IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2011-404-4415
[2017] NZHC 2191

UNDER	the Unit Titles Act 2010
BETWEEN	BODY CORPORATE 211747 Applicant
AND	HAI MIN GU, JIAN HUA CHEN, QAYIUM ABDUL AND LUBNA ABDUL Respondents

Hearing:	28 June,7 July and 21 -22 August 2017
Appearances:	G B Lewis and B J Mills for the Applicant JPM Wood and J Heatlie for the Respondents
Judgment:	8 September 2017

INTERIM JUDGMENT OF MUIR J

This judgment was delivered by me on 8 September 2017at 4.00 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……..

Counsel/Solicitors:
G B Lewis, Grimshaw & Co, Auckland
B J Mills, Grimshaw & Co, Auckland
JPM Wood, Rainey Law, Auckland
J Heatlie, Rainey Law, Auckland

Introduction

[1] Body Corporate 211747 (the Body Corporate), applies under s 74(8) of the Unit Titles Act 2010 (UTA) for an order varying or modifying earlier orders made by this Court under s 74 of the Act.

[2] The application relates to a four storey unit title development at 83 – 91 New North Road, Auckland known as the Up Town Apartments. The development consists of 60 residential units and five commercial units. Each of the commercial units and six of the residential units are located on the ground floor. On each of levels 1 – 3 there are 18 residential units. Car parking is located both on the ground floor and in the basement area.

[3] The respondents own four of the five commercial units. They oppose the Body Corporate's application which is supported by all other owners.

Background

[4] The Up Town Apartments were completed in about 2002. Typical of so many developments at that time, weathertightness issues were later discovered. In a report prepared towards the end of 2010, the Body Corporate's consultants, Maynard Marks, identified significant moisture ingress and decay damage to the timber framing of the building. They recommended that it be fully reclad with replacement balcony membranes and that repairs be undertaken to framing and substrates damaged by the weathertightness issues.

[5] In July 2011 the Body Corporate applied to the High Court for an order for a scheme governing the repairs recommended by Maynard Marks.

[6] That scheme provided that with respect to:

1. the roof and basement repairs, all owners were to pay for the costs according to ownership interest;

2. the ground floor, the owners of the ground floor units would pay for the repairs to their units (including the exterior, substantial parts of which were common property)[1] and otherwise the repairs to the ground floor (parking areas, lift access and fire egress) would be paid for by all owners in accordance with their ownership interest;

3. the first and third floors, the owners of the relevant units would pay for repairs in proportion to their ownership interest.[2]

[7] Accordingly, the costs apportionment provided for by the scheme did not exactly follow the delineation between unit and common property on the deposited plan, with all owners sharing the cost of repair to the roof, basement and ground floor common areas but otherwise the ground floor owners paying for repair to the exterior of their units and the level 1 - 3 owners (as a group) paying for the repairs to the exterior of theirs. This was despite the fact that parts of the exterior at all levels were common property.

[8] On 31 July 2011 the High Court confirmed the proposed scheme with minor amendments requested by Housing New Zealand which held leases over 21 of the units at the time.

[9] In 2013 the Body Corporate applied to Auckland Council for building consent to undertake the remedial works and in January of 2014 such consent issued. The scheme of the proposed works provided for construction in four stages; stage one being the eastern third of floors 1 – 3, stage two the central third of floors 1 – 3, stage 3 the western third of floors 1 – 3 and stage 4 the ground floor.

[10] Physical works commenced in January 2015. However, shortly after this, Maynard Marks advised the Body Corporate that, in the course of removing the cladding and undertaking other works, they had identified additional defects. These

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1 The survey plans show that all of the exterior walls of the commercial units were common property and likewise the southwest wall of Residential Unit GA.

