EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT AUCKLAND

CIV 2015-004-000928
[2016] NZDC 14692

BETWEEN	YEE GOOD FORTUNE INVESTMENTS LIMITED Appellant
AND	BODY CORPORATE 392619 Respondent

Hearing: 25 July 2016

Appearances: Mr N B Dunning for Appellant
Mr C A Leishman as agent for Respondent

Judgment: 5 August 2016

DECISION OF JUDGE G M HARRISON

Background

[1] The appellant company owned Unit 3G, 84 Gunner Drive, Te Atatu Peninsula in Auckland. The respondent, which administered the development, known as the Bella Visa Apartments, levied the appellant (YGFI) in February and May 2014 for $2,235.60 each, plus interest, costs and filing fees.

[2] YGFI challenged the validity of the levies in the Tenancy Tribunal.

[3] The matter was part-heard before the Tribunal in June 2014 and ultimately decided on 25 November 2014 in which the Tribunal held that the two levies totalling $4,471.20 were payable and awarded interest of $745.11 and the filing fee of $850.

[4] YGFI now appeals that decision. Its notice of appeal specified seven grounds of appeal which can best be summarised by the issues identified by Mr Dunning on appeal as:

(i) The primary issue is whether or not the body corporate committee had the power to pass that levy.

(ii) If it did have that power under the Unit Titles Act 2010, whether it properly followed the procedures and requirements of that statute.

Appointment of Committee

[5] Dealing with the first issue, the levies arose from the necessity for the body corporate to undertake repairs to the complex, some of the units within it suffering structural deficiencies and possible water damage.

[6] As I understand YGFI's position, it is that no remedial work is required to its unit, and it has declined to join the majority of the other unit owners who have paid their levies, and commenced action in the High Court seeking damages from the various parties alleged to have been at fault. It is necessary in the first instance to determine whether the body corporate through a committee appointed by it had the power to make that levy.

[7] The minutes of the annual general meeting held on 20 September 2011, under Item 20 state, inter alia, as follows:

> 1. The body corporate delegate to the body corporate committee under s 108(1) of the Act the duties of the Chairperson set out in subpara 1(a)-(m) of the regulations.
>
> 2. The committee contract with the Secretary to carry out the duties delegated to the committee in terms of regulation 11(1), provided that the committee may at any time revoke one, more or all of the duties contracted to be carried out by the Secretary.

[8] Following this resolution a committee of seven people was appointed, and it was then resolved:

> The committee is delegated the full powers and authority of the body corporate, subject to any prior direction given at any general meeting of the body corporate or prohibition as contained in s 108(2) of the Act.

[9] The body corporate accepts that its notification of the meeting where it recorded the resolution as "ordinary' rather than "special" was in error.

[10] It appears that at the annual general meeting held on 18 September 2012 the resolutions of the previous year's meeting were confirmed when under Item 13 it was resolved:

> The committee is delegated the full powers and authority of the body corporate, subject to any prior direction given at any general meeting of the body corporate or prohibition as contained in s 108(2) of the Act.

[11] It was apparent from the record of that meeting that the decision on that item of the agenda was passed unanimously exceeding the requisite 75 percent threshold for a special resolution. The Tribunal determined that "the resolution was probably passed as a special resolution as there was nothing in the annual general meeting minutes or otherwise to indicate any dissent to the resolution at the meeting".

[12] Section 108 Unit Titles Act 2010 (the Act) provides:

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

[13] Nothing in subs (2) prevents the delegation in this instance.

[14] Section 109 goes on to provide:

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

[15] Clearly then, the body corporate had the power to delegate to a committee its duties of repair and maintenance imposed by s 138 of the Act.

[16] YGFI has not been able to demonstrate that the resolution appointing the committee was other than unanimous and in excess of 75 percent of eligible voters, and so I am of the view that it has not been demonstrated that the Tribunal erred in its decision that the body corporate's powers were properly delegated to the committee.

[17] In reaching that conclusion I am of the view that the Tribunal was acting according to s 85(2) of the Residential Tenancies Act 1986, in that it was correct in law to acknowledge that a special resolution was required to appoint the committee and that it could be safely inferred from the minutes of the relevant meeting that the requisite number of eligible voters had voted in support of the motion.

The imposition of the levies

[18] The next consideration is whether the committee had the power to impose the levies, now challenged. YGFI's position is that the body corporate committee had no authority to raise the unpaid levies and the appropriate procedure to be followed was an application to the High Court under s 74 of the Unit Titles Act 2010 to approve a scheme of reinstatement or improvement.

