**IN THE DISTRICT COURT**
**AT AUCKLAND**

**I TE KŌTI-Ā-ROHE**
**KI TĀMAKI MAKAURAU**

**CIV-2017-004-002720**
**CIV-2018-004-000942**
**[2019] NZDC 9240**

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| UNDER THE | UNIT TITLES ACT 2010 |
| AND THE | RESIDENTIAL TENANCIES ACT 1986 |
| IN THE MATTER OF | APPEALS FROM THE TENANCY TRIBUNAL |
| BETWEEN | LT2 STRATA & PROPERTY MANAGEMENT LIMITED<br>Appellant |
| AND | BODY CORPORATE 358570<br>Respondent |

Hearing: 15 May 2019

Appearances: J P Wood for Appellant
C Baker and A Elia for Respondent

Judgment: 17 May 2019

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**RESERVED JUDGMENT OF JUDGE G M HARRISON**

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## The appeals

[1] There are two appeals between the same parties whereby the appellant company (LT2) challenges the procedure of the body corporate in approving annual budgets and consequent levies on unit owners.

[2] Appeal 942 challenged the levies struck for the 2016/2017 and 2017/2018 years.

[3] The body corporate brought proceedings to recover the unpaid levies for those years in the Tenancy Tribunal.

[4] LT2 opposed that application and advanced affirmative defences to the claim without making its own application to the tribunal. Legal representation for LT2 has changed since the appeals were filed owing to the illness of counsel then acting. Mr Wood, now appearing for LT2, accepts that it is not appropriate to pursue the affirmative defences on appeal and records that the company may make its own application in the future.

[5] That appeal is effectively discontinued and it is dismissed accordingly with costs reserved.

**The remaining issue**

[6] The only issue now pursued on appeal 2720 is stated as follows:

> Was the annual budget levy raised subject to a resolution that was passed by the requisite majority at the 2015 AGM?

[7] The body corporate opposes this issue being raised on this appeal. The Notice of Appeal of 24 November 2017 raised five grounds of appeal, but not the issue now advanced.

[8] Rule 18.9 District Court Rules 2014 requires that a Notice of Appeal must explicitly set out the grounds of appeal. By subcl (2), the grounds of the appeal may be amended by leave of the Court. There has been no prior grant of leave.

[9] The issue now questions whether the annual budget levy raised, was subject to a resolution that was passed by the requisite majority. That is, by 75% of the members of the body corporate. Mr Baker, for the body corporate, submits that that issue should have been raised before the tribunal which would have provided an opportunity for evidence to be given that the requisite majority passed the resolution and that accordingly leave to amend the grounds of appeal should not be granted.

[10] He referred to the High Court decision in *Li v Chen.*[1] At [75], Grice J said:

> [75] This additional ground of appeal was raised by Ms Li less than 24 hours before the appeal hearing. She said that the Judge wrongly entered judgment in favour of Ms Chen because there was no disclosure of the loan details as required under the Credit Contracts and Consumer Finance Act 2003.
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> [76] This was not an issue that was before the District Court. It was not raised in Ms Li's Statement of Defence or in the Notice of Appeal to this Court. The issue of whether the loan was governed by the Act was therefore never explored at the first instance.

[11] The Judge went on to consider the decision of the Supreme Court in *Paper Reclaim Limited*, which noted that fresh evidence would likely be necessary as the new material sought to be introduced raised issues of law and fact that required evidence and argument.[2] At [16], the Supreme Court said:

> It would ordinarily be outside the scope of the statutory direction to proceed by way of rehearing for this Court to allow a new case to be put up by a party to the appeal on which fresh evidence had to be called. The short answer accordingly, to the applications to add the proposed new ground of appeal and to call fresh evidence to support it, is that they would take the appellate process outside of appropriate bounds.

[12] On the basis of that authority, Grice J declined leave to introduce the new ground of appeal

[13] In response, Mr Wood submitted that there was some evidence before the tribunal and referred to the minutes of the meeting of the body corporate on 14 November 2015. Under item 14 "Delegation of Chairperson's Powers and Duties to the Body Corporate Committee", the minutes recorded that the body corporate delegated to the committee such of the body corporate's powers and duties which it was legally entitled to delegate, and all of the duties of the chairperson as described in regulation 11 of the Unit Titles Regulations 2011. The minutes recorded that the resolution was "Carried, 1 abstention".

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[1] *Li v Chen* [2018] NZHC 2843.
[2] *Paper Reclaim Limited* v *Aotearoa International Ltd (Further Evidence) (No 2)* [2007] NZSC 1.

[14] Mr Wood fairly acknowledged that evidence could have been called to clarify whether the word "Carried" meant that at least 75% of the members had voted in favour of the motion.

[15] For his part, Mr Baker referred to the decision of Muir J in *Wheeldon v Body Corporate 342525* where at [22] the Judge said:[3]

> Although neither the agenda nor the minutes record the resolution as a special resolution, and the minutes do not identify it as having being passed by the 75% majority necessary for that purpose, the unchallenged evidence of Mr Leishman is that it was passed unanimously. He states in his affidavit dated 3 February 2015 that it is his "normal recording practice in the minutes when recording a resolution which has been passed unanimously or without anyone registering a dissenting vote" to simply record the resolution as "Carried". Further, the evidence in the case was of unanimity among the body corporate members until Ms Stent's acquisition of the Wheeldon's unit. In the absence of any evidence to the contrary, I conclude that the resolution was passed unanimously. I further find that any procedural inadequacy in terms of the identification of the resolution as "special" in the agenda was capable of ratification (as occurred at the 2015 EGM). Moreover, having come to such conclusions, I am unpersuaded that my discretion to grant a declaration of invalidity would be appropriate exercised in any event.

[16] On the face of it, therefore, and in reliance on that authority, the record of the Notice of Motion having been carried with one abstention, supports the likelihood of the passing of a valid resolution in any event.

[17] For the same reasons as those relied upon by Grice J, I decline to grant leave to the appellant to introduce this new ground of appeal. Not only should there have been an opportunity for this evidence to be given before the tribunal, but to admit this new ground of appeal might well require that the proceeding be remitted to the tribunal for re-hearing on the issue now sought to be advanced. That is clearly contrary to the interests of the other members of the body corporate who have chosen not to challenge its procedure, and who would be liable for what may well turn out to be the unnecessary cost of such a further hearing. That effectively concludes this appeal.

[18] I pause to record that even if I had been persuaded that leave should be granted, I formed the view that the body corporate had ratified the budget and consequent levies

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

set by the committee for the reasons set out by Mr Baker in paragraphs 15-21 of his submissions.

**Conclusion**

[19] Appeal 2720 is consequently also dismissed with costs reserved.

[20] I invite the parties to agree on the issue of costs on both appeals. In the absence of agreement, a memorandum may be filed on behalf of the body corporate within 14 days of the delivery of this decision, with any response to be filed within a further 14 days.

G M Harrison
District Court Judge