2 Requiring a recalculation of the relevant ownership interests for unit title purposes as a result of the ownership interests of those on the ground floor not being included in the calculation.

are described by Mr Manning of Maynard Marks in his affidavit sworn on 4 April 2016 in the following terms:

> "Passive fire protection
>
> 1. The steel framing has inadequate protection to ensure it retains structural integrity in the event of a fire so as to allow occupants to escape and firemen to work in the building. The steel framing requires an intumescent coating or fire resistant panels, however this was not provided. This is a breach of clauses C3 (spread of fire), C4 (movement to a place of safety) and C6 (structural stability during fire) of the building code.
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> 2. The inter-tenancy walls do not have adequate fire protection in that:
>
> (i) The steel framing does not have an intumescent coating or fire related enclosure; and
>
> (ii) The fire rated walls do not extend to underside of the roof covering.
>
> This is a breach of clauses C3 (spread of fire) and C6 (structural stability during fire) of the building code.
>
> 3. The fire stopping designed to prevent the passage of fire and smoke around cables, water pipes, drainage pipes and apartment ventilation ducts where they penetrate inter-tenancy walls, corridor walls and floor slabs is inadequate in that the penetrations are not properly sealed by way of intumescent sealant or fire collars. There are some fire seals and collars missing and some fire collars that are incorrectly installed or of indeterminate origin and adequacy. This is a breach of clause C3 (spread of fire) of the building code.
>
> Non-compliant extract risers
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> 4. The two ventilation extract risers in the building are non-compliant in that:
>
> (i) The extract riser from the ground floor restaurant to the roof:
>
> (1) Is enclosed by gib board framing with corners and joints that are not correctly formed.
>
> (2) Has a duct which has been disconnected from the range hood in the restaurant kitchen. The disconnection of this duct increases the volume of air which may be discharged from the kitchen range hood but it results in air contaminated with grease from the range hood discharging into the extract riser rather than the duct causing damage to the ducts in the riser and the plasterboard walls of the riser. The grease forms a coating which is flammable and gives rise to a fire hazard contrary to clause C3 (spread of fire) of the building code.

(ii) The extract riser from the ground floor café to the roof is enclosed by gib board framing with corners and joints that are not correctly formed.

This breaches clause C3 (spread of fire) of the building code.

Extraction/air supply ductwork

5. The ventilation extraction and air supply ductwork is defective in that:

(i) In apartments and common areas at levels 1 – 3 ducts are constricted, obstructed or disconnected:

(ii) The apartment kitchen extract ducts are plastic rather than steel.

This leads to inadequate ventilation and an increased risk of the spread of fire and smoke. This is a breach of clauses C3 (spread of fire) and E3 (internal moisture) of the building code."

[11] Maynard Marks advised the Body Corporate that further works would be necessary to address these additional defects. The Body Corporate accordingly applied to Auckland Council for an amendment to the building consent which resulted in much of the physical work being put on hold for a period.

[12] In June 2015 the amended consent was granted. The project has continued since that time and is now largely complete.

[13] To place the additional works in perspective, the anticipated costs are in the order of $6.63 million. This compares with the approximately $5 million already spent remediating the weathertightness issues originally identified.

[14] In early 2016 the Body Corporate Committee proposed an amendment to the s 74 scheme formerly approved. The chairman of the Body Corporate, Mr Bennett, addresses the background to this decision in the following terms:[3]

15. In his affidavit Michael Dixon describes the way in which the fire protection works on levels 1-3 benefit all of the owners including the ground floor unit owners. There is also the significant work to the two main risers which service the restaurant and café. At the time the existing scheme was put in place the need for these works was not known so in my view it is reasonable for the body corporate to seek a reconsideration of the cost allocations.

[3] Affirmation dated 7 February 2017.

> 16. At the time of the original scheme the body corporate committee considered it was reasonable to divide the weathertightness repair costs between the ground level and levels 1-3 as opposed to an allocation based on unit and common property. This is because there were repairs to parts of the exterior that were within common property but largely benefitted the units in that general location. It was reasonable to levy the owners for the weathertightness repairs within their own area.
>
> 17. The new defects identified in 2015 are different. The fire protection works and work to the risers benefit all of the owners. I remain of the view (as does the body corporate committee) that it would be inequitable to charge the vast majority of these costs to the owners of the apartments on levels 1-3 just because most of the works have been undertaken on those levels. The works are for the common benefit of all owners.

