effect of rule 2.2(c) was to impose on the Body Corporate the duty to repair and maintain the roof and the exterior walls of the building, notwithstanding that those areas are almost entirely private property. However, counsel did (faintly) canvass the possible alternative construction, which I consider for completeness.

[20] The rule identifies three groups to which the obligation to repair and maintain relates: first, the exterior walls, windows and roof of the building; secondly, the interior walls, ceiling and floor comprising part of the common property; thirdly, the fire protection systems. These groups are clearly separated, in this rule, by the co-

ordinating conjunction “and”. The repeated use of “repair and maintain” relates to the fire protection systems and simply reflects the fact that those are the only actions required in respect of fire protection systems, as opposed to cleaning, repainting, redecorating and renewing, which are required in respect of the other areas. The rule is properly construed by treating the opening words that establish the obligation as applying separately to each group of nouns.

[21] The possible constructions are that rule 2.2(c) either requires the Body Corporate to repair and maintain the exterior walls, windows and roof of the building only if they comprise part of the common property or requires the Body Corporate to repair and maintain the exterior walls, windows and roof even if they are not common property. I consider that the latter construction is correct, with the result that the Body Corporate has an absolute obligation to repair and maintain the exterior walls, windows and roof of the building regardless of whether they are private or common property.

[22] First, if the rule only applied to common property, it would overlap with s 15(1)(f). There would, therefore, be no rationale for introducing a new rule.

[23] Secondly, looking at this rule in the wider context of rule 2.2 it is evident that an obligation on the Body Corporate to repair the exterior walls and roof is consistent with and complementary to rule 2.1(e) which imposes a duty on unit proprietors to repair and maintain the interior of the unit only. If rule 2.2(c) were construed to mean exterior walls, windows and the roof only if they are part of the common property, there would be no provision for the repair and maintenance of the exterior walls and roof. That is not a sensible construction.

[24] Looking even more broadly at the rules it can be seen that this interpretation is also consistent with rules 2.1(f), 2.1(h), 2.1(i), 2.1(k), 2.1(m), 2.3(g), 3.3(a), 3.8 and 3.11. Under these rules, the unit owners surrender rights that they would otherwise have over the exterior of the building that is their private property. For example, rule 2.1(f) prohibits unit proprietors from making additions or alterations to their units that would in any way affect the elevation or external appearance of the unit without Body Corporate consent. That is consistent with the exterior of the building being the responsibility of the Body Corporate.

[25] Therefore, I consider that rule 2.2(c) imposes on the Body Corporate the obligation to repair and maintain the exterior walls and roof, even though they are private property. Counsel for all parties agreed that if the rule did have that effect it would illegitimately expand the Body Corporate's obligation in relation to common property. Counsel did not consider that the obligation imposed by rule 2.2(c) was incidental to the performance of the duties imposed by the Act for the purposes of s 16.

[26] Counsels' view was consistent with *Velich v Body Corporate 164980*¹⁸ and *Body Corporate 188529 v North Shore City Council (Sunset Terraces)*.¹⁹ It was also consistent with the High Court's decision in *Berachan*, the facts of which have parallels with the present case.²⁰ In *Berachan* the body corporate rules had been amended to provide that the body corporate would, among other things, repair and maintain the roof. Most of the roof (80%) was held by one of the unit owners with the remaining 20% held by the body corporate. In the High Court the new rule was held to be ultra vires as it imposed an obligation that was not incidental to the powers and duties imposed by the Act. That decision was, however, reversed on appeal.

[27] The Court of Appeal considered that the features of the building were such that an obligation to repair and maintain the roof was fairly regarded as incidental to the body corporate's statutory obligation under s 15(1)(f) to maintain and repair common property. These features were, first, that the roof was a single entity that had to be replaced as a whole. Secondly, rain water collection gutters, which were the responsibility of the body corporate, ran through both the common property and private property areas of the roof. Thirdly, workers needed access to the roof for both private purposes such as installing air-conditioning units and television aerials, and body corporate purposes, such as cleaning and maintaining the exterior walls (which were common property).

[28] Many of these features exist in the present case. The building's water pressure services are located on private areas of the roof. A few air-conditioning

¹⁸ *Velich*, above n 14.

¹⁹ *Body Corporate 188529 v North Shore City Council (Sunset Terraces)* [2008] 3 NZLR 479 (HC) at [110].

²⁰ *Body Corporate 164205 v Berachan Investments Ltd* (2011) 12 NZCPR 385 (HC).

units and television aerials have been installed on private areas of the roof. Cleaning the exterior walls requires safe abseiling points to be established on private parts of the roof. However, there are also significant differences. First, the common area that exists on the roof is minimal. Although there was no evidence of the exact area, my assessment is that, at most, about 10 per cent of the roof area is common. First, the common area that exists on the roof is minimal. Although there was no evidence of the exact area, my assessment is that, at most, about 10% of the roof area is common property.

[29] Secondly, the exterior walls of the Endeans Building are private property. It is not feasible to argue that access to the exterior walls is needed for the purposes of maintaining and repairing common property. The extent to which the Body Corporate could legitimately need access to the private areas of the roof for the purposes of fulfilling its obligations in relation to the common property is very limited. I do not consider that it could fairly be viewed as incidental to the powers and duties conferred on the Body Corporate by the Act. It follows that rule 2.2(c) is ultra vires. The invalidity of rule 2.2(c) necessarily means that rule 2.1(a)(iv), which requires unit proprietors to allow the Body Corporate access to their units for the purpose of maintaining and repairing the exterior of the building, is also invalid since it assumes, and depends on, the power purportedly conferred by rule 2.2(c).

Unit owners' obligations to repair and maintain – is rule 2.1(e) ultra vires?

[30] The new rules also affected default rule 1, which imposes obligations on unit owners including requiring them to:

- (c) Forthwith and at all times carry out all work that may be ordered by any competent local authority or public body in respect of his unit to the satisfaction of that authority or body:
...
- (e) Repair and maintain his unit, and keep it in sufficiently good order, repair, and condition to ensure that no damage or harm shall ensue to the common property or any other unit in the building of which this unit forms part ...

[31] The new rule 2.1(e) relieves the unit holder of the obligation in default rule 1(e) to “repair and maintain his unit” and instead limits the unit owner’s obligation to repair and maintain to the interior of the unit only, requiring that he or she:

- (e) repair and maintain the interior of the Unit, and keep it in sufficiently good order, repair and condition to ensure that no damage, harm or diminution in value shall ensue to the Common Property or any other Unit ...

