

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

**CIV-2011-404-002361
[2012] NZHC 2808**

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 Respondents
AND	MARK DANIEL WATSON Third Respondent

Hearing: On the papers

Judgment: 25 October 2012

JUDGMENT (2) OF COURTNEY J

This judgment was delivered by Justice Courtney
on 25 October 2012 at 2:30 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

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AND ANDREW MILLWARD PAYNE AND
JULIE MARGARET PAYNE
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 Respondents
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 PHILIP SMELLIE AND LYND SAY 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

[1] In my decision 29 June 2012 I made an order that a scheme be settled under s 48 of the Unit Titles Act 1972 for work to be undertaken on the Endeans Building.¹ Since delivery of that decision I have held several conferences with counsel to discuss the terms of the scheme. All parties are now agreed on the terms and I am satisfied with those terms.

[2] I therefore make an order that the terms of the s 48 scheme will be those attached to this judgment. I reserve leave to any party to apply to the Court to vary the terms of the scheme, acknowledging the possibility of unforeseen developments in the work or among the parties that may necessitate changes to the terms of the scheme.

P Courtney J

¹ *Body Corporate 95035 v Chang* [2012] NZHC 1512.

**Scheme under s 48 of the Unit Titles Act 1972 in relation to
Body Corporate 95035 of 2 Queen Street, Auckland**

Preamble

- A. This scheme governs remedial work to the Endeans Building at 2 Queen Street, Auckland (the "**Building**"), which is situated on land owned by Body Corporate 95035 (the "**Body Corporate**"). The Building is part of a unit title development created under the Unit Titles Act 1972 and now governed by the Unit Titles Act 2010 (the "Act").
- B. The Building consists of 37 principal Units on seven levels and their respective accessory units. The seven principal units on the ground floor are used for commercial purposes. The 30 principal units on floors one to six are used largely for residential purposes. The central atrium that provides access to the units on levels 1 to 6 is comprised in an accessory unit that is owned in equal/30th shares by the owners of those units.
- C. This scheme binds the Body Corporate, any person or persons for the time being registered as proprietor of the stratum estate in a unit (an "owner" or "owners"), any transferee or assignee of an owner, any person in actual occupation of a unit at the date of this scheme and at any time prior to the completion of works, and any other person who is bound by the scheme pursuant to the Act.
- D. The scheme governs building work required to comply with the Notice to Fix that Auckland City Council issued to the Body Corporate on 23 February 2009 (the "Notice to Fix") and any other work constituting Repairs for the purposes of the scheme.
- E. The scheme apportions responsibility for the costs incurred in carrying out the Repairs and obtaining code compliance certification in respect of the work required to comply with the Notice to Fix and all other work carried out pursuant to the scheme.

This scheme orders:

1. Repairs

1.1 For the purposes of this scheme, "**Repairs**" means all work:

- (a) required to investigate and carry out the building work required to comply with the Notice to Fix and to obtain (or retain) code compliance certification in respect of all such work carried out under the building consents referred to in the Notice to Fix;

- (b) required to investigate and rectify damage to the external facade of the Building (such work not being otherwise required to comply with the Notice to Fix or to erect a new verandah) and to obtain (or retain) code compliance certification in respect of all such work;
 - (c) necessary or expedient to maintain a consistent standard of building work and finishing commensurate with the nature, character, and status of the Building;
 - (d) undertaken to investigate, assess or determine the extent of the works described in clauses 1.1(a) to 1.1(c) or to prepare for those works, including obtaining plans, drawings, specifications, reports, or consents required under any statute, regulation or other binding instrument.
- 1.2 The costs of any building work required to the interior of a unit in order to comply with the Notice to Fix shall be paid by the owner(s) of the relevant unit unless such work is required as a result of damage necessarily caused to the interior of a unit by any work to the exterior of the Building.
- 1.3 The costs of, or associated with, any finishing or other work directly over the parts of the physical roof created by the waterproof membrane of the external floor areas of units 6C, 6D and 6E and accessory units 8, 9 and 10 (such as paving) which are able to be apportioned (including project management, insurance and other costs) are the sole responsibility of the relevant unit owners. The costs shall be paid in full not less than 30 days before the work is undertaken. The areas covered by this clause are shown on the attached plan.
- 1.4 The owners of units 6C, 6D and 6E (and the associated accessory units) may determine the nature and extent of any work referred to in clause 1.3. They may require such work to be carried out as part of the same construction project as the Repairs, provided that they work with the contractors engaged by the Body Corporate under this scheme so that the work does not impede the progress or integrity of the Repairs.
- 2. **Costs**
- 2.1 **"Costs"** means the costs of:
 - (a) carrying out the Repairs; and
 - (b) any cost to the Body Corporate that is reasonably incidental to carrying out the Repairs, including the costs of operating this scheme and obtaining independent legal or other expert advice in relation to the operation of the scheme.

