

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA456/2012  
[2012] NZCA 620**

BETWEEN	HARRY ROY LAW AND SUK CHING LIAUW AND OTHERS Appellants
AND	TAN CORPORATE TRUSTEE LIMITED AND OTHERS Respondents

**CA458/2012**

BETWEEN	CBD INVESTMENTS LIMITED Appellant
AND	TAN CORPORATE TRUSTEE LIMITED AND OTHERS Respondents

Hearing: 30 October 2012

Court: Arnold, Randerson and Wild JJ

Counsel: G A Muir for Appellants in CA456/2012  
S A Grant for Appellant in CA458/2012  
No appearance for First Respondent  
M C Harris for Second Respondents in CA456/2012 and CA458/2012

Judgment: 21 December 2012 at 11am

---

**JUDGMENT OF THE COURT**

---

- A The appeals are dismissed.**
- B The appellants in CA456/2012 must each pay, jointly and severally, costs to the second respondents as for a standard appeal on a Band A basis with usual disbursements.**

**C The appellant in CA458/2012 must pay costs to the second respondents as for a standard appeal on a Band A basis with usual disbursements.**

---

## **REASONS OF THE COURT**

(Given by Randerson J)

### **Table of Contents**

	Para No
<b>Introduction</b>	[1]
<b>The construction of the building</b>	[10]
<b>The Council notice</b>	[11]
<b>The additional repairs required to the exterior of the building</b>	[13]
<b>The validity of the BC rules</b>	
<i>The genesis of the rules</i>	[14]
<i>The statutory scheme</i>	[15]
<i>The relevant BC rules</i>	[20]
<b>Is r 2.1(e) ultra vires the 1972 Act?</b>	[22]
<b>Does default r 1(e) in the Second Schedule of the 1972 Act apply and, if so, what is its scope?</b>	[29]
<b>Is BC r 2.2(g) valid?</b>	[31]
<b>Was the Judge correct to find that it was inappropriate to make orders under s 37(12) of the 1972 Act?</b>	[37]
<b>Did the Judge err in approving the scheme under s 48 of the 1972 Act and in settling its terms relating to the apportionment of repair costs amongst the unit owners?</b>	[47]
<i>Grounds of appeal on the terms of the s 48 scheme</i>	[68]
<i>Discussion on the terms of the s 48 scheme</i>	[73]
<b>Conclusion</b>	[85]

### **Introduction**

[1] The Endeans Building at the foot of Queen Street, Auckland has stood for over a century. It is a building of considerable charm and heritage value. But, like many buildings in the city, it has developed serious weathertightness issues. This led the Auckland City Council to issue a Notice to Fix. The cost of carrying out the repairs required by the Council notice is likely to be at least \$2 million. In addition, cracks and other damage to the exterior walls of the building have emerged. The cost of repairing the additional wall damage has yet to be assessed but is expected to be substantial.

[2] Unfortunately, the 37 unit owners in the building have been unable to reach agreement about how the cost of repairs should be apportioned between them. The Body Corporate (BC), established under the Unit Titles Act 1972 (the 1972 Act) in respect of the building, brought proceedings in the High Court seeking declaratory relief as to the validity of some of the BC rules as well as enforcement orders under s 37(12) of the 1972 Act. In the alternative, the court was asked to sanction a scheme under s 48 of the 1972 Act compelling owners to work co-operatively to comply with their obligations as determined by the court.

[3] The High Court proceedings were opposed by the second respondents who are the owners of three penthouse units on levels 6 and 7 of the building. The penthouse owners cross-applied seeking other declaratory relief and asking the court to settle an alternative scheme under s 48.

[4] Unusually, the exterior walls of the building are defined by the unit title plan to be the private property of the unit owners rather than common property vested in the BC. The BC rules also contain a number of unusual provisions, the validity of which was at issue in the High Court.

[5] The rules challenged in the High Court before Courtney J<sup>1</sup> and her findings on these were:

- Rule 2.1(e) (imposing an obligation on unit owners to repair and maintain the interior of their units) was found to be valid.
- Rule 2.2(c) (imposing an obligation on the BC to repair and maintain the exterior walls, windows and roof of the building) was found to be ultra vires.
- Rule 2.2(g) (limiting the liability of the ground floor unit owners from certain levies) was found to be ultra vires.

[6] Courtney J also found that it was not appropriate to make orders under s 37(12) of the 1972 Act. Instead, she approved the scheme proposed by the penthouse owners under s 48 for both the repair work required by the Council notice and the repair of the other damage to the exterior of the building. With some

---

<sup>1</sup> *Body Corporate 95035 v Chang & Ors* [2012] NZHC 1512.

exceptions we mention later, the broad effect of the scheme is to apportion all the costs of the work amongst all the unit owners in accordance with the floor area of their unit rather than by their unit entitlements established by s 6 of the 1972 Act.

[7] There is no challenge to the Judge's finding in relation to rule 2.2(c) but the appellants challenge all the other findings we have identified in the preceding paragraphs.

[8] The issues arising in these appeals are:

- (a) Whether BC rule 2.1(e) is ultra vires the 1972 Act.
- (b) Whether default rule 1(e) in the second schedule of the 1972 Act applies and, if so, what is its scope?
- (c) Whether BC rule 2.2(g) is valid.
- (d) Whether the Judge was correct to find that it was inappropriate to make orders under s 37(12) of the 1972 Act.
- (e) Whether the Judge erred in approving a scheme under s 48 of the 1972 Act and in settling its terms relating to the apportionment of repair costs amongst the unit owners.

[9] The appeal CA458/2012 is brought by the owners of the ground floor units (the GFU owners). These units are used for commercial purposes. The appeal CA456/2012 is brought by the owners of 15 of the 26 residential units on levels 1 to 5. Both appeals are opposed by the three penthouse owners on levels 6 and 7. The BC has not taken any steps in relation to the appeals.