[32] Both the Body Corporate and the Chang respondents asserted that rule 2.1(e) was ultra vires, though for different reasons. Mr Sills submitted that rule 2.1(e) was ultra vires because s 37 does not allow amendments relating to the powers and duties of unit owners. Section 37 does not, in my view, preclude the amendment of rules relating to unit proprietors. On the contrary, an amendment to the rules relating to unit proprietors would seem to fall directly within the first category of permitted amendments identified in s 37(5), being an amendment to a rule that relates “to the control, management, administration, use or enjoyment of the units”. The proviso is not applicable because it is limited to powers or duties conferred or imposed on the Body Corporate.

[33] Mr Sills also submitted that the limitation on the owners’ responsibility in rule 2.1(e) is the corollary to the expansion of the Body Corporate’s responsibilities in rule 2.2(c) – that is, if the expansion to the Body Corporate’s responsibilities in rule 2.2(c) is ultra vires then the corresponding limitation in rule 2.1(e) must also be ultra vires. There was no authority offered for this proposition. However, in relation to a similar change to the default rules in *Berachan*, the Court of Appeal did comment that if the rule requiring the body corporate to repair and maintain the roof were ultra vires then the rule limiting proprietors’ obligations to the interior of the units would also have to be declared ultra vires.²¹ The only reason given for the Court’s (*obiter*) conclusion was that, if it were otherwise, no party would be responsible for the part of the roof that was private property.

[34] In the present case, too, this would be the result of rule 2.1(e) being valid. One might view this result as being contrary to the purpose of the Act in that it would make no provision for the management of these parts of the units. On the

²¹ *Berachan*, above n 15, at [51](a).

other hand, Parliament clearly did not regard the obligation on unit holders to repair and maintain private property as of equal importance to the obligation on the body corporate to repair and maintain common property, the former being provided for only in the default rules that could be repealed or amended. Further, the restrictions placed on amendments to rules by s 37(5) relate only to those rules affecting the body corporate.

[35] I respectfully consider that there is no reason that the invalidity of one rule should necessarily result in the invalidity of another rule to which it has no direct relationship. The scheme as originally conceived and implemented by the developer did make provision for the management of these parts of the units. If rule 2.1(e) is declared to be invalid that original scheme would be fundamentally changed. All unit owners agreed to the original scheme when they purchased and I am not satisfied that this Court should take steps to alter that scheme by striking down an otherwise valid rule unless there were no other option.

[36] Despite some hesitation in light of the Court of Appeal's comments, I nevertheless conclude that the invalidity of rule 2.2(c) does not result in rule 2.1(e) also being invalid. Although the result is that neither the Body Corporate nor the unit proprietors have any obligation to repair or maintain the exterior walls and roof save for work required to be done by a local authority or public body, the immediate problems can be overcome through a scheme under s 48. The future position will be rectified by the Unit Titles Act 2010, which imposes the obligation on unit holders to repair and maintain their units not under the default rules, but under s 80, which cannot be contracted out of.

[37] Ms Grant made the slightly different submission that rule 2.1(e) was ultra vires because it imposed responsibility on the Body Corporate to carry out repairs to property other than common property and destroys the right of owners under default rule 1(e) to have proprietors repair private property. The first limb of that submission is incorrect because silence in respect of the repair and maintenance obligation of part of the unit cannot, in itself, impose a duty on the Body Corporate to carry out repairs on that part. This is all the more so when the rule that purported to specifically impose that duty has been accepted as ultra vires.

[38] Nor do I accept that the effect of the rule is to destroy the right of owners to repair private property. Rule 2.1(e) is concerned with obligations, not rights. Even default rule 1 is silent in respect of rights. I would have thought it self-evident that a unit owner has the right, as a consequence of his or her ownership, to carry out repairs.

The levying of unit owners – is rule 2.2(g) ultra vires?

[39] In many cases, including the present, the issue is not so much whether the body corporate should undertake the work but whether it should bear the cost of doing so. The cost of the work that a body corporate undertakes is, in general, met through levies on unit holders. This power arises only under the Act; s 15(2)(a) requires a body corporate to establish and maintain a fund for various specified purposes, including for “repairs and the discharge of any other obligations of the body corporate”. Under s 15(2)(c) the body corporate is required to determine the amounts to be raised for these purposes and to raise them by “levying contributions on the proprietors in proportion to the unit entitlement of their respective units”. A unit entitlement is an entitlement of each unit fixed by a registered valuer for the purposes identified in s 6(3) which include the extent of the proprietor’s obligation under s 15 in respect of contributions levied by the body corporate.

[40] There are two other ways in which the cost of work undertaken by a body corporate may be recovered from unit owners. There is provision under s 33 for the body corporate to recover the cost of work it has undertaken where the work benefitted one or more unit owners to a greater extent than the others. Secondly, under a scheme settled under s 48 the cost may be directed to either be borne by the body corporate or apportioned among the unit owners.

[41] Default rule 3 confers various powers that are incidental to the power to levy under s 15. These include borrowing, investing and establishing a current account with a bank. The Body Corporate rule 2.2(g) contains similar provisions. However, it also includes a provision that purports to alter the basis for levying set under s 15(2) for some types of work:

(g) when levying any Proprietor of any of the Ground Floor Units pursuant to [s]ection 15(2)(c) of the Act, there shall be excluded from such levies (or if included there shall be deducted therefrom):

(i) any part of the levy that relates to the ground floor Common Property, the exterior painting of the Building including Level 1 and above (provided that the Ground Floor Units shall pay 100 % of the cost of painting the exterior of the ground floor of the Building), and the lifts all of which shall be dedicated for the use of levels 1 (and above) of the Building, the intent being that the Proprietor(s) of the Ground Floor Units shall only be liable to contribute to levies which are attributable to the whole Building and from which the Ground Floor Units derive a direct benefit ...

(ii) any secretarial charges of the Body Corporate where such charges exceed 20 percent of the total secretarial charges made to the Body Corporate;

and the Body Corporate shall add any levies unrecovered (by virtue of this rule 2.2(g)) from the Proprietor(s) of the Ground Floor Units to the levies of the other Proprietors of Units in the Building on a pro rata basis based on the residual Unit Entitlement of those Units.