3. **Appointment**

- 3.1 The Body Corporate is hereby appointed the agent of each owner for the purposes of carrying out this scheme and shall have the authority of each owner to authorise, undertake, covenant and agree on behalf of each owner all matters concerning and incidental to the Repairs.
- 3.2 There shall be constituted as a committee of the Body Corporate a "**Scheme Committee**" to implement this scheme and in whom the authority granted under clause 3.1 shall vest.
- 3.3 The Scheme Committee shall comprise:
- (a) one voting member as representative of the owners of the ground floor units;
 - (b) one voting member as representative of the owners of the units at levels 1 to 5 and the owner of unit 6F;
 - (c) one voting member as representative of the owners of units 6C, 6D and 6E; and
 - (d) the Project Manager, who shall be a non-voting member.
- 3.4 The Body Corporate shall appoint to the Scheme Committee the representatives chosen by the three groups of owners referred to in clauses 3.3(a)-(c) by 28 August 2012. Scheme Committee members may nominate an alternate to attend a meeting of the Committee if they are not available. Those persons who have previously agreed not to be members of the Scheme Committee shall not be alternates.
- 3.5 The Scheme Committee shall meet by 31 August 2012 for the purpose of identifying and appointing a suitable project manager. The project manager shall, if available, be appointed by 14 September 2012.

4. **Body Corporate duties**

- 4.1 The Body Corporate, through the Scheme Committee, must:
- (a) appoint a project manager;
 - (b) identify the nature and extent of the Repairs by immediately taking all steps to instruct suitably-qualified professionals to prepare a scope of works and an estimate of the costs of carrying out the work;
 - (c) immediately take all steps necessary to minimise the danger posed to the public by damage to the external facade:

- (d) carry out all of the Repairs as expeditiously, cost-efficiently and efficiently as reasonably possible whilst taking reasonable steps to minimise disruption to owners or occupiers;
- (e) obtain regular reports from a suitably-qualified professional that the Repairs are being carried out in a proper and workmanlike manner;
- (f) levy the owners for the Costs in accordance with the provisions of this scheme;
- (g) account to the owners for all money received and expended under this scheme in accordance with clause 12;
- (h) report to the owners in accordance with clause 13;
- (i) ensure that the contractors maintain a photographic record of the building work undertaken pursuant to this scheme, before during, and on completion of the work; and
- (j) obtain appropriate guarantees and warranties for building work undertaken under this scheme.

5. **Body Corporate powers**

5.1 The Body Corporate, through the Scheme Committee, shall have the power to:

- (a) determine the nature and extent of Repairs that are required by this scheme;
- (b) engage, instruct, employ and authorise suitably qualified advisors, managers, agents or assistants as it thinks fit for the purpose of implementing this scheme;
- (c) levy the owners for the Costs in accordance with clauses 7 and 8;
- (d) be entitled to sue in respect of any work that is carried out negligently or is otherwise defective; and
- (e) take any action reasonably necessary to enable it fully and properly to perform its duties and exercise its powers under this scheme.

5.2 Except as expressly provided for under or as varied by this scheme, the Body Corporate and the Scheme Committee shall have all of the powers granted to the Body Corporate under the Act and the Body Corporate Rules.