### **The construction of the building**

[10] The Judge described the construction of the building in these terms:

[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.

### **The Council notice**

[11] The Council notice to effect repairs was issued in 2009 after an inspection in 2008. It emerged that no final code compliance certificate (CCC) had been issued for the building consents between 1993 and 1994 when the major redevelopment work occurred.

[12] The BC engaged a firm of architects to advise on the scope of works required by the Council notice. It is not in dispute that about two thirds of the cost of the work required to comply with the Council notice must be carried out on the three penthouse units on level 6 and on their auxiliary units on level 7. The remaining third involves work on AU7 (owned jointly by the 30 residential owners) and common property. The work mainly involves work to repair deficiencies in weathertightness in order to comply with the Building Code. This includes the removal and replacement of exterior cladding on levels 6 and 7; the redesign of the level 6 balcony; the removal of the existing floor substrate and membrane on the

rooftop terrace and replacing these with a new waterproofing membrane; new gutters and flashings and related work; new apron flashings and overflow outlets from the main roof; the repair of the butynol membrane on the main roof; and a new waterproof membrane and related works in the rooftop service area. In addition, fire protection work is required and the handrail on the rooftop terraces needs repair.

### **The additional repairs required to the exterior of the building**

[13] In 2010 and 2011, reports were obtained from separate firms of architects and structural engineers after concerns were raised about cracking to the external facade of the building. Inspections showed numerous cracks on the northern, eastern and western facades of the building. These were randomly distributed across the whole building although mainly on the northern and western facades. The cracks are of varying severity but some require urgent attention. Some of the cracking is sufficiently severe to allow water to penetrate the plaster through to the underlying concrete. Eventually, the water would begin to corrode the structural steel frame of the building if repairs are not carried out. The expert evidence was that large pieces of concrete would eventually be dislodged and fall to the ground with obvious implications for the safety of pedestrians as well as the integrity of the building.

### **The validity of the BC rules**

#### *The genesis of the rules*

[14] The BC was established in 1982 when leasehold strata titles were created. The BC operated under the default rules in the second and third schedules of the 1972 Act until 1994. At that time Mr Arthur Morgenstern, a property developer, acquired the freehold interest in the building through his company, Allrich Investments Ltd. The then lessee of the first floor, Mr John Stubbs, agreed to purchase the ground floor commercial units once freehold unit titles were issued. He did this through his company Stubbs Investments Ltd. Mr Stubbs wished to limit costs to those directly relating to the commercial units. He and Mr Morgenstern agreed that the unit title plan be prepared with as little common property as possible.

When the unit plan was deposited, Allrich Investments Ltd and Stubbs Investments Ltd were its sole members. They unanimously agreed to repeal the default rules and adopt new BC rules.

*The statutory scheme*

[15] As the Judge noted, as a general rule, unit owners in a unit title development are responsible for maintaining and repairing private property while the corresponding obligation in respect of common property falls upon the BC. Relevantly to the present case, the BC has the following obligations under s 15(1) of the 1972 Act:

- s 15(1)(f) - to keep the common property in a state of good repair.
- s 15(1)(g) - to comply with any notice or order served upon it by the Local Authority requiring repairs to or work to be performed on the land or building.
- s 15(1)(h) - subject to this Act, to control, manage and administer the common property and to do all things reasonably necessary for the enforcement of the rules.

[16] Under s 16 of the 1972 Act, the BC shall have all such powers as are reasonably necessary to enable it to carry out the duties imposed on it by the Act and by its rules.

[17] Section 37 provides that the rules applicable to a BC are those set out in Schedules 2 and 3. Only those in Schedule 2 are relevant in the present case. The default rules may be amended or repealed by unanimous resolution of the proprietors.<sup>2</sup> Subsections 37(5) and (6) impose constraints upon the ability of the BC to amend or add to the rules:

- (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

---

<sup>2</sup> Unit Titles Act 1972, s 37(3).

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.

[18] It is not in dispute that the proviso to s 37(5) means that no power or duty may be conferred or imposed upon the BC by an amended rule unless the amendment could fairly be said to be incidental to the performance of the duties or powers imposed on the BC by the 1972 Act. A rule that appreciably expands the existing powers and duties could not fairly be said to be merely “incidental” to those existing powers and duties.<sup>3</sup> And in the recent decision of this Court in *Berachan Investments Ltd v Body Corporate 164205*<sup>4</sup> it was held that the assessment of what is “incidental” for the purposes of s 37(5) should take account of the physical and other characteristics of the particular development. This may involve, as it did in *Berachan*, the BC assuming responsibility in relation to the repair and maintenance of items of private property belonging to the unit holders. As the Court put it:<sup>5</sup>

To summarise, then, while we accept that the duties of a body corporate in this context relate principally to the maintenance and repair of common property, we consider that a body corporate is entitled to assume responsibility in relation to the repair and maintenance of 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.

[19] The power of the BC to levy unit owners for contributions is conferred by s 15(2)(c) which empowers the BC to levy contributions in proportion to the unit entitlement of each unit as established by valuation under s 6. Any such levies are recoverable by the BC as a debt due.<sup>6</sup> In certain circumstances, the recovery of levies in accordance with the unit entitlement may be varied under s 33 or by court approval of a scheme under s 48 (as in this case).

---

<sup>3</sup> *Velich v Body Corporate 164980* (2005) 5 NZ Conv C 194, 138 (CA).

<sup>4</sup> *Berachan Investments Ltd v Body Corporate 164205* [2012] NZCA 256, [2012] 3 NZLR 72.

<sup>5</sup> At [46].

<sup>6</sup> Unit Titles Act 1972, s 32.