[42] The new rule is clearly intended to work in tandem with rule 2.2(c) to limit the extent to which the ground floor unit owners contribute to the cost of work to the upper levels. There is no record of the reason that this rule was introduced but it seems likely that Allrich Investments Ltd and Stubbs Investments Ltd realised that it would be impractical to leave the repair and maintenance of the roof and exterior walls wholly to the various individual unit proprietors to attend to as and when they wished.

[43] There is some ambiguity in the wording of this rule. The first part of sub-clause (i) is clear that what is to be excluded from levies imposed under s 15(2)(c) is the cost of exterior painting and work to lifts. The second limb of that sub-clause, however, refers to "levies which are attributable to the whole Building". Although this might be read as an intention to extend the ambit of work excluded from levies imposed under s 15(2)(c), I consider that those words are merely explanatory of intent and ought to be read in the context of the preceding part of the sub-rule. Therefore the effect of rule 2.2(g)(i) is not extended; it relates only to exterior painting and work to the lifts.

[44] Mr Sills, for the Body Corporate, and Ms Grant, for the Chang respondents, submitted that the power to levy other than by unit entitlement in the manner

provided for in rule 2.2(g) was valid and properly seen as incidental or attaching to the Body Corporate's combined powers under ss 15(2)(c) and 33. I do not accept these submissions.

[45] First, rule 2.2(g) assumes that the Body Corporate has the power to levy for painting the exterior walls but, as already discussed, no such power exists in this case because the exterior walls are private property. Rule 2.2(g) would only be triggered if the Body Corporate were required to undertake such work by a local authority or public body, which seems unlikely, at least in relation to exterior painting.

[46] Secondly, although the intent of rule 2.2(g) is clear (namely that the proprietors of the ground floor units will only be liable to contribute to levies for work to the whole building from which they derive a direct benefit), the formula imposed is contrary to s 15(2)(c) which requires levies to be assessed according the unit entitlements fixed under s 6.

[47] Nor do I accept that the rule has any legitimacy as an adjunct to s 33. It is apparent from the Court of Appeal's comments in *Tisch* that s 33 simply provides a mechanism by which repair costs already levied and incurred can be adjusted if the repairs substantially benefit some units more than others.²² Since that provision (and any rule adopted) can only relate to work that the Body Corporate is entitled to carry out, it must have very limited application in the present case where the Body Corporate, as a result of the invalidity of rule 2.2(c), has no power to carry out work on the exterior of the building save in the circumstances that might arise under ss 15(1)(g) or 16, or a scheme settled under s 48.

[48] For these reasons, the rule was not one permitted by s 37(5) and has to be regarded as ultra vires.

²² *Tisch*, above n 16, at [25].

What work needs to be done to the Endeans Building?

The construction of the building

[49] As originally built the Endeans Building had four levels. Following a fire in 1912 it was rebuilt with five levels. In 1922 a caretaker's flat was built on the roof (now level 6). The balance of level 6 was completed in 1967. When the building was redeveloped in 1994, level 6 was altered; the caretaker's flat was left unchanged but the rest of the floor was developed into three units opening onto balconies.

[50] The building now comprises seven ground floor commercial units and 30 residential units on the upper levels. The northeast corner of the ground floor houses the services structures. That area is common property. Running up the core of the building is a common atrium space which constitutes accessory unit AU7. It comprises the stairs, lifts, internal balconies, concierge room and culminates in a roof-top skylight. AU7 is owned jointly by the upper level owners. Apart from AU7 the roof-top area is mostly taken up by accessory units 8, 9, and 10 belonging to two of the level 6 units and accessed by internal staircases leading from those units onto the roof. There is a very small area in the southeast corner of the roof that is common property.

[51] The five stories that were rebuilt in 1912 were constructed with reinforced concrete and concrete-encased structural steel frames. The later construction of the level 6 units and the roof is, however, lighter than the rest of the building. Those units are timber framed with a plaster finish. The roof is constructed from structural steel frames, timber framing and plywood overlaid with a butynol waterproof membrane. The roof-top areas comprising accessory units 8, 9 and 10 have had paving tiles laid over the top of the butynol membrane to create terraces.

Work required by the Notice to Fix

[52] The Notice to Fix was issued in 2009 consequent on an Auckland City Council inspection in 2008. The inspection was triggered by the enquiries made of the Council by a prospective purchaser of one of the units. It emerged that no final Code Compliance Certificate had been issued for the building consents approved

between 1993 and 1994, which included the major redevelopment work undertaken by the developer, Allrich Investments Ltd.

[53] The Body Corporate engaged Peddle Thorpe Architects to advise on the scope of works required by the Notice to Fix. Mr Bryan Aitken, a director of Peddle Thorpe, gave evidence about the work that was required:

- There are numerous deficiencies in the exterior cladding of the sixth and seventh floors which will require the cladding to be removed and replaced by a new ventilated cavity cladding system that complies with the Building Code.
- The sixth floor balcony, which was constructed from a thin concrete floor slab over a polystyrene infill laid on the existing fifth floor roof, does not have sufficient setback to the deck and the cladding was carried down to the floor in contravention of the Building Code. It is no longer possible to comply with Building Code requirements through this form of construction and an alternative design solution is needed.
- The rooftop terrace, which was constructed of plywood, timber framing and butynol membrane supported by a steel frame with tiles on top, has numerous deficiencies in its weathertightness. Peddle Thorpe recommends removing the existing floor substrate and membrane and replacing them with a two-layer torch-on waterproofing membrane with new gutters and falls to the deck, and new flashings and waterproofing membrane on the parapet and fascia. Replacement of the balustrades is also required.
- The flashings, outlets and penetrations on the main roof are not weathertight and require new apron flashings and overflow outlets. The butynol membrane on the main roof also requires repair.
- The rooftop service area has weathertightness defects and requires a new two-layer torch-on membrane with a finish suitable for foot traffic and new flashings and cladding to the service roof.
- The concierge room on the ground floor is not code compliant and requires an exhaust fan, a drip tray below the hot water cylinder, an air admittance valve or back vent, and a waste gully. This work is only minor.

- Fire protection standards have not been met as a result of penetrations through fire rated areas that are not protected, and doors and windows that do not comply. Peddle Thorpe propose applying a fire rated sealant to the perimeter of ducting penetrations, installing fire sleeves to the pipe penetrations, repairing existing damage to plasterboard linings and installing or adjusting existing door closers.
- The handrail on the rooftop terraces is badly corroded and requires urgent repair.

What other work is needed?"