[15] In February 2016 the Committee prepared a new proposed cl 4 for the scheme. The new clause retained the cost allocations of the old scheme but with exceptions for expenditure for "structure and fire" and "extract risers", with such costs to be allocated to all owners in accordance with ownership interest. On this basis the commercial owners were to be responsible for 15.4 per cent of the additional costs.

[16] A further specific exception was proposed for the cost of work to address grease contamination to the interior surfaces of the risers, for which it was proposed that the commercial owners responsible would pay. However, the amount involved in this respect is minor (said to be in the order of $2,000 only).

[17] At an extraordinary general meeting of the Body Corporate on 7 March 2016 a resolution was carried to amend the scheme in accordance with the proposed new cl 4. That resolution was carried with the only opposition being from the owners of units 2 and 3 (the first two respondents in this proceeding). Since that time they have been joined in opposition to the proposal by the owners of units 4 and 5 (the third and fourth named respondents).

[18] The respondents say that the additional expenditure should be apportioned in accordance with the existing scheme which would see them responsible for fire protection works within their own units but not otherwise. They do, however, concede that a contribution to the remediation of the extract risers on an ownership

interest basis would be appropriate given that they benefit from the integrity of that particular building element. Although all works are not yet complete and the final accounting has yet to be done, in broad terms the difference between what the commercial owners would pay towards the additional costs under the existing scheme and the proposed scheme is likely to be in the range of $600,000 – $700,000.

Legal principles

[19] Section 74(8) of the UTA provides that:

> The High Court may cancel, vary, modify or discharge any order made by it under this section.

[20] There is only one decided case which discusses the provision (or its equivalent provision in the 1972 Act, s 48(6)). This is the very recent authority in *Body Corporate 172018 v Manchester Securities*.[4]

[21] In that case a scheme was originally sanctioned by the High Court permitting repairs to be undertaken to levels 1 – 11 of a 12 storey block by the Body Corporate with the owner of level 12 (Manchester) attending to its own repairs. Level 12 had a different cladding to the remainder of the building and the owner believed it could effect repair more cost effectively than could the Body Corporate. In terms of the scheme, Manchester's contribution to the Body Corporate costs was limited to 11.88 per cent less the amount it spent on level 12.

[22] During the course of repairs, however, the costs in respect of levels 1 – 11 increased by 33 per cent and in respect of level 12 by 400 per cent, the result being that the costs to level 12 exceeded 11.88 per cent of the costs to levels 1 – 11.

[23] The Body Corporate sought a variation to the scheme requiring Manchester to contribute to the costs of levels 1 – 11 while Manchester claimed that the Body Corporate should contribute to the additional costs of repairs on level 12.

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4 *Body Corporate 172018 v Manchester Securities* [2017] NZHC 329.

[24] Fogarty J noted that the scheme had been approved prior to the leading decision under the former s 48, *Tisch v Body Corporate No 318596*,[5] and that it was difficult to reconcile with the emphasis in that decision on allowing departures from the scheme of the Act and Body Corporate Rules only to the extent necessary to achieve a fair outcome between all unit owners.

[25] In relation to the application under s 74(8) his Honour held:[6]

1. It was sufficient on such an application for the Court to follow *Tisch* (that is, does the proposed amendment satisfy the test for granting a scheme as set out in that decision).

2. Coupled with this was an inquiry into whether the logic of the existing scheme has been rendered inapplicable due to events that were unforeseen at the time this scheme was settled (in essence an inquiry into whether, had the parties known what they knew now, would the High Court have approved that scheme).

[26] On the facts his Honour found the cost escalation, which was unforeseeable at the time the scheme was sanctioned, rendered the logic of the allocation inapplicable as it would result in Manchester making no contribution at all to repair of the common property, most of which was located on levels 1 – 11. He concluded that if what was known in 2017 had been known then, the scheme would not have been approved.