*The relevant BC rules*

[20] So far as they are relevant, the rules of the BC relating to the duties of the unit owners (proprietors) in the present case are:

**Duties of proprietor**

2.1 A Proprietor shall in relation to any Unit of which that Proprietor is the registered proprietor:

(a) permit the Body Corporate (or its agents or employees) at all reasonable hours, and at any time in the case of an emergency, to enter the Unit for any of the following purposes:

(i) viewing the condition of the Unit;

(ii) installing, maintaining, repairing, or renewing any pipes, conduits, wires, cables, services, ducts, or plant in, upon, or passing through the Unit and capable of being used in connection with the enjoyment of any other Unit or Common Property;

(iii) maintaining, repairing, cleaning, repainting, redecorating or renewing any Common Property;

(iv) maintaining, repairing, cleaning, repainting, redecorating or renewing the exterior of the Building;

...

(b) comply in all respects with all legal requirements for the time being in force in the area in which the Unit is situated in so far as they relate to the use, occupation, or enjoyment of the Unit;

(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 the Unit to the satisfaction of that local authority or public body;**

(d) duly and punctually pay all rates, taxes, charges, and other outgoings from time to time payable in respect of the Unit to any local authority or public body and all sums properly levied in respect of the Unit by the Body Corporate;

(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;**

...

(Emphasis added.)

[21] The relevant powers and duties of the BC are:

### **Powers and duties of Body Corporate**

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;**
- ...
- (g) **when levying any Proprietor of any of the Ground Floor Units pursuant to Section 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; and**

- (ii) **any secretarial charges of the Body Corporate, where such charges exceed 20% 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.**

2.3 The Body Corporate may:

...

- (h) levy, and require payment from a defaulting Proprietor, without the necessity of making an application pursuant to section 33 of the Act or apportioning the liability to the Proprietors as a whole, and any fees, costs or expenditure incurred in the recovery of a contribution or other lawful payment shall be recoverable from such defaulting Proprietor (including legal fees which shall be recoverable from a defaulting Proprietor on a solicitor/client basis);

...

For the purposes of Rule 2.3(h) “a defaulting Proprietor” means a Proprietor whose Unit substantially benefits from any repair, work or act carried out by the Body Corporate pursuant to the Act, or by or under any other act, or pursuant to these Rules where that Proprietor does not pay the share of expenditure allocated to the Proprietor by the Body Corporate, and also includes a Proprietor whose negligent act or omission, or breach of Rule by that Proprietor, or that Proprietor’s tenant, lessee, licensee or invitee, necessitates any repair work or act to be carried out by the Body Corporate.

(Emphasis added.)

### **Is r 2.1(e) ultra vires the 1972 Act?**

[22] Ms Grant’s submission on behalf of the GFU owners is that the Judge erred in finding that r 2.1(e) was valid. In essence, her submission was that r 2.1(e) and r 2.2(c) were intended to operate in tandem. She submitted that if, as the Judge found, r 2.2(c) was invalid, then the same conclusion ought to have been reached in relation to the validity of r 2.1(e). To put it another way, since the BC was found not to have any obligation to repair and maintain the exterior wall of the building, the obligation of the unit owners under r 2.1(e) could not be confined to repairing and maintaining the interior of their units. If it were otherwise, neither the BC nor the unit owners would have any obligation to maintain the exterior of the building.

[23] In order to resolve this issue, it is necessary to set out the Judge's reasons for upholding the validity of r 2.1(e), despite finding that r 2.2(c) was invalid. The Judge noted that it was not seriously contested that the effect of r 2.2(c) was to impose on the BC a duty to repair and maintain the roof and the exterior walls of the building, despite the fact that those areas were almost entirely private property. The Judge recorded that all parties agreed that if r 2.2(c) had the effect she described, it would illegitimately expand the BC's obligations in relation to common property. That was because counsel agreed that the obligation imposed by r 2.2(c) was not incidental to the performance of the duties imposed on the BC by the 1972 Act.

[24] The Judge distinguished the decision of this Court in *Berachan* on the facts. While there were some features in common with *Berachan* (certain building services were located on private areas of the roof and cleaning of the exterior walls required safe abseiling points to be established on private parts of the roof), there were also significant differences. The Judge estimated that only about 10% of the roof area was common property which she regarded as minimal. Secondly, since the exterior walls of the building were the private property of the unit owners, it was not feasible to argue that access to the exterior walls was needed for the purpose of maintaining and repairing common property. In these circumstances, the Judge found r 2.2(c) could not fairly be viewed as incidental to the powers and duties conferred on the BC by the 1972 Act. The invalidity of r 2.2(c) necessarily meant that r 2.1(a)(iv) was also invalid since it assumed and depended upon the power conferred by r 2.2(c). As already noted, there is no challenge to the Judge's findings in relation to r 2.2(c). Nor was any issue raised about her finding on r 2.1(a)(iv).

[25] As to the validity of r 2.1(e), the Judge noted that r 2.1(e) relieved the unit holder of the obligation under default r 1(e) to "repair and maintain his unit" and instead limited the unit owner's obligation to the repair and maintenance of the interior of the unit only. Despite this, the Judge was not persuaded that r 2.1(e) was invalid. She considered that if r 2.1(e) were declared to be invalid, the original scheme under which all unit owners purchased, would be fundamentally changed. Although the result was that neither of the BC or the unit owners had any obligation to repair or maintain the exterior walls and roof (save for work required to be done by a local authority or other public body), the Judge considered the immediate

problems could be overcome through a scheme under s 48 of the 1972 Act. For the future, the Judge saw the position being rectified by the Unit Titles Act 2010 which came into effect on 1 October 2012. Under the new Act, unit holders have an obligation to repair and maintain their units under s 80 rather than under the default rules and the BC has obligations to repair and maintain the common property and all building elements and infrastructure under s 138.

[26] As the Judge noted, this Court suggested (*obiter*) in *Berachan*<sup>7</sup> that if the BC's obligation to repair the roof of the building in that case were declared to be invalid, then a rule limiting the unit owner's obligations to repair the interior of their units would have to be declared ultra vires also. Otherwise, no party would be responsible under the rules for the maintenance of that part of the roof that was unit property.