[54] In 2010 Peddle Thorpe was also engaged by the owner of a fifth floor unit to advise on cracking to the interior plaster walls of this apartment and cracking of the external façade. Mr Aitken concluded that cracking to the external façade was causing the damage to plaster work on interior walls of this unit. Peddle Thorpe recommended that further inspections and remedial work be carried out and that these would involve breaking out the complete length of the construction joint, treating damaged steel, re-plastering and re-painting.

[55] Also in 2010 another firm of structural engineers, Thorburn Consultants, reported to the Body Corporate on floor loadings as required by the Notice to Fix. Thorburn Consultants reported observing cracking to the façade from street level and recommended further investigation to confirm whether the cracking extended to the concrete encasing the structural steel frame and, if so, whether the steel frame had been affected. No further investigative or remedial steps were taken at that stage.

[56] Finally, in 2011 the sixth floor unit owners engaged Peddle Thorpe to inspect the exterior façade. Inspections were undertaken from street level and by abseiling down the walls. Photographs taken during these inspections show approximately 70 cracks in the northern, eastern and western façades of the building, randomly distributed across the whole building though mainly on the northern and western façades.

[57] In his evidence Mr Aitken described the cracks as being of varying severity with some requiring urgent attention. For example, there is a major vertical crack on

one of the columns of the northern façade, the width of which indicated that there had been a reasonable degree of movement in the structure. Another serious example of cracking that requires urgent attention is that found on the western façade which is large enough to allow water to penetrate the plaster through to the concrete. Eventually, the water will begin to corrode the structural steel frame.

[58] Of particular concern is Mr Aitken's evidence that if the cracks are not repaired it is inevitable that large pieces of concrete will eventually be dislodged and fall to the ground. This has obvious implications for the safety of pedestrians.

Can the work be undertaken pursuant to orders under s 37(12)?

[59] The Body Corporate and most of the unit owners seek an order from the Court requiring the proprietors whose units are directly affected to undertake (and bear the cost of) the work required. Under s 37(12) a body corporate or any proprietor can apply for an order enforcing the performance of any rule. It provides that:

The body corporate or any proprietor shall be entitled to apply to any Court of competent jurisdiction for an order –

- (a) Enforcing the performance or restraining the breach of any rule; or
- (b) Awarding damages for any loss or damage arising out of the breach of any rule –

by any person bound to comply therewith or by the body corporate.

[60] The Body Corporate, whose position is limited by the terms of its members' resolution, seeks orders under s 37(12) regarding the work required by the Notice to Fix only, namely that the unit owners required to undertake the work be identified and compelled to undertake it. The Chang respondents seek orders that address both the work required by the Notice to Fix and the repairs needed to the façade. In relation to the Notice to Fix they seek orders requiring the unit owners, the owners of AU7 and the Body Corporate to comply with the Notice to Fix and any other requirements of the Auckland City Council or other local body. In relation to the façade they seek orders that each of the owners is to repair any cracks in the exterior walls of their units by collectively instructing an expert to investigate, paid in

proportion to unit entitlement, and then undertake the required work as part of such collective or individual contracts as are cost effective.

[61] Mr Law proposed orders requiring the various owners affected by the Notice to Fix to undertake the necessary work. In relation to the façade such orders would require the Body Corporate to arrange an investigation as to whether repairs were necessary, with those costs to be met by owners according to their unit entitlement on the basis that all owners except the ground floor units were affected.²³ The ground floor units do not require scaffolding and have mainly glass fronting but would be adversely affected by any scaffolding; therefore, such investigative work should be carried out, as far as is possible, without scaffolding. If new abseiling anchors are needed, the owners on level 6 must allow this. If it is found that repairs are needed to the walls, then those costs should be borne by the relevant owners. In the absence of agreement between owners as to the extent of the work and the means of effecting it, it was proposed that leave be granted to seek further directions from the Court, with the cost of the repairs to be apportioned between the owners according to the ownership of the wall on which the repairs are effected.

[62] The level 6 owners do not seek orders under s 37(12). They maintain that the unusual configuration of the unit boundaries, the nature of the work required and the inability of the Body Corporate to function effectively makes a scheme under s 48 the appropriate course rather than orders under s 37(12).

[63] I agree that the work required by the Notice to Fix could be managed by orders under s 37(12). The Notice to Fix is directed to the Body Corporate which is bound to comply with it under ss 50(5) and 15(1)(g). I do not accept Mr Sills' submission that the Body Corporate has no power to comply with the notice because it has no right of access nor a right to undertake work to the areas of private property affected by the notice, principally the roof. Section 15(1)(g) does authorise work such as that required by the Notice to Fix and, by virtue of s 16, the Body Corporate has the powers necessary to enable it to do so.²⁴

²³ Although the level 6 owners do not share the exterior wall that is cracked (their cladding being of a different construction) they nevertheless rely on the steel frame for support.

²⁴ See the discussion by Duffy J in *St John's College Trust Board v Body Corporate 197230* [2012] NZHC 827.

[64] However, by virtue of rule 2.1(c), so too are the level 6 unit proprietors obliged to comply with the Notice to Fix insofar as it relates to their units. The Body Corporate is responsible for work required to the small amount of common property affected and the owners of levels 1-6 for work required to AU7. Most of the work, however, relates to property owned by the level 6 unit owners. As between them and the Body Corporate it must be the unit owners who are ultimately responsible for the cost of the work. First, the Body Corporate is entitled to seek an order compelling the proprietors to comply with the rules. Secondly, the Body Corporate can only raise funds by levying under s 15(2)(c) or seeking repayment under s 33 after the work has been done. Both routes will ultimately result in the unit owners bearing the cost.

[65] I do not, however, accept that the investigation and repair work to the façade can be achieved through orders under s 37(12). It is this aspect that really highlights the problems in the configuration of the units and the rules. As I have already discussed, neither the Body Corporate nor any individual unit owner has any obligation to repair or maintain the façade because it is private property and the unit owners only have obligations regarding the interior of their units unless there is a requisition by the local authority or a public body, which there is not. As a result, no unit owner is in breach of any rule regarding the façade and there is, therefore, no scope for an order under s 37(12) requiring the various unit owners to comply with a rule.

[66] I acknowledge that this state of affairs is temporary; when the Unit Titles Act 2010 becomes effective on 1 October 2012 the unit holders will be obliged to repair and maintain the whole of their units. I am, however, conscious of Mr Aitken's view that repairs to the façade should be regarded as urgent for reasons of safety. Two preliminary investigations have already been undertaken and Mr Aitken (without challenge) described the need for repairs to these cracks as urgent, signalling the risk of masonry coming loose and falling onto pedestrians below. It is obvious that repair work is needed within a reasonable time. The nature of the work clearly requires a co-ordinated effort but the dynamics between the unit holders that I have observed make this unlikely to be achieved.