[27] As the decision recognises, the principles established in *Tisch* continue to underpin the relevant analysis. In that case the Court of Appeal accepted the High Court's position that the 1972 Act vested responsibility for repair of common property and unit property in the Body Corporate and unit proprietors respectively and that although s 48 was an exception to that general rule:

> [30] … it does not follow that the s 48 exception is to be used without regard to the general rule. The situation must be one justifying departure from the general rule, and the departure should only be to the extent

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5 *Tisch v Body Corporate No 318596* [2011] NZCA 420, [2011] 3 NZLR 679.
6 At [66]–[67].

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

[28] In that case the proposed scheme would have made remediation of balconies, all of which were part of unit property, a Body Corporate responsibility. The Court of Appeal set out a three step process for considering any application under s 48, namely:[7]

1. the Court must be satisfied the building has been damaged or destroyed;

2. the Court must decide whether a scheme is appropriate; and

3. if so, the Court must decide what the terms of the scheme should be.

[29] With respect to step 3 the Court stated:

> [44] … The aim should be to balance the interests of each unit holder in a way that imposes terms that achieve the outcome fairest to all unit holders. Although we do not preclude other considerations relevant in the particular case, at least five guiding principles emerge from the case law.
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> [45] First, a scheme with broad support is to be preferred. The greater the level of support from owners for the proposed scheme, the more likely it is that the scheme does justice between owners…
>
> [46] Secondly, the scheme should be appropriately detailed. The more detailed a scheme, the less scope for later misunderstanding and argument about it.
>
> [47] Thirdly, providing that what has been done by the body corporate before the s 48 scheme is actually approved is in accordance with the scheme, the order has retrospective effect…
>
> [48] Fourthly, work should normally be done to the same standard and at the same time…

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7 At [35].

> [49] Fifthly, as we explain in [30] and [31] above, the terms of the s 48 scheme should depart from the scheme of the Act and from the Body Corporate rules no more than is reasonably necessary to achieve what is fair as between unit owners in the circumstances. Thus, the Act and the Body Corporate rules remain relevant considerations…

[30] In relation to the position under the Act and Rules, the Court held:

> [65] Secondly, and a related point, the owners of the eight units with balconies must be taken to have purchased knowing the balconies were their property and therefore their responsibility under the Act and the Body Corporate Rules. While they may well not have anticipated the "leaky building" problem that necessitates the balcony repairs, the unexpected nature of that problem is neither a logical nor a sound reason for shifting some of the repair costs to the owners of the units below, who equally may not have anticipated "leaky building" problems above.

[31] In relation to the argument that the owners of the units below benefitted substantially from the repairs, the Court in turn held:

> [64] … There are two considerations. First, assessing a scheme in terms of who will benefit from it may lead to outcomes that are completely inconsistent with the Act and the Body Corporate Rules. Relative benefits, of themselves, are not a sufficient reason to depart from the Act and Rules. Balconies are a good example. Repair of a leaky balcony that is the roof of the unit below may be of no benefit to the balcony's owner, but of considerable benefit to the owner of the unit below. But if the Act and the Body Corporate Rules assign responsibility for balconies to owners, the relative benefits just spelt out must be assumed to have been taken into account. That is, there has been a conscious decision to assign responsibility for remedial work to owners even though in some situations at least they may derive little or no benefit from that remedial work.

The Body Corporate's case

[32] The Body Corporate says that the original scheme proceeded on the assumption that, apart from the roof and basement it was reasonable to levy the owners for the weathertightness repairs related to their own units (with the costs in respect of levels 1 – 3 aggregated and then divided by adjusted utility interest). That approach was consistent with expert opinion. In his affidavit dated 7 February 2017 Mr Manning of Maynard Marks stated:

> The weathertightness repairs to levels 1 – 3 were primarily for the benefit of the apartments on those levels (the vertical break in the building provided by the concrete balconies on the southern and northern elevations of levels 1 – 3 prevented leaks reaching the ground floor).

As indicated the cost of that remediation work totalled (with variations in the order of $1.3 million) approximately $5.0 million dollars.

[33] The Body Corporate says that the new defects are "different in nature to the exterior weathertightness issues". It says that the defective passive fire system has implications for the structural integrity of the entire building and for all occupants in it. It says that the defective extract risers and duct work have similar implications.