[27] In *Berachan*, the building had a roof requiring repair. 80% of the roof belonged to one unit owned by the appellant and 20% belonged to the BC. The roof was a single entity however and had to be repaired as a whole. Under the BC rules, the BC was responsible for repairing the roof. In the particular circumstances of the case, this Court found that the rule requiring the BC to repair the roof was fairly incidental to the BC's responsibilities despite the fact that 80% of the roof was owned privately by the unit owner. The configuration of the building meant that the roof must be kept in a good state of repair both to protect the units and common property from damage and to provide the BC with safe and convenient access to common property (the exterior walls and windows of the building) for cleaning, maintenance and repairs.<sup>8</sup>

[28] We accept the submission made by Ms Grant that r 2.1(e) must also be declared to be invalid. It follows as a matter of logic that if the BC has no obligation to repair and maintain the exterior walls and roof of the building, then the unit owners could not validly confine their obligations to the interior of the units. In this respect, we agree with the *obiter* observations of this Court in *Berachan*. It cannot have been the legislative intention under the 1972 Act that neither the BC nor the

---

<sup>7</sup> At [51](a).

<sup>8</sup> At [48].

unit owners have any obligation to repair and maintain the exterior walls and roof of the building. We acknowledge that the Unit Titles Act 2010 and the approval of the scheme under s 48 may resolve matters for the future but we do not see either of those matters as proper grounds to decline to make the declaration of invalidity. And, in any event, we have yet to determine whether the s 48 scheme was validly approved.

**Does default r 1(e) in the Second Schedule of the 1972 Act apply and, if so, what is its scope?**

[29] We do not understand the second respondents to dispute that if r 2.1(e) of the BC rules is invalid then default r 1(e) in the Second Schedule of the 1972 Act would apply. This point was left open by this Court in *Velich v Body Corporate 164980*<sup>9</sup> but we accept this is the logical outcome of holding the corresponding BC rule invalid. Under the default rule, the proprietor of the unit is obliged to:

... 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 in which this unit forms part:

[30] As we understand Ms Grant's submission, since default r 1(e) applies, the BC was obliged under s 15(1)(h) of the 1972 Act to do all things reasonably necessary for the enforcement of that rule. While her submissions must be right as far as they go, the outcome of these appeals depends ultimately on the determination of the issues under ss 37 and 48 of the 1972 Act.

**Is BC r 2.2(g) valid?**

[31] The GFU owners contend that the Judge erred in finding that BC r 2.2(g) was invalid. The Judge considered that this rule was intended to work together with BC r 2.2(c) to limit the extent to which the GFU owners were obliged to contribute to the cost of work to the upper levels. She noted that there was some ambiguity in the scope of the rule but found it related only to exterior painting and work to the lifts. The reference to levies attributable to the whole building from which the ground floor units derived a direct benefit were, the Judge said, merely explanatory

---

<sup>9</sup> *Velich v Body Corporate 164980*, above n 3, at [38].

of the intent of the rule and were not intended to extend the ambit of work excluded from levies imposed under s 15(2)(c) of the 1972 Act.

[32] The reasons given by the Judge for deciding that r 2.2(g) was invalid were first that the rule assumed that the BC had power to levy for painting the exterior walls. No such power existed because the exterior walls were private property. Rule 2.2(g) would only be triggered if the BC were required to undertake work by a local authority or public body which the Judge considered was unlikely, at least in relation to exterior painting. Secondly, the Judge considered that the rule imposed a formula that was contrary to s 15(2)(c) which required levies to be assessed according to the unit entitlements fixed under s 6. Finally, the Judge noted that the rule did not have any legitimacy as an adjunct to s 33 of the 1972 Act. In that respect, she relied on this Court's comments in *Tisch v Body Corporate 318596*<sup>10</sup> where s 33 was described as a provision enabling the BC to recover money already expended on repairs and other work. The cost of repairs actually incurred could be adjusted under that provision if the repairs substantially benefited some units more than others.<sup>11</sup>

[33] The Judge concluded that r 2.2(g) was not permitted by s 37(5) since it could not properly be seen as incidental or attaching to the BC's powers under s 15(2)(c).

[34] Ms Grant submitted that r 2.2(g) was really a re-allocation of costs between the unit owners. There was, she submitted, no restriction in the 1972 Act to prevent unit owners from re-allocating costs between themselves. The only limitation on contracting out of the provisions of the 1972 Act was in relation to the powers and duties of the BC. Rule 2.2(g) was properly viewed as constituting a waiver of the statutory cost collection regime in favour of a regime that recognised the practicalities of the building. She maintained that the GFU owners had consistently refused to contribute to the costs of the exterior walls and roof, initially on the basis of r 2.2(g) and subsequently on the basis that default r 1(e) applied.

---

<sup>10</sup> *Tisch v Body Corporate No 318596* [2011] NZCA 420, [2011] 3 NZLR 679.

<sup>11</sup> *Tisch*, above n 10, at [25].

[35] We are unable to accept the appellants' arguments in relation to r 2.2(g). We accept the submission made by Mr Harris on behalf of the second respondents that r 2.2(g) is not merely a re-allocation of costs as between the owners. Section 15(2)(c) of the 1972 Act placed a statutory obligation on the BC to levy contributions in proportion to the unit entitlements of the respective units. Rule 2.2(g) purported to limit the power and duty of the BC under s 15(2)(c) of the 1972 Act to levy the GFU owners in accordance with the statute. By no stretch of the imagination could such a provision be regarded as incidental to the performance of the duties or powers imposed under the Act. It was plainly not permissible as an amendment to the rule under s 37(5) and was clearly contrary to the statutory scheme. The only avenues under the 1972 Act to avoid the statutory levying of duties under s 15(2)(c) are through the mechanisms provided by ss 37 and 48. We agree with the Judge that s 37 does not apply for the reasons this Court stated in *Tisch*.

[36] We conclude that the Judge was correct to find that r 2.2(g) of the BC rules was ultra vires the 1972 Act.