[67] Finally, because of the access issues and the need for scaffolding, I am satisfied that the Notice to Fix work and the repairs to the façade should be undertaken together, if possible. Mr Aitken's unchallenged evidence that both should be undertaken at the same time was:

In my opinion, the cracking is sufficiently extensive that all levels of the building façade should be inspected and repaired. The only practically and economically feasible way to do this is to scaffold the façade and install appropriate measures to protect pedestrians while the work is carried out. This work should plainly be carried out at the same time as the works required by the Notice to Fix, which will also require the building to be scaffolded.

[68] Mr Aitken considered that it would be "totally impractical" for individual owners to carry out inspections and repairs to the exterior walls of their own units. Such an approach would require each owner to scaffold the façade or erect a builder's stage, which would be more expensive.²⁵ In Mr Aitken's opinion it was "vital that the inspections and repairs are carried out in a comprehensive and co-ordinated manner". Finally, cleaning of the building generally, particularly the windows, requires new abseiling points to be affixed to the top floor. This will, inevitably, involve accessing the private property of the level 6 unit owners for the benefit of the owners at lower levels.

[69] I have decided that, although the work required by the Notice to Fix could be directed to be undertaken by orders under s 37(12), a scheme under s 48 that covers both that work and the repairs to the façade is desirable.

A scheme under s 48

Section 48

[70] Section 48 confers a discretion to impose on a body corporate and unit holders a scheme for reinstatement or improvement of a building that is damaged or destroyed. The significant aspect of s 48 is that it allows the Court to impose a scheme that departs from the obligations imposed by the Act and the body corporate

²⁵ According to Peddle Thorpe, scaffolding and a builder's stage will be necessary to protect pedestrians and parked cars.

rules. In particular, it allows a scheme under which a body corporate may undertake work to private property.²⁶

[71] In *Tisch* the Court of Appeal summarised the correct approach to the determination of applications to settle a scheme under s 48 as being first that the Court must be satisfied that the building has been damaged or destroyed; secondly, that the Court must decide whether a scheme is appropriate in the circumstances; and, thirdly, if a scheme is appropriate, the Court must decide the terms of the scheme.

[72] Mr Law has proposed a scheme which has broad support from most of the unit holders. The level 6 owners have proposed a different scheme. The different scheme has support from a small number of other unit owners. The Body Corporate has not taken a position regarding either scheme and abides the decision of the Court.

The building is damaged

[73] It is evident from my earlier description of the work required that there is damage to this building. Ms Grant, for the Chang respondents, and Mr Muir, for Mr Law, both resisted the suggestion that the building was damaged as a result of the work required by the Notice to Fix for the purposes of s 48, either at all, or to an extent that would justify a scheme being settled. They submitted that some of the work was required solely for compliance reasons, was unrelated to any damage and should therefore not be the subject of a s 48 scheme.

[74] There is no indication in the Act as to the threshold for the extent of damage that would justify a scheme under s 48, though I respectfully agree with the Court of Appeal's observation in *Tisch* that no-one is likely to apply under s 48 unless the damage is substantial and if they did the Court would probably not be minded to settle a scheme.²⁷ I accept that the mere fact that compliance work is required would not, in itself, render a building damaged for the purposes of s 48. However, a scheme may encompass not only reinstatement but also improvement. Provided

²⁶ *Tisch*, above n 16, at [34].

²⁷ At [36].

there is damage to the building, which there clearly is in this case, s 48 may be utilised.

[75] There was also a slight attempt by the Chang respondents to argue that most of the damage was caused by long-term lack of maintenance, which could be rectified by orders under s 37(12), making a s 48 scheme inappropriate. There is nothing in the wording of s 48 to suggest that it should be restricted in that way. It is worded broadly and speaks to the state of the building rather than the cause of the damage. In any event, there was insufficient evidence on which to find that lack of maintenance was the cause of the current state of the building.

A scheme is appropriate

[76] In considering whether a scheme is appropriate it is important to take account of the provisions of the Act and the body corporate rules. In *Tisch* the Court of Appeal, acknowledging that s 48 was an exception to the general rule that a body corporate can only undertake tasks associated with common property, commented:

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

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

[77] There are three reasons that a scheme is appropriate in this case. First, although the work required by the Notice to Fix and the repair work to the façade are very different and involve discrete areas of the building, I am satisfied that all the work should be undertaken together for the reasons already discussed.

[78] Secondly, the scheme created by the configuration of the boundaries and the Body Corporate rules in this case is impractical in the face of the need for such extensive repairs to the building's exterior. Although there were statements by some

of the unit owners to the effect that they were content to attend to repairs to the exterior of their respective units, there was no recognition by them as to the practical difficulties that this would involve.

[79] Thirdly, the level of divergence in the respective interests represented on the Body Corporate, the disproportionate unit entitlement shares held by the ground floor unit owners compared to the physical space they occupy and the unhappy dynamics among the unit owners mean that there is no prospect of repairs being undertaken in a co-ordinated and effective manner. The Notice to Fix was issued more than three years ago and the cracking to the façade has been recognised as a serious problem for over a year. Yet the evidence I heard and the suggested solutions of the various parties give no confidence at all that an effective overall solution for the building can be agreed upon.

Terms of the scheme

[80] In *Tisch* the Court of Appeal said that the aim of a scheme under s 48 was to “balance the interests of each unit holder in a way that imposes terms that achieve the outcome fairest to all unit holders”.²⁸ The Court identified five guiding principles that applied in determining the terms of a scheme.

[81] First, a scheme with broad support is to be preferred. Secondly, the scheme should be appropriately detailed.²⁹ Thirdly, providing that what has been done by the body corporate before the s 48 scheme is actually approved is in accordance with the scheme, the order has retrospective effect. Fourthly, work should normally be done to the same standard and at the same time. Fifthly, the terms of the scheme should depart from the scheme of the Act and from the body corporate rules no more than is reasonably necessary to achieve what is fair as between the owners in the circumstances (unless, of course, a scheme is unanimously agreed to by all unit owners). In this case the first and fifth principles are especially relevant.

²⁸ At [44].

²⁹ At [46]-[49].