6. Owners' and occupiers' obligations

6.1 Each owner and occupier shall:

- (a) facilitate access to his or her unit as reasonably required by the Body Corporate or its agent to carrying out the Repairs or for any purpose reasonably incidental to the Repairs; and
- (b) comply with any reasonable request from any person authorised by the Body Corporate to carry out Repairs to remove contents, pets or other items of personal property to allow that person to carry out Repairs in a timely and efficient manner; and
- (c) allow abseiling and attachment points to be placed on the outside wall of their respective units to the extent and for so long as they are required to effect the Repairs and the painting and cleaning of the exterior of the Building upon completion of the Repairs (the abseiling and attachment being subject to removal at the request of the relevant unit owner and any damage they cause to the unit repaired once they are no longer required for the purposes of this clause).

6.2 Each owner and occupier is responsible for protecting his or her contents, pets or other items of personal property from damage that may occur as a result of the Repairs being carried out, other than damage arising as a result of any reckless or negligent act of any person engaged by the Body Corporate to carry out the Repairs.

7. Costs allocation

7.1 Save as expressly provided otherwise in this scheme, the Body Corporate shall recover the Costs of this scheme from the owners for the time being in the shares set forth in the schedule to this scheme.

7.2 No natural person registered as an owner of a unit on 29 June 2012, nor their successors, shall cease to be such while they remain contingently liable to pay levies in excess of those fixed under this Scheme should the appeals lodged against the Scheme on 26 July 2012 be determined adversely to them.

8. Levies

8.1 The Body Corporate, through the Scheme Committee, shall levy the funds necessary to meet the Costs in accordance with clause 7.

8.2 The Scheme Committee shall, at its first meeting, raise a levy of \$100,000, payable within 21 days, to facilitate the engagement of the

project manager and to meet other initial costs of implementing the scheme.

- 8.3 A second levy shall be raised to cover the estimated costs of completing a scope of works, obtaining an estimate of the costs of carrying out the Repairs, obtaining a building consent and completing a tender process for the building work. This levy shall be payable within 21 days from the date on which an invoice for the levy is issued
- 8.4 The Scheme Committee shall notify owners as soon as reasonably practicable of the estimated costs of completing the Repairs and provide an indication of the levies for which each owner is expected to be liable.
- 8.5 Additional levies shall cover progress payments as required for carrying out the balance of the work required to complete the Repairs as determined by the Scheme Committee. Such levies shall be payable within 30 days from the date on which an invoice for the levy is issued. The levies shall be raised in time for payment to be received by the Body Corporate 30 days prior to the date that a payment for the work will become due in accordance with the progress payments for the head contract.
- 8.6 Without limiting the generality of the above, the Body Corporate may:
 - (a) demand payment of levies from each owner in such amounts and at such times as the Scheme Committee deems necessary to implement the scheme;
 - (b) treat any refusal to pay a levy as a breach of a court order and
 - (i) take all steps that the Scheme Committee deems necessary to recover a levy from any owner who fails to pay that levy, including by seeking enforcement orders; and
 - (ii) seek further directions from the Court.
- 8.7 The Scheme Committee shall arrange for monies levied under this scheme to be deposited into a separate interest-bearing bank account pending disbursement in accordance with the terms of this scheme.
- 8.8 No owner shall withhold payment of a levy under this scheme on the basis that the levy is disputed. Any refund or adjustment of levies made as a result of any dispute over a levy shall be made after the dispute has been determined.

9. Payment refund and cost recovery

- 9.1 If any owner fails to pay a levy in the amount and at the time required by the Body Corporate or the Scheme Committee, the owner shall be liable for all costs, expenses and disbursements (including legal fees on a solicitor/client basis) incurred in connection with such non-payment together with interest (not exceeding 10%) on the unpaid amount.
- 9.2 If the Body Corporate holds a surplus after completing the Repairs and obtaining code compliance certification in respect of all Repairs, the surplus shall be refunded to the owners who paid their levies in accordance with the basis on which they were levied.
- 9.3 An owner shall have no right to demand the return of any funds credited to that owner's account until such time as all Repairs have received code compliance certification.