**Was the Judge correct to find that it was inappropriate to make orders under s 37(12) of the 1972 Act?**

[37] The appellants submitted that the Judge erred in rejecting the proposal by the BC that enforcement orders be made under s 37(12) of the 1972 Act which provides:

- (12) 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 of 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.

[38] The BC sought further orders under s 37(12) limited to the work required by the Council notice. The BC sought further orders that the unit owners who were required to undertake the work be identified and compelled to undertake it. The GFU owners and some of the residential owners sought orders under s 37(12)



relating to both the work required by the Council notice and the repairs needed to the facade. The draft orders placed before the High Court provided for the unit owners to comply with the Council notice and any other regulatory requirements by repairing the areas that they owned and by repairing and maintaining any cracks in the exterior walls of their units. The draft orders provided that the unit owners would collectively instruct an expert to investigate whether repairs were required and then to carry out such repairs as the BC required to be effected. Where it was practical or cost-effective to do so, the owners of units on which work was required, the BC as owner of the common property, and the 30 unit owners of AU7, were to enter into separate contracts. If this was not practical, a joint contract was to be entered into.

[39] Under this proposal, in the first instance, the cost of repairs to private property was to be borne by the owner of the unit or accessory unit on which the work was carried out; the cost of repairs to AU7 was to be borne by the 30 residential owners in proportion to their ownership shares; and the cost of repairs to the common property was to be borne by all owners on the basis of their unit entitlements. The proposal allowed for the re-allocation of costs in accordance with the 1972 Act or the BC rules once repairs had been effected.

[40] The 19th respondent in the High Court (Mr Law) had a different proposal. It was that the various owners affected by the Council notice were to undertake the necessary work. In relation to the facade, the BC was to arrange an investigation as to whether repairs were necessary, with those costs to be met by unit owners according to their unit entitlement, on the basis that all owners were affected other than the GFU owners.

[41] The penthouse owners opposed the making of orders under s 37(12) and proposed instead that the Court sanction the scheme under s 48 of the 1972 Act.

[42] The Judge accepted that the work required by the Council notice could be managed by orders under s 37(12). The BC had an obligation under s 15(1)(g) to comply with the notice and, by virtue of s 16, the BC had all the powers reasonably necessary to enable that duty to be carried out. The Judge noted that, by virtue of

BC r 2.1(c), the penthouse owners and the other residential unit owners on that level were obliged to comply with the Council notice to the extent it related to their units. As well, the BC was responsible for work required under the notice to the small amount of common property affected on level 6. The 30 owners on levels 1 to 6 would be required to contribute to the work required to AU7. The unit owners would be ultimately responsible for the cost of the work by way of levy under s 15(2)(c) or by the BC seeking repayment from them under s 33 after the work had been completed.

[43] The problem, as the Judge saw it, was that the investigation and repair work to the facade could not be achieved through orders under s 37(12). In the absence of any Council requirement to repair the facade, neither the BC nor any individual unit owner had any obligation to repair and maintain the facade since it was private property and, under the BC rules, the unit owners only had obligations to repair and maintain the interior of their units. Since no unit owner was in breach of any rule regarding the facade, there was no room for an order under s 37(12) requiring the unit owners to comply with the rule. In view of the conclusion we have reached at [28] above that r 2.1(e) must also be declared to be invalid, this last point cannot stand since the unit owners would become responsible for the repair of the external walls and the roof. But this does not detract from the other reasons the Judge gave for rejecting the submission that orders should be made under s 37(12).

[44] While the Judge acknowledged that this state of affairs was temporary since the Unit Titles Act 2010 would impose new obligations of repair and maintenance on the unit owners and the BC, she was conscious of expert evidence that repairs to the facade should be regarded as urgent for safety reasons. The Judge also accepted the unchallenged expert evidence that the repair work under the Council notice and to the facade should be undertaken together. It was necessary to erect scaffolding to all levels of the building facade to enable its inspection and repair. The expert evidence was that the only practical and economically feasible way to do that was to scaffold the facade and install appropriate measures to protect pedestrians while the work was carried out. The Judge also noted the expert evidence that it would be totally impractical for individual owners to carry out inspections and repairs to the exterior

walls of their own units and that it was vital that the work be carried out in a comprehensive and co-ordinated manner.

[45] For these reasons, the Judge decided it would be inappropriate to make orders under s 37(12) and that a scheme under s 48 was desirable.

[46] Although counsel for the appellants sought to persuade us otherwise, we view the Judge's conclusion on this issue as unassailable, for the reasons she gave (subject of course, to the qualification expressed at [43] above). On the evidence the Judge accepted, an urgent solution was required which would enable the early and comprehensive undertaking of all the necessary work under the Council notice as well as the work necessary to repair the damage to the facade. The prospect of individual unit owners separately pursuing repairs to the walls of their own units was simply not feasible. In these circumstances, a scheme under s 48 was the only option available in the absence of agreement between the unit owners.

**Did the Judge err in approving the scheme under s 48 of the 1972 Act and in settling its terms relating to the apportionment of repair costs amongst the unit owners?**

[47] So far as it is relevant, s 48 of the 1972 Act provides:

**48 Scheme following destruction or damage**

- (1) Where any building or other improvement comprised in any unit or on any land to which a unit plan relates is damaged or destroyed, but the unit plan is not cancelled, the Court may, on the application of the body corporate, an administrator, the proprietor or one of the proprietors of a unit, or a registered mortgagee of a unit, by order settle a scheme including provisions—
  - (a) For the reinstatement in whole or in part of such building or other improvement; or
  - ...
- (4) On any application to the Court under subsection (1) of this section, any person having or claiming to have any estate or interest in any unit or in the land or in any part of the land or any insurer who has effected insurance on the buildings or other improvements comprised in any unit or in the land or any part thereof shall have the right to appear and be heard.