The scheme proposed by Mr Law

[82] Mr Law's proposed scheme has broad support from the majority of unit owners – a significant point in its favour. However, that level of support reflects the fact that the level 6 owners would bear most of the cost of the work required by the Notice to Fix. Self-evidently, and understandably, a scheme that requires less financial input from the majority of unit owners is likely to be more widely endorsed. So, the weight given to a high level of support needs to be tempered with the recognition that majority support will not necessarily represent fairness between the owners as a whole and may have an unfair effect on the minority.³⁰

[83] The scheme that Mr Law proposes is premised on the assumption that private owners must pay for, arrange and undertake repairs to their own units and accessory units, except AU7. The other terms of the proposed scheme are directed only towards the repair of common property and AU7. The essence of it is that repair work to common property and AU7 be undertaken under a single contract with all owners paying their proportion on a unit entitlement basis in relation to common property and on a 1/30th basis in relation to AU7.

[84] There is recognition that some of the work to common areas and AU7 will involve areas that adjoin private property, with the proposal that the Body Corporate has the authority to levy the owners of the private property affected to ensure that the junction between the two complies with the Building Act 1992 and any other legislative or council requirements. The proposed terms of the scheme, insofar as they relate to common property, AU7 and private areas adjoining common property or AU7, are unobjectionable and cover such matters as identifying the extent of the work required, engaging advisers, letting the necessary contracts and so on.

[85] It is evident, however, that the scheme was proposed very much with the work required by the Notice to Fix in mind and reflects the view of most of the unit holders that this work falls to be undertaken mainly by the level 6 unit owners. Leaving aside the complaint by the level 6 unit owners that this is unjust, the proposed scheme is unsuitable for the work required to the exterior walls, which does not involve either common property or AU7.

³⁰ *Tisch*, above n 16, at [45]; *Body Corporate 172108 v Meader* (2011) NZCPR 101 (HC).

[86] The work to the façade involves the far more problematic interface between different private areas. There is, for example, nothing in the proposed scheme that would address the consent required by unit holders to scaffold the entire building in order to adequately investigate and repair the cracks to the exterior walls. Nor is there any proposal as to whether repairs required to particular areas of the walls should be related back to specific units or how costs would be apportioned. In short, Mr Law's proposal does not address the main reasons that I consider a scheme is needed.

The scheme proposed by the level 6 unit owners

[87] The scheme that the level 6 unit owners propose would spread the costs of the work required under both the Notice to Fix and the work to the façade over all the unit owners and would ultimately see those areas transferred from private ownership to common ownership. Their proposed scheme has three main aspects. First, the cost of all the work required would be shared in accordance with the physical area occupied by each unit as identified in the unit plan rather than by unit entitlement. This would result in the ground floor units paying less than they would on a unit entitlement basis and some of the upper floors paying more than they would on that basis. Secondly, the work to the roof would be undertaken by reference to a "notional roof" that would finish at the top of the waterproof membrane. Additions, including paving on top of the notional roof would be borne by the level 6 owners alone. Thirdly, a new unit plan would be deposited, bringing the external walls and the notional roof into the common property and resolving errors in the present plan.

[88] The rationale of the proposed scheme is essentially that it is fair to the unit holders as a whole, having regard to the scheme that they bought into and adhered to for some years. Although the roof and exterior walls of the building lay in private ownership by virtue of the unit plan, the body corporate rules imposed on the Body Corporate the obligation to repair and maintain those areas.

[89] Mr Harris, for the level 6 unit owners, submitted that those who resist contributing to the cost of the roof are effectively ignoring the rules they agreed to abide by and that they are choosing to overlook their long history of adherence to the

rules. He submitted that all of the owners must be taken as having purchased their units knowing that the repairs and maintenance of the exterior walls, windows and roof would be shared in accordance with the rules and that fairness requires them to honour this aspect of the contract that is embodied in the Body Corporate rules. Mr Harris did not frame his submission in terms of what, in a different contractual context, would be estoppel by convention.³¹ Nor could the circumstances satisfy the requirements of such an approach. He was simply arguing that, in *Tisch* terms, it would be fair to require the unit owners to continue to act in accordance with the scheme they believed was valid when they purchased and on which they acted.

[90] Ms Grant and Mr Muir did not accept that the unit owners had, in fact, always acted in accordance with the rule that imposed responsibility for the roof and exterior walls on the Body Corporate. In particular, they pointed out that instances of the Body Corporate meeting costs associated with those areas were very minor. In addition, some of the unit owners who gave evidence made it plain that they considered that, to the extent that the Body Corporate may have taken responsibility for the roof and walls, it did so as a result of the influence improperly exerted by the level 6 owners, particularly Mr Marris and Ms Wilson, who each sat on or chaired the Body Corporate Committee for several years.

[91] It is clear, however, from minutes of early Body Corporate meetings that the Body Corporate Committee (which then included Mr Morganstern and Mr Stubbs) expected the roof and exterior walls to fall within the Body Corporate's responsibility. In the minutes of every Body Corporate meeting for the years 1997-2001 there were references to work undertaken to either the roof or the exterior walls for which the Body Corporate took responsibility in terms of investigation, arranging work and meeting the cost of that work. The amounts involved in these early years were relatively modest but the pattern was clear. I am satisfied that during these years in allowing the Body Corporate to take responsibility for work to these areas the Body Corporate Committee members were acting in accordance with the plain meaning of the Body Corporate rules.

³¹ *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1981] 3 All ER 577 (CA); *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548 (CA).

[92] The perception of the Body Corporate members began to change in about 2003, when the seriousness of the weathertight issues emerged. The minutes of the AGM in May 2003 recorded serious concern about weathertightness issues and referred to the Committee commissioning a building condition survey, with the area of greatest concern being the roof, which required urgent work after being patched up over the years.

[93] The following year the extent of the problem became clearer. The Committee members for 2003-2004 included Mr Marris (chair), Mr Stubbs (the original owner of the ground floor units), Mr Law and Mr Playle (the current chairman of the Committee). During that year the Body Corporate Committee had engaged an architectural firm, Salmond Reed, which tabled its report at the 2004 AGM. That report identified serious defects in the roof and the canopy attached to the ground floor units. The estimated cost of repairs totalled \$534,062. The attendees of that meeting, including Mr Marris and Mr Playle, resolved that the Body Corporate would raise a special levy of \$534,062.50 for the purposes of the work. Mr Stubbs was not at that meeting and, when he learned of the special levy, took the view that he had no obligation to contribute in relation to work to the roof.