10. Painting

- 10.1 The exterior of the Building shall be painted following the completion of the Repairs, but the cost of this work shall be borne by the owners in proportion to the external area of their unit that is to be painted.
- 10.2 The Body Corporate shall have power to levy the owners for the painting in these proportions and to have the same powers in relation to commissioning the painting, managing it and raising levies for it as it has for the Repairs under this scheme.

11. Use of funds

- 11.1 Funds received pursuant to this scheme shall be used only to meet the Costs and not for any other purpose except with the unanimous written consent of all owners

12. Accounting

- 12.1 The Body Corporate shall keep levies paid under this scheme in a separate named account identifiable to the owner until such time as the funds are paid out in accordance with this scheme.
- 12.2 The Body Corporate shall keep a permanent and up-to-date record of payments received and made in accordance with this scheme.

13. Reporting

- 13.1 The Scheme Committee shall keep each owner informed of details and progress of the Repairs and shall in any event report to the owners through the Body Corporate Secretary not less often than every two months.
- 13.2 The reports required under this clause shall include, as appropriate:

- (a) a report on the overall progress of the Repairs from the Project Manager;
- (b) a statement of financial position from the Body Corporate Secretary that summarises the money received and paid out pursuant to the scheme and any arrears in the payment of levies; and
- (c) a final report to the owners, after code compliance certification has been obtained, summarising the nature of the Repairs carried out, the Costs and the apportionment of those Costs among the owners.

14. Insurance

14.1 The Body Corporate will ensure that:

- (a) its interest as agent for the Owners is noted on the contractor's all risks insurance policy;
- (b) its insurers are properly advised of this scheme; and
- (c) its insurance premiums are paid.

14.2 The premium for any insurance policy taken out by or on behalf of the Body Corporate in respect of this scheme shall be paid by the owners in the proportions set forth in the schedule and treated as Costs for the purposes of this scheme.

15. Transfer of property

15.1 If the owner of a unit sells or transfers an interest in a unit before the Repairs have been completed and code compliance certification obtained, the selling or transferring owner shall remain bound by the terms of this scheme and shall remain liable to pay all levies raised by the Body Corporate pursuant to this scheme until the date on which that owner ceases to be an owner of the unit.

15.2 Any person who becomes an owner or occupier of a unit in the Building on or after the date on which it is settled shall be bound by the terms of this scheme and obliged to pay all levies raised by the Body Corporate pursuant to this scheme from that date.

16. Authority

16.1 No third person dealing with the Body Corporate in relation to this scheme will be obliged to verify the Body Corporate's authority under this scheme.

17. Indemnity

- 17.1 The owners jointly and severally indemnify and hold harmless the members of the Body Corporate, including the members of the Scheme Committee, against all costs, expenses, claims and proceedings and any other cost, expense or liability of any sort incurred by them in the exercise or attempted exercise of the powers granted to the Body Corporate and Scheme Committee, save in respect of wilful default or misconduct.
- 17.2 The members of the Body Corporate and the Scheme Committee shall not be liable to any owner or other party for the standard or extent of the Repairs or for any action they take, or any action they do not take, in any way relating to the Repairs or this scheme, save as expressly provided for in this scheme.