- (5) In the exercise of its powers under subsection (1) of this section, the Court may make such orders as it considers expedient or necessary for giving effect to the scheme, including orders—
- (a) Directing the application of any insurance money;
  - (b) Directing payment of money by or to the body corporate or by or to any person;
  - (c) Directing the deposit of an appropriate new unit plan; or
  - (d) Imposing such terms and conditions as it thinks fit.
- (6) The Court may from time to time cancel, vary, modify, or discharge any order made by it under this section.

...

[48] The parameters of this section were comprehensively canvassed in this Court's decision in *Tisch v Body Corporate 318596*.<sup>12</sup> A three-step process was suggested for the consideration of applications under the section.<sup>13</sup> The first or triggering requirement is that the building must be damaged or destroyed. There is no dispute in the present case that this requirement has been met since the building is damaged. The second step requires the Court to be satisfied that it is appropriate to settle a scheme in the circumstances. The Judge was satisfied that it was appropriate to settle a scheme under s 48. She relied on the reasons she had already given for rejecting the proposal that enforcement orders be made under s 37(12) and gave additional reasons. These were that there was no recognition by unit owners of the impracticalities of their attending separately to repairs to the exterior of their particular units; the level of divergence in respect of the interests represented in the BC; the disproportion between the unit entitlement shares held by the GFU owners compared to the physical space they occupied; the unhappy dynamics amongst the unit owners; and her lack of confidence that an effective overall solution for the building could be agreed upon.

[49] If we were to reject the proposal that enforcement orders be made under s 37(12), there was no real dispute by the appellants that a scheme under s 48 was the only other available option. We are satisfied that is the case.

---

<sup>12</sup> *Tisch v Body Corporate No 318596*, above n 10.

<sup>13</sup> At [35].

[50] The real dispute relates to the third step in the process outlined in *Tisch*, which is to decide what the terms of the scheme should be. In particular, the appellant challenged the terms relating to the apportionment of the repair costs amongst the unit holders.

[51] In *Tisch*, this Court said that, in exercising its discretion under s 48, the aim should be to balance the interests of each unit holder by imposing terms that achieve the outcome fairest to all unit holders.<sup>14</sup> The Court went on to outline five (non-exhaustive) principles applicable to the exercise of the discretion. First, although this was not invariably so, a scheme with broad support is to be preferred. Secondly, the scheme should be appropriately detailed. Thirdly, an order made under the section will have retrospective effect provided what has been done by the BC accords with the approved scheme. 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 provisions of the Act and from the BC rules no more than is reasonably necessary to achieve what is fair as between the unit owners in the circumstances.<sup>15</sup>

[52] The Judge began by considering the scheme proposed by Mr Law. As noted, the essence of this scheme was:

- Each unit owner paying for, arranging and undertaking repairs to their own units and accessory units (other than AU7).
- Repair work to common property and AU7 would 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.

[53] While the Judge acknowledged that this scheme had the broad support of the majority of unit owners (reflecting the fact that the penthouse owners would bear most of the cost of the work required by the Council notice), she noted this would not necessarily reflect fairness between the owners as a whole. The Judge considered the proposed scheme was unsuitable for the work required to the exterior walls which were not common property and did not form part of AU7. The work to the building exterior involved the difficult interface between different private areas.

---

<sup>14</sup> At [44].

<sup>15</sup> At [45]–[49].

The proposed scheme would not address, for example, the consent required by unit holders to scaffold the entire building in order to investigate and repair the cracks to the exterior walls. Nor was there any proposal as to whether repairs required to particular areas of the walls should be related back to specific units or how costs should be apportioned. In short, the Judge considered Mr Law's proposal did not address the principal reasons she had given for concluding that a s 48 scheme was needed.

[54] Addressing the scheme proposed by the penthouse owners, the Judge summarised the following features of the scheme:

- (a) It would spread the cost of the work required under the Council notice and the work to the facade over all the unit owners and would ultimately see those areas transferred from private ownership to common ownership.
- (b) With the exception of the paving or other work above the "notional roof" noted in (c) below, 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 have paid on a unit entitlement basis and some of the other floors paying more than they would have paid on that basis.
- (c) The work to the roof would be undertaken by reference to a "notional" roof that would finish at the top of the waterproof membrane. Above that level, additions such as the paving on top of the notional roof would be borne by the penthouse owners alone.
- (d) A new unit plan would ultimately be deposited, bringing the external walls and the notional roof into the common property and resolving errors in the present plan.

[55] The Judge noted that the rationale for this scheme as advanced by the penthouse owners was fair to the unit holders as a whole, having regard to the scheme they bought into when acquiring their units and the history of adherence to the rules as they were understood. Although the roof and exterior walls of the building were in private ownership by virtue of the unit plan, the BC rules placed the obligation to repair and maintain those areas on the BC.

[56] The Judge considered and rejected the submissions made on behalf of those unit owners opposing the scheme that the BC had not adopted any uniform practice of assuming responsibility for the cost of repairs to the roof and exterior walls. On this issue the Judge concluded in relation to the years 1997–2001:

[91] It is clear, however, from minutes of early Body Corporate meetings that the Body Corporate Committee (which then included Mr Morgenstern 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.

[57] The Judge then observed that the perception of the BC members began to change about 2003 when the seriousness of the weathertight issues emerged. Expert reports were obtained and, by late 2004, the extent of the BC's obligations for repairs became an openly contentious issue amongst the unit owners. At an Extraordinary General Meeting on 6 December 2004 Mr Stubbs made it plain he did not accept that the GFU owners had any obligations in relation to the roof. Consideration was being given by the legal representatives of some of the parties to the prospect that some of the BC rules were ultra vires. By the time of the 2005 AGM, there was talk of legal proceedings in relation to the BC rules.

[58] The Judge then concluded:

[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.