[19] The body corporate's position is that the committee had delegated authority and the power to raise the levies, and that if it did not do so then its actions in purporting to do so were ratified at an extraordinary general meeting of the body corporate held on 10 June 2014 and that consequently it is unnecessary for the body corporate to seek an approved scheme under s 74 of the Act.

[20] The minutes of the committee meeting 43 held on 28 November 2012 recorded under Item 5 the following:

> In terms of the building works a formal proposal had been received from Cove Kinloch for all of the preliminary consultancy work up to the time of obtaining the building consent. This included estimates for their fees and the various subconsultants including the fire engineer, structural engineer and cladding engineer. It also included an estimate in relation to the quantity surveyor's fees both during preliminary stages of cladding options and in also analysing the tenders.
>
> The total estimated fees are just over $160,000 plus GST …
>
> **Resolved**
>
> "That in principal (sic) the proposal from Cove Kinloch be accepted". It was recognised that further levies would be necessary to meet the costs of the consultancy fee and it was therefore:

Resolved

"That a special levy of $160,000 plus GST be raised to be payable in two equal instalments, the first due on 10 February 2013 and the second on 10 May 2013." …

[21] Section 138 (as amended) of the Act provides:

> (1) The body corporate must repair and maintain -
>
> (a) the common property; and
>
> (b) any assets designed for use in connection with the common property; and
>
> (c) any other assets owned by the body corporate; and
>
> (d) any building elements and infrastructure that relate to or serve more than one unit.

Subsection (4) provides:

> Any costs incurred by the body corporate that relate to repairs to [or maintenance of] building elements and infrastructure contained in a principal unit are recoverable by the body corporate from the owner of that unit as a debt due to the body corporate (less any amount already paid) by the person who was the unit owner at the time the expense was incurred or by the person who is the unit owner at the time the proceedings are instituted.

[22] Mr Leishman emphasised the compulsory aspect of subs (1) by the use of the word "must", and so when defects in the units are discovered the body corporate is obliged to repair them.

[23] Mr Dunning's point is that ss 115-119 of the Act create five funds in respect of which the body corporate may impose levies. His submission was that the levy imposed did not relate to any of the specified funds and therefore the only option open to the body corporate was to apply to the High Court pursuant to s 74 of the Act for approval of a scheme of arrangement.

[24] He relies upon a decision of Judge Walker in *Body Corporate 83140 v Newland* (CIV 2015-091-342, Porirua District Court, 11 February 2016). That was a case where the unit owner maintained that the major levy imposed by the body corporate was for a contribution to the long term maintenance fund which, he argued, is a fund to pay for future maintenance and is not able to be used for the

costs of remediating existing leaky building defects. She argued that the body corporate should apply to the High Court for approval of the scheme under s 74 of the Act because what was being repaired was damage to, or destruction of the building.

[25] The Judge accepted that argument and found that the unit owner had established an arguable defence to the application against her by the body corporate for summary judgment, and directed a defended hearing on that issue, while indicating that the proper course may be to apply to the High Court pursuant to s 74.

[26] It is noteworthy that the Judge did not refer in his decision to s 118 of the Act which provides:

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

[27] Section 121 empowers a body corporate to determine from time to time the amounts to be raised for each fund and impose levies on the owners of principal units to establish and maintain each fund.

[28] Mr Leishman's argument was that s 118 permitted the establishment of a contingency fund for repair or remediation. The section empowers a body corporate to establish one or more contingency funds, and all that is required is for such fund to be appropriately named and kept separate from other funds of the body corporate designated for other purposes.

[29] Mr Dunning submitted that s 138 must be read subject to s 80(1)(g) of the Act which requires an owner of a principal unit to "repair and maintain the unit and keep it in good order to ensure that no damage or harm, whether physical, economic, or otherwise, is, or has the potential to be, caused to the common property, any building element, any infrastructure or any other unit in the building".

[30] However, the Court of Appeal in *Wheeldon v Body Corporate 342525* [2016] NZCA 247 did not agree. In upholding the decision of Muir J at first instance, the Court said:

> [27] As noted, the appellants say that the Judge erred in finding that a body corporate's duty to repair under s 138(1)(d) prevails over that of the unit owners under s 80(1)(g). Obviously, this ground of appeal concerns the proper interpretation of ss 80 and 138 of the UTA 2010. Mr Brill submitted in the High Court (and before us) that the scheme created by the UTA 2010 for repairs and maintenance to unit title developments places the primary obligation for necessary work to individual units on the unit owner, including work required to those building elements lying within the confines of the individual unit. In short, s 80(1)(g) should be interpreted as prevailing over s 138(1)(d).
>
> [28] Muir J rejected this argument. He held that s 138(1)(d) prevailed, having regard to the purposes of the UTA 2010 expressed in s 3:
>
> > Recognition of flexibility and responsiveness, the requirement to manage buildings on an economically sustainable basis and the requirement to protect the integrity of the development as a whole all, in my view, point strongly to a more expansive interpretation of s 138 than the "default provision" for which the plaintiffs contend.
>
> [29] Muir J referred approvingly to the approach suggested by the commentator, Thomas Gibbons, that if a building element or infrastructure serves more than one unit the body corporate has the obligation to repair it, and if it is part of a unit but does not serve more than one unit then it is the owner's responsibility to repair, and if it is common property it is the body corporate's responsibility.