18. Costs incurred prior to the settlement of this scheme

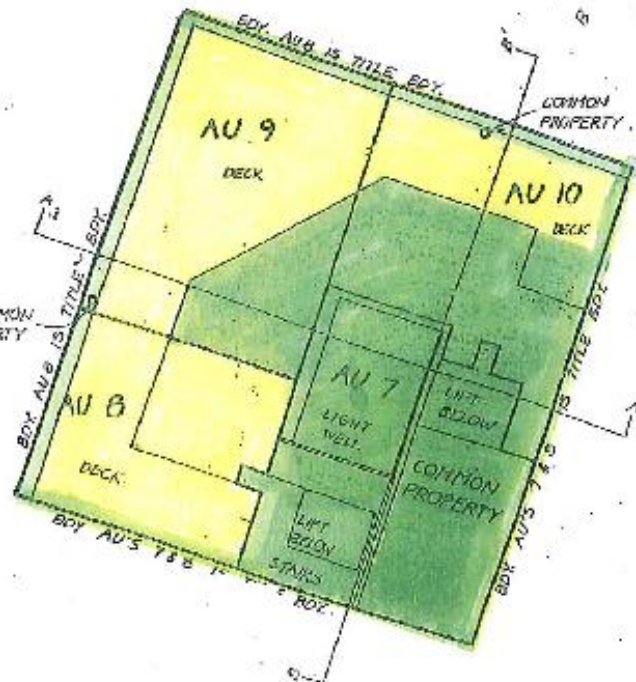
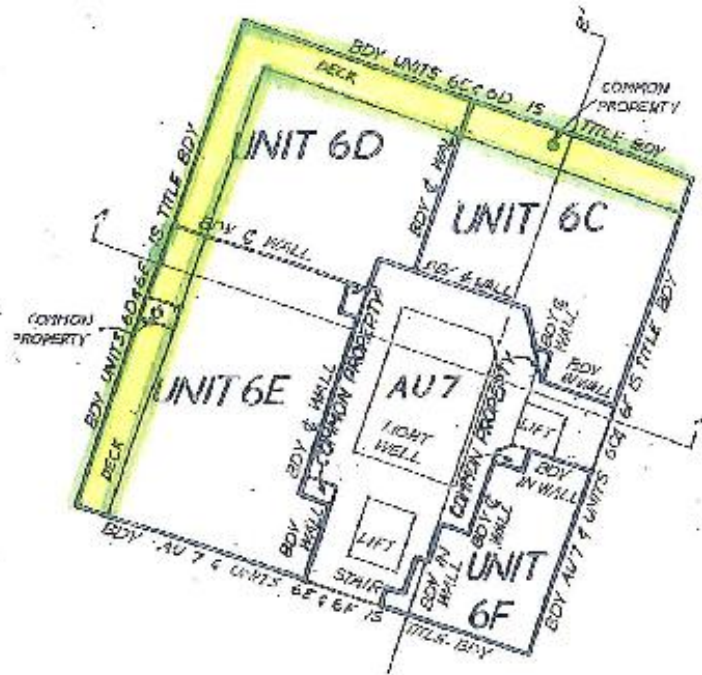
- 18.1 The costs incurred by the Body Corporate in obtaining services from Peddle Thorp Architects and in obtaining an estimate from White Associates of the total costs of the work described in the scope of works prepared by Peddle Thorp Architects following the issuance of the Notice to Fix shall be treated as Costs in this scheme.
- 18.2 The costs incurred by the owners of units 6C, 6D and 6E in obtaining services from Peddle Thorp Architects and Celtic Solutions Limited in examining and reporting on the condition of the external facade of the Building shall be treated as Costs in this scheme.
- 18.3 The re-apportionment among the owners of the costs described in clauses 18.1 and 18.2 shall be taken into account in the first levy issued under this scheme.

19. Leave to Apply

- 19.1 Any owner or the Body Corporate has leave to apply to the Court for directions if required in relation to the Scheme.

Schedule of Costs payable by the owners of each unit

C	1.75%
o	2.77%
E	2.25%
F	1.31%
G	1.38%
H	1.18%
I	1.20%
1C	2.35%
10	2.48%
1E	2.30%
1F	3.32%
1G	1.57%
1H	1.33%
2C	3.52%
20	3.60%
2E	2.30%
2F	2.22%
2G	1.57%
3C	3.52%
3D	3.60%
3E	2.30%
3F	2.22%
3G	1.57%
4C	3.52%
40	3.60%
4E	2.30%
4F	2.22%
4G	1.57%
5C	3.52%
50	3.60%
5E	2.30%
5F	2.22%
5G	1.57%
6C	7.57%
6D	8.36%
6E	4.41%
6F	1.64%



- = Work paid for in accordance with clause 7 of scheme
- = Area referred to in clauses 1.3 and 1.4