[59] In approaching the issue of overall fairness of the scheme the Judge accepted that, in general, where all unit owners purchased their units on the basis of clear rules, it was desirable that their legitimate expectation as to the operation of those rules be given effect, provided it could be achieved in a way that was consistent with

the Act (citing this Court's decision in *Berachan*<sup>16</sup>). The Judge also acknowledged the observation made in *Berachan*<sup>17</sup> that it was "somewhat unattractive" for a BC to come along years after the event and claim that its own rules were ultra vires, to the significant disadvantage of some proprietors and the advantage of others.

[60] However, as the Judge pointed out, the difference in *Tisch*, *Berachan* and *St Johns College Trust Board v Body Corporate 197230*<sup>18</sup> was that the BC rules in those cases were valid. In the Judge's view, it was necessary to consider how the reasonable expectations of the unit owners and overall fairness were to be assessed in a case where some of the key BC rules had been found to be invalid after the relevant units had been bought.

[61] After considering the unusual nature of the unit plan (making the roof and exterior walls private property) and the history of the arrangements made between the Stubbs and Morgenstern interests, the Judge said:

[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.

[62] The Judge further reasoned that it was likely there would be disagreement amongst unit holders as to whether and what kind of work would be required; there was a risk of a disproportionate burden falling on some unit holders who were not able to meet the cost; and there was a risk that delay would result in the building deteriorating. Courtney J then concluded:

[102] ... 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.

---

<sup>16</sup> At [51].

<sup>17</sup> At [42].

<sup>18</sup> *St Johns College Trust Board v Body Corporate 197230* [2012] NZHC 827.



[63] The Judge accepted as a general proposition that parties taking legal advice before purchasing their units must be taken to have assumed the risk of errors in that advice so far as it related to the validity of the rules. However she regarded the question of fairness as requiring a broader approach, citing the following passage from *Tisch* for the proposition that a scheme under s 48 might legitimately be adopted to avoid problems of ultra vires rules:

[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.

(Footnotes omitted.)

[64] The Judge expressed her final conclusions as to the approach to be adopted in cases where the BC rules have later been found to be invalid in these terms:

[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.

[65] The Judge went on to express concern that the necessary work be carried out in a timely and effective manner. This was necessary to preserve the structural integrity of the building and the safety of pedestrians. If the BC was not authorised to undertake that work with the cost being spread across all the owners it was very unlikely this would happen. She repeated her concerns that the interests of the unit owners were so divergent that there was no assurance that agreement would be reached as to how the costs of work to the exterior walls would be apportioned. Nor was there any assurance that the unit owners would be in a position to fund the work to the roof within a reasonable time.

[66] The overall conclusion of the Judge was that the main aspects of the scheme promoted by the penthouse owners fairly reflected the original scheme under the BC rules and was in the best interests of the unit holders as a group.

[67] The Judge went on to address specific aspects of the scheme that are no longer in dispute. However, on the key aspect of apportionment of costs, the Judge directed:

- 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% and 2.77% of the repair costs, units on levels 1–5 paying between 1.57% and 3.6% of the costs and the top floor unit owners paying 4.41%, 7.57% and 8.36% for their 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.

*Grounds of appeal on the terms of the s 48 scheme*

[68] The argument advanced by Ms Grant and Mr Muir in their written submissions under this heading is that, in approving the cost-sharing arrangement under the s 48 scheme, the Judge failed to recognise and apply the general principle that private property owners pay for repairs to their private property and are not required to share communally the cost of repairing private property. Counsel accepted that this principle might be displaced by some express provision or rule to the contrary. Given the existence of the 1972 Act and the BC rules, it might be thought there was little room for the general principle espoused by counsel to operate. Indeed, Ms Grant's argument focused on the relevant legislation and rules. Mr Muir also accepted that those provisions were relevant.

[69] Counsel also placed reliance on the general principle endorsed by this Court in *Tisch* that a scheme approved under s 48 ought not to depart from the provisions of the 1972 Act and from the BC rules any more than reasonably necessary to

achieve what is fair between the unit owners in the circumstances. An open-ended approach to what is fair could not be justified.

[70] Assuming BC rule 2.1(e) is invalid (as we have now found) then default r 1(e) imposes an obligation on the unit owners to repair and maintain their units. It was submitted that since about two-thirds of the cost of the repairs required by the Council notice were to the penthouse units and auxiliary units, it was proper, and in accordance with the default rule, that penthouse owners should bear the burden of those repairs. The appellants appeared to recognise that the cost of the “notional roof” could be shared amongst all the owners and also accepted that a consequence of applying default r 1(e) was that they would be required to meet the cost of the repairs to the facade of their particular units (since the unit title plan meant that their units included all the exterior walls).

[71] It was further submitted for the appellants that the Judge failed to take into account that the repairs required by the Council notice were largely for the benefit of the penthouse owners and that it would not be fair to require the other owners to contribute to those costs when they received no direct benefit from that expenditure. Ms Grant submitted this was particularly unfair to the GFU owners who had bargained for and obtained special provisions in the BC rules limiting their responsibility for levies under BC r 2.2(g) (now found to be invalid). Counsel also submitted BC r 2.3(h) and the definition of “defaulting proprietor” supported the contention that the BC rules recognised the apportionment of levies by reference to relative benefit.

[72] Mr Muir also submitted that the Judge’s findings about the historic pattern of the BC accepting responsibility for the roof and exterior walls could not be supported by the evidence.

#### *Discussion on the terms of the s 48 scheme*

[73] We accept the general proposition that a scheme under s 48 should depart from the general principles of the Act and the terms of the BC rules no more than is necessary. We also accept that, as a general proposition, the owners in a unit title

development are not expected to meet the costs of repairs to common property accept in accordance with the levy system under the 1972 Act and the relevant BC rules. However, as was recognised by this Court in *Berachan*, the exigencies and circumstances of particular cases may justify the BC assuming responsibility for repairs to privately owned parts of a unit title development. That has been accepted as an available function under a s 48 scheme where necessary and appropriate.