[31] Mr Leishman refers to the resolution on which the levy was based as passed at the annual general meeting of 18 September 2012. It reads:

> That the committee is authorised to engage Cove Kinloch to carry out the preparation of plans and specifications and the tendering and the obtaining of a building consent for the repair of the defect. This authority was subject to the committee being satisfied as to an offer of service from Cove Kinloch in this regard.

[32] The building consent with associated plans and specifications would be required for all units within the complex. It would therefore be of benefit to YGFI, the remedial work culminating in the issue of a Code Compliance Certificate by the territorial council, clearly being of benefit to the unit of YGFI.

[33] Consequently the decision of the Tenancy Tribunal on this issue has not been demonstrated to be in error, holding as it did that the body corporate through its committee was justified in imposing the levies.

[34] The Tribunal determined that the resolutions passed at the annual general meeting of 18 September 2012 to engage Cove Kinloch and Grimshaws were invalid, because the postal and proxy voting forms forwarded to eligible voters incorrectly stated that the motion to appoint the committee could be passed by ordinary resolution, whereas s 108(1) provides that a body corporate may delegate any of its powers or duties to a committee by special resolution. It went on to hold that the body corporate could delegate all its powers to the committee including the power to engage contractors to repair the property, and that consequently the committee's resolution to raise the levy was valid.

[35] It is clear that the appointment of Cove Kinloch and Grimshaws was discussed at the annual general meeting of 18 September 2012. The proposed appointment of Cove Kinloch and Grimshaws was not on the agenda for the annual general meeting but the minutes confirm the discussion.

[36] Section 101(3) of the Act provides that:

> Any matter that is not on the agenda for a general meeting may be discussed at the meeting but unless all the eligible voters are present at the meeting, no resolution may be voted on and made in respect of that matter except to include that matter on the agenda for a subsequent general meeting.

[37] The committee then at its meeting of 28 November 2012 accepted the proposal from Cove Kinloch and fixed the special levy, as detailed in [20].

[38] At [6](d) of its decision, the Tribunal determined that the body corporate could delegate all of its powers to the body corporate committee, including the power to engage contractors to repair the property and the committees resolution to raise the levy was therefore valid.

Ratification

[39] Out of an abundance of caution the body corporate called an extraordinary general meeting for Tuesday 10 June 2014, just prior to the initial hearing before the Tribunal on 19 June 2014. At that meeting the body corporate resolved to ratify the decisions of the committee in the following terms:

> Without prejudice to its position that all resolutions previously passed by the body corporate at the AGM of 18 September 2012 were correctly passed, and solely out of an abundance of caution, all resolutions appearing in the minutes of the 2012 AGM meeting as adopted by the 28 August 2013 AGM are hereby ratified and adopted and all actions and decisions by the committee in consequence of any resolution of the body corporate delegating to them authority to exercise powers and duties of the body corporate, whether those powers and duties are stipulated in an enactment or regulation are hereby ratified from the date when the committee's decision or action occurred.

[40] It is clear that a body corporate can ratify the actions of a committee appointed by it. *Guardian Retail Holdings Limited v Buddle Finlay* [2013] NZHC 1582.

[41] I am not satisfied that the Tenancy Tribunal was wrong when it held that the body corporate committee, having been duly appointed, had the power to engage contractors but it is now clear that the body corporate has ratified its decision to do so.

Conclusion

[42] For all of the foregoing reasons I am not persuaded that the decision of the Tenancy Tribunal was in error.

[43] If some error had been demonstrated I would have been minded to substitute the appropriate order pursuant to s 118(1)(b) of the Residential Tenancies Act 1986, bearing in mind the interests of the other unit owners who have paid the levy in question without demur. The body corporate made it clear that in the event the decision of the Tenancy Tribunal was overturned, it would simply reimpose the levies, but I do not see how that can be in the interests of the other owners who no

doubt wish to obtain resolution of the issues affecting the development as expeditiously as possible.

[44] The appeal is accordingly dismissed. There is no order as to costs.

G M Harrison
District Court Judge