[34] It further says that because approximately 90 per cent of the new work is to levels 1 – 3 and 10 per cent only to the ground floor (of which 36 per cent is common property) attribution of costs in accordance with the existing scheme would produce an inequitable result. It relies primarily on the evidence of its fire engineer Mr M J Dixon.

[35] Mr Dixon's affidavit responds to one from the respondent's fire engineer Mr James whose overall conclusion was expressed as follows:

> Drawing these two aspects of the fire design together. The benefit of the fire protection that was installed as part of the remediation work benefits as the Building Code anticipates the occupants and the property on the floor it is installed on and the floors above. While there is a practical benefit to the floors above for the work done on the ground floor, the fire rating in floors 1 – 3 is not intended to provide a benefit and does not provide a benefit to the ground floor units.

[36] In relation to that proposition Mr Dixon says:

> <u>Steel framing – Intumescent coatings/fire resistant panels</u>
>
> 29 The application of intumescent coatings or fire resistant panels to steel framing relates to the passive fire protection system and is necessary to maintain the structural integrity of the steel framing in the event of a fire. It ought to have been installed at the time of construction in order to achieve compliance with clause C4 (structural stability during fire). The equivalent provision in the new code is clause C6 (structural stability). This work was also required in order to achieve compliance with clause C3 (spread of fire) and C2 (means of escape) of the building code at the time of construction.
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> 30. In reaching his conclusions Mr James does not appear to have taken into account the important purpose this repair has in maintaining the structural integrity of the steel framing of the building. The steel framing supports the entire building. If the fire on an unprotected critical framing member is sufficiently severe then the collapse of the building is possible.

> 31. The fire remedial work to the steel framing on the upper levels is designed to protect against both catastrophic and local structural failure. This work therefore provides a benefit to the units below. This remedial work also protects against the spread of fire to units in all directions. If the structural steel distorts this can create gaps in the fire rated partitions allowing fire to spread above, to the sides and below the affected units. If there is a spread of fire this will restrict means of escape in the event of a fire.

[37] It is common ground that at each of the levels 1 – 3 inclusive the steel columns and beams, in respect of which intumescent coatings or the installation of fire resistant panels have been necessary, are building elements that relate to or serve more than one unit. At levels 1 and 2 beams also support the edge of the stairwell opening above and at level 3 the lighter columns and beams (which the lighter dead loads permit) hold down the roof trusses against wind lift.

[38] In respect of the risers and ducts, Mr Dixon notes that there are:

1. two large extract risers which extend from the ground floor (one from the restaurant and one from the café), through levels 1 to 3, and to the roof; and

2. ducts from the ground floor which carry cables and pipes from the ground floor apartments to the roof.

[39] He further says that the passive fire protection works on levels 1 – 3 (including the fire stopping and filling of gaps above the inter-tenancy walls on level 3) have direct implications for the integrity of the risers should a fire occur. In the event the work is not undertaken, a fire on levels 1 – 3 could in his view spread more easily to the risers and prevent them from operating. That, he says, would have obvious implications for the restaurant and café at ground floor level. He therefore concludes that the fire stopping work (and work to address gaps above inter-tenancy walls) all of which are designed to achieve compliance with clause C3 of the Building Code (spread of fire), provide a measurable benefit to the ground floor owners. He also notes that the risers are enclosed by gib board framing with corners and joints that are not correctly formed and that the kitchen hoods discharge directly into the riser (as they have been disconnected from the internal ducts) resulting in

grease contamination. He said this results in breaches of clause C3 and that as the restaurant and café owners are dependent on the risers, the fire rating work will again have a direct benefit to them.

[40] In his affidavit Mr Manning summarises this evidence by saying that:

> … the fire protection works and works to the risers relate to building-wide systems that serve all the units in the building.

[41] Neither Mr Manning nor Mr Dixon were cross-examined on this evidence. The Body Corporate says that if the existing scheme (which it is common ground will continue to apply in relation to the weathertightness defects) were to apply to the new work, the vast majority of the new costs would have to be borne by the level 1 – 3 residential owners and that this is inconsistent with the approach taken in the original scheme whereby the owners paid for work on the basis of benefit and would be unfair.