[74] We are not persuaded that the Judge erred in approving the s 48 scheme and in settling the allocation of costs in the way she did. She was right to reject the alternative proposals advanced as wholly impracticable. A comprehensive solution for the whole building covering the repairs needed to comply with the Council notice as well as the investigation and repair of the damage to the exterior walls was plainly required. The prospect of individual unit owners bearing separate responsibility to effect repairs only to those portions of the exterior walls relating to their own units was unrealistic for the reasons the Judge gave.

[75] In contrast, the proposals advanced by the second respondents had the advantages of comprehensiveness, practicality and the minimisation of the potential for dispute amongst the divergent groups of owners.

[76] Importantly, a scheme under s 48 was necessary to address the consequences of the court holding that key provisions of the BC rules were ultra vires. The consequence of these rulings was that the legitimate expectation engendered by the plain wording of the BC rules (that the BC would be responsible for the repair and maintenance of the work to the exterior walls of the building) is no longer available. The scheme as approved would enable that expectation to be restored. In this context, we do not consider that it is realistic to disregard the terms of the rules found to be invalid. Certainly not in the absence of any evidence that the unit owners knew about or ought to have anticipated the potential invalidity at the time they acquired their unit.

[77] There was also a sound basis for the Judge to conclude that the building should be treated as a whole in relation to the allocation of repair costs. As Mr Harris pointed out, the building consents issued in 1993 were for the entire

building. The principal building consent for the new development project (5092) was granted on 9 November 1993. The overall project included the conversion of levels 1 to 5 from commercial to residential; the provision of four residential units (the three penthouses and the existing caretaker flat) on level 6 with a terrace area; the construction of a new roof at level 7 and a glass roof over the internal atrium; and new lift/plant rooms at level 7. There was some debate as to whether 5092 included the addition to level 7. That change was certainly shown on the plans. However, a second building consent in late 1993 (6741) was specific in covering the addition to level 7. A third consent in early 1994 (0182) related to plumbing work on the mezzanine level of the ground floor. The final consent (4792) was granted in 1995 and was for alterations to the concierge room on the ground floor.

[78] The Council notice referred to building consent 5092 only but the work to be done was very broadly described. It would appear the Council intended it to apply to the building as a whole even if all or most of the work was on levels 6 and 7. If there was any serious dispute about that, the Council could have issued a second notice to clarify the extent of the obligations.

[79] The BC was obliged by s 15(1)(g) of the 1972 Act to comply with the notice and the unit owners had a similar obligation under BC r 2.1(c) to the extent that the work related to their own units.

[80] Any prospective buyer of a unit in the development (not just the penthouse owners) would have been alerted to the fact that no final CCC had been issued for the building if they had taken the elementary precaution of checking the Council file before purchasing. An interim CCC was issued on 9 June 1994 specifying the principal building consent 5092 was granted for all building work except the sprinkler installation. If the 5092 consent did not cover level 7, then there was no CCC at all for that floor. Potential purchasers ought to have been aware of that too. In consequence, it is difficult for any unit owner buying after 1993 or 1994 to sustain an argument they were unaware of the potential for further work.

[81] We do not accept that there is a disproportionate benefit in favour of the penthouse owners under the approved scheme. Ultimately, it is in the interests of all

unit owners to have a watertight building. Water penetration from the roof or walls in a steel-framed building is an obvious risk to the building's structural integrity as the expert evidence confirmed.

[82] We accept that the GFU owners will be required to contribute more than they would have been obliged to do if r 2.2(g) remained valid but the formula based on unit area will see them contributing between 1.18% and 2.77% to the total cost. This compares with a range of 1.33% to 3.6% for the residential owners on levels 1 to 5 and 4.4%, 7.57% and 8.36% for the penthouse owners (who will also be responsible for the costs of the paving and other work above the "notional roof" level). Added together in the three groups, the 7 GFU owners will contribute 11.84% of the total cost; the 27 level 1 to 5 owners 67.82%; and the three penthouse owners 20.34%.

[83] The Judge did not discuss in any detail why the costs under the scheme were to be apportioned by unit area rather than by unit entitlement. Nor did counsel in these appeals advance any specific argument on this topic. An apportionment of costs according to unit entitlement would have been more consistent with the scheme of the 1972 Act. However we assume that this matter has not been pressed because the apportionment method proposed is generally more favourable to the GFU owners and less favourable to the penthouse owners. The unit entitlements for the GFU owners based on valuation were much higher than those of the other unit owners since they occupied commercial premises at ground level with frontage to Queen Street. The contributions required from the penthouse owners are much higher on the apportionment basis adopted in the s 48 scheme because their rooftop accessory units are counted as a physical area for the purposes of the calculation.

[84] We do not find it necessary to deal with the factual challenge to the Judge's finding that, at least until 2003/2004, there was a clear pattern of the BC taking responsibility for expenditure on the walls and roof of the building. It is sufficient for present purposes that this was the plain expectation owners were entitled to hold by a plain reading of the BC rules until such time as they were found to be invalid.

## **Conclusion**

[85] In summary we find:

- (a) Body Corporate r 2.1(e) is ultra vires.
- (b) In consequence, default rule 1(e) in the Second Schedule of the Unit Titles Act 1972 applies.
- (c) Body Corporate r 2.2(g) is ultra vires.
- (d) The Judge correctly found it was inappropriate to make orders under s 37(12) of the Unit Titles Act 1972.
- (e) The Judge correctly concluded that the s 48 scheme was fair to all the owners and she correctly exercised the discretion to approve it on the terms ordered.

[86] Since the appellants have failed overall, the appeals are dismissed. The appellants in CA456/2012 must each pay, jointly and severally, costs to the second respondents as for a standard appeal on a Band A with usual disbursements. The appellant in CA458/2012 must pay costs to the second respondents as for a standard appeal on a Band A basis with usual disbursements.

Solicitors:  
Macky Robertson, Auckland for Appellants  
Gilbert Walker, Auckland for Respondents