[94] At that point in late 2004, the extent of the Body Corporate's obligations in respect of the roof and exterior walls became an openly contentious issue among the unit proprietors. At an Extraordinary General Meeting on 6 December 2004 Mr Stubbs made it plain that he did not accept that the ground floor unit owners had any obligations in relation to the roof. By that stage the respective solicitors engaged by the Body Corporate and by Mr Stubbs were already considering the possibility that some of the Body Corporate rules were ultra vires. By the time of the 2005 AGM there was talk of legal proceedings regarding the Body Corporate rules. The special levy that the 2004 AGM resolved to impose was deferred.

[95] So, the Body Corporate initially acted on the basis that it was responsible for the roof and exterior walls, but then changed that practice in 2004. I note that one of the Chang respondents, CBD Investment (NZ) Ltd, which acquired the ground floor units from Stubbs Investments Ltd in 2008, has never accepted that it is liable to contribute anything beyond the ground floor and the common areas. However, on the question of whether the Body Corporate has historically acted on the assumption

that it was liable for repairing and maintaining the roof and exterior walls, I find that it has.

[96] In response to the question of whether it is fair to hold unit owners to the scheme they had bought into, Ms Grant submitted that fairness was not a consideration in determining the terms of a s 48 scheme. She relied on the decision in *St John's College Trust Board v Body Corporate 197230* which involved a mixed use complex comprising four separate buildings.³² The owners of units in the older part of the buildings were required to contribute to repair costs required to the newer parts. There was no doubt that it was the owners of the latter that would benefit the most but they comprised a minority of the unit holders. Dealing with the argument that this outcome was unfair on the majority of unit holders, Duffy J concluded that:

[52] Insofar as it may appear to be unfair that owners of units in one building must contribute to costs of common property located in another building, the answer is that this is a fundamental element of this strata title development. The likelihood of this occurrence has been present from the outset. Anyone who did not want to subscribe to this type of liability need not have acquired a unit in this complex ... It can also be said that the legal liabilities that are attendant on this strata title scheme have always been evident. As stated in *Tisch* at [64], "if the Act and the body corporate rules assign responsibility ... to owners, the relative benefits just spelt out must be assumed to have been taken into account". Anyone who failed to see them must have done so through a failure to understand the legal consequences of this scheme.

[97] I do not interpret the Judge's comments as meaning that fairness is not a consideration. *Tisch* makes it clear that fairness among the unit owners is the objective of a s 48 scheme. The Judge was simply saying that, in the circumstances of that case, it was not unfair to require the unit owners to abide by the terms of the scheme they bought into. That this is the correct approach is affirmed by the Court of Appeal's comments in *Berachan* that:³³

[42] ...all of the proprietors bought into the complex on the basis of the amended rules. Those rules set out the basis on which they might legitimately have expected that the complex would be operated. To have the body corporate come along years after the event (as in the present case) and claim that its own rules are ultra vires, to the significant disadvantage of some proprietors and the significant advantage of others, is somewhat unattractive ...

³² *St John's College Trust Board*, above n 23.

³³ *Berachan*, above n 15, at [42] and [51](b).

[51] ... As to fairness, all of the unit proprietors purchased their units on the basis of rules that are clear in their allocation of responsibilities as between the Body Corporate and the proprietors in respect of the roof and their units. Provided that it can be achieved in a way that is consistent with the Act, it is obviously desirable that their legitimate expectations be given effect.

[98] Of course, the difference is that the schemes in *Tisch*, *St John's College Trust Board* and *Berachan* were valid. In the usual course it would be fair to require unit owners to adhere to the valid scheme they bought into. But what should the position be in relation to a scheme premised on invalid body corporate rules? This question requires a closer look at the nature of the scheme for the Endeans Building.

[99] The scheme that Allrich Investments Ltd and Stubbs Investments Ltd set up was very unusual. The surveyor witness, Mr Murray, described the unit plan making the roof and exterior walls private property as "a most unusual allocation of unit boundaries and common property". The valuer witness, Mr Dean, said that he was not aware of any other multi-unit developments in which the roof and external faces of exterior walls are divided into private ownership of individual units rather than being designated common property.

[100] The reason for placing the roof and exterior wall in private ownership is accepted as being the desire of the ground floor unit owner (originally Stubbs Investments Ltd) not to contribute to costs for upper levels. This was understandable because, on a unit entitlement basis under the Act, the ground floor units held 40 per cent of the total unit entitlements, yet occupied a much smaller proportion of the overall space in the building. However, it is also plain that this was not the only concern: had the original Body Corporate members wished to ensure complete separation between the ground floor and the upper floor's units, they could simply have retained the default rules. If they had done that the Body Corporate would have had no responsibility for the roof and exterior walls and the obligation to repair and maintain those areas would have fallen entirely on the unit owners.

[101] It seems clear that the unit plan and the rules were framed to work together so as to limit the contribution required of ground floor unit owners to the maintenance of upper levels while at the same time ensuring that the structural integrity of the building would be attended to by having the Body Corporate take responsibility for

those areas. Even the owner of the ground floor units, who had no interest in contributing to costs not directly involving its units, would have appreciated that the building would require repair and routine maintenance and leaving that task to be undertaken piecemeal by more than 40 unit owners in respect of their various portions of the exterior walls and roof as and when they wished would be disastrous.

[102] Disagreement would be likely among unit holders as to whether and what kind of work would be required. This could result in necessary work not being done, leading to the deterioration of the building generally, including to areas of structural significance. Another obvious risk is that a disproportionate burden would fall on some unit holders not financially able to meet that cost. If that happened there would be no means by which the other unit owners could be assured that essential work would be done, again with the result that the building would deteriorate. It seems to me that it was always intended that the scheme for this building would, for the good of the unit holders as a whole, require the Body Corporate to take responsibility for those areas that were crucial to the structural integrity of the building.

[103] I return, then, to the approach to be taken where the scheme is based on invalid body corporate rules. Mr Muir approached the problem on the basis of which of the innocent parties should bear the burden of the invalid Body Corporate rules. He submitted that all of the parties concerned took legal advice when they purchased their properties and must be taken to have assumed the risk of errors in that advice insofar as it related to the validity of the rules.