[42] It says in summary:

1. with respect to protection of the steel framing (both perimeter and inter-tenancy), this relates to the structural integrity of the building as a whole.

2. with respect to the risers, that they extend from the ground floor restaurant and café owned by the respondents to the roof, passing through the unit property of units K and O on levels 1 – 3 and that among their principal functions is to ventilate the kitchens of the restaurant and café and bathroom and toilets on the ground floor and levels 1 – 2.

3. with respect to fire stopping and ventilation ducts, that the work is designed to protect the passage of fire and smoke around cables, water pipes, drainage pipes and apartment ventilation ducts where they penetrate into tenancy walls, corridors and floor slabs and this again relates to building wide systems which provide a common benefit. In particular the fire stopping works on the ground floor benefits all

ground floor occupants and the work at levels 1 – 3 prevents spread of fire to the risers which are themselves of benefit to the commercial owners.[8]

[43] It points to the fact that all but three of the owners bought prior to the introduction of the 2010 Act and that the original Body Corporate Rules lodged under the 1972 Act stated (rr 1(a), 2(a) and 2(b)) that the Body Corporate was responsible for repairing pipes, conduits, wires, cables or ducts passing through units or capable of being used with other units or the common property, and fixtures and fittings for use in connection with the common property. It says that applying the approach in *Tisch*, a purchaser who turned his mind to the Rules would have likely concluded that the Body Corporate would be responsible at least for the works identified by Mr Manning as fire stopping,[9] extract risers[10] and extraction/air supply duct work[11] as all of this work relates to pipes, cables, penetrations or ducts. It also says that, while the Rules do not specifically address the steel framing issue, a purchaser would likely have assumed building elements such as these would be a Body Corporate responsibility on the basis that the framing was likely to pass through unit and common property.[12] Because the work to unit property was work incidental to work being undertaken to common property, a potential purchaser would, the Body Corporate submits, have regarded it as a Body Corporate responsibility under the 1972 Act and considered a s 33 UTA 1972 reapportionment unlikely on the basis that it was equally unlikely any one or more units benefitted to an extent greater than others.[13] It says that such conclusions would be reinforced by the fact that:

(1) Rule 2(c) imposed an obligation on the Body Corporate to insure against fire (consistent with fire protection being its responsibility) and that the relevant premium would be paid by unit entitlement.

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8 In cross-examination the respondents' expert Mr James suggested that the ducts within the risers were fire rated thereby minimising any benefit, but the applicant's expert was not cross-examined on this subject.

9 Para 19(c) of his affidavit dated 4 April 2016.

10 Para 19(d).

11 Para 19(e).

12 Citing s 16 of the 1972 Act whereby the Body Corporate was granted all powers as reasonably necessary to enable it to carry out the duties imposed on it by the Act including the s 15(1)(f) duty to keep common property in a good state of repair.

13 See *Young v Body Corporate No 120066* (2007) 8 NZCPR 932 (HC).

(2) The third schedule to the Rules proscribed any activity affecting such insurance.

(3) Section 15(g) of the UTA 1972 imposed an obligation on the part of bodies corporate to comply with local authority notices and the ability of a local authority to serve a notice on a Body Corporate to mitigate a fire hazard.

[44] Turning then to the 2010 Act, the Body Corporate says that its framework is also relevant (albeit less so than the 1972 Act) because three of the owners purchased subsequent to its introduction and the new Act was, in its terms, designed to provide for better management of bodies corporate which must have a bearing on what the Court now assesses as fair as between unit owners.

[45] It notes that the operational rules lodged under the 2010 Act do not (as it says with most rules lodged by Body Corporates under the new Act) address responsibility for the repair of building elements as this is now dealt with in s 138 of the 2010 Act.

[46] It says in a submission, which I accept, that all of the new work is either repair and maintenance of an asset designed for use in connection with the common property[14] or concerns building