[104] As a general proposition, it is correct that a party to a contract bears the risk of the legal advice received about it being incorrect or inadequate.³⁴ However, I do not consider that this is the proper approach in the context of s 48. The question is a broader one, identified in *Tisch* as being the best interests of unit holders as a whole.³⁵ Indeed, the Court in *Tisch* actually recognised that a s 48 scheme might legitimately be adopted to avoid problems of ultra vires rules:³⁶

³⁴ *Keen v Holland* [1984] 1 All ER 75 (CA) at 82.

³⁵ See paragraph [80] above.

³⁶ *Tisch*, above n 16, at [34].

[34] That uncertainty [the risk of amendments being ultra vires] is one of the factors that makes it attractive to apply to the Court to settle a scheme under s 48. Other factors are that such a scheme does not require unanimity. It can enable the body corporate to force owners to vacate their units while the remedial work is carried out. Perhaps most importantly, because a s 48 scheme is settled by the Court under the Act, it avoids potential ultra vires issues by enabling the body corporate to repair both common and unit property, and to do so to the same standard and at the same time.

[105] I consider that whether or not a scheme is valid in terms of its rules does not detract from the legitimate expectations of the unit holders who bought into the development intending to be bound by those rules. A scheme settled under s 48 should, as much as possible, reflect the scheme that the parties agreed to, provided that doing so is in the best interests of the unit holders as a group. In this case I consider that it is fair and in the interests of the unit holders as a group that the scheme that is settled reflects the nature of the scheme originally adopted.

[106] The completion of all the necessary work in a timely and effective manner is essential for several reasons, including the structural integrity of the building and the safety of pedestrians. However, if the Body Corporate is not authorised to undertake that work with the cost being spread across all the owners it is very unlikely that this will happen. These unit owners are not able to work together because their interests are too divergent. There is no assurance that agreement will be reached as to how the cost of work to the exterior walls will be apportioned. Nor is there any assurance that the various unit owners will be in a position to fund the work to the roof within a reasonable time.

[107] I am satisfied that the main aspects of the scheme that the level 6 unit holders propose does fairly reflect the original scheme and is in the best interests of the unit holders as a group.

Terms of the scheme

[108] Having accepted, in principle, that a scheme of the kind proposed by the level 6 unit owners should be settled under s 48, I intend at this stage to identify the main aspects of the scheme as it should ultimately be framed and invite the parties to make further submissions regarding the details of it. In general terms I consider that:

- The Body Corporate should be responsible for identifying and undertaking the work required by the Notice to Fix, completing the investigation of the cracking to the exterior walls and the repairs to them. These tasks should be delegated to a Scheme Committee. The make-up of that committee should fairly represent the various groups of unit owners.
- There should be a single manager engaged by the Body Corporate Scheme Committee who will be responsible for scoping, planning, tendering and project managing all of the work that is required to be done to this building. Given Peddle Thorpe's involvement to date, they may be an appropriate manager.
- To the extent that access is required to private areas to complete any of the work, the owners of those areas must consent to reasonable access being given. This agreement does not extend to ongoing access beyond the terms of the scheme; if there is to be continuing use of private areas for future services that access will need to be negotiated directly with the relevant owners. This may particularly affect any ongoing need for abseiling points to be located on the roof areas and services such as air-conditioning units and TV satellite dishes.
- The cost of the work required by the Notice to Fix and to investigate and repair the exterior walls should be apportioned among all the unit owners on the basis proposed by the level 6 unit owners – that is, on the basis of the size of each unit, rather than by unit entitlement. This would see the ground floor unit owners meeting between 1.18% - 2.77% of the repair costs, units on levels 1-5 paying between 1.57% - 3.6% of the costs and the top floor unit owners paying 4.41%, 7.57% and 8.36% for the respective units.
- Other work, particularly work that involves any addition above the waterproof membrane to the roof (such as paving), is to be borne by the owner of the relevant unit.

[109] I do not consider that the scheme can include the deposit of a new unit plan. Under s 48(1)(b) a scheme may include provisions for “the transfer of units to the proprietors so as to form part of the common property”. In order to give effect to such a provision s 48(5) permits the Court to make such orders as it considers “expedient or necessary”, including directing the deposit of a new unit plan. Although a new unit plan bringing the roof and exterior walls into the common property would achieve the purpose of the original scheme, s 48(1)(b) only permits “the transfer of units”. What the level 6 unit owners are proposing is not the transfer of units but the subdivision of units which is outside of the power conferred by s 48. If the Court did have the power to subdivide, I would be inclined to exercise it. It is highly unsatisfactory that unit proprietors will in future be individually responsible for areas of great structural significance. Nevertheless, I do not have the power to remedy that state of affairs.

Conclusion

[110] I have concluded that rules 2.2(c), 2.1(a)(iv) and 2.2(g) are ultra vires and make declarations to that effect. Rule 2.1(e) is, however, valid. The result is that neither the Body Corporate nor any unit owner has the obligation to repair and maintain the exterior walls and roof of the Endeans Building. This is plainly unsatisfactory, particularly because of the nature of the work that is required to be done and is one reason that I consider a scheme under s 48 to be appropriate.

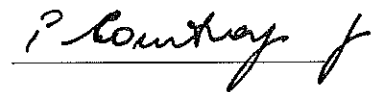
[111] Orders under s 37(12) are not the appropriate course because there is no basis on which to make orders requiring work to be done to the façade and it is clear that the work to the façade and work required by the Notice to Fix should be undertaken together. The applications for such orders are therefore refused.

[112] I am satisfied that the building is damaged for the purposes of s 48 and that a scheme is appropriate. I make an order that a scheme be settled under s 48. The terms of the scheme will be determined within the parameters I have set out at [109] which are intended, as much as possible, to reflect the scheme implemented by the original Body Corporate rules. The Body Corporate will be responsible for repairs and maintenance to the exterior walls, windows and roof. Notwithstanding the invalidity of the relevant rules it is fair and in the interests of the unit owners as a

whole that the terms of any scheme involve the work being undertaken by the Body Corporate with all members of the Body Corporate contributing to the cost. The apportionment of the cost should, however, be made in the way suggested by the level 6 respondents rather than on the basis of unit entitlement. I will make final orders once I have received counsels' memoranda.

[113] I direct the parties, either jointly or separately, to file memoranda by 16 July 2012 setting out detailed terms of a scheme that would conform to the parameters I have identified. If necessary I am prepared to hear counsel further on this aspect.

[114] I was not addressed on the issue of costs. Counsel may file memoranda as to costs by 9 July 2012 and memoranda in reply by 16 July 2012.

A handwritten signature in black ink, appearing to read "P Courtney J", written over a horizontal line.

P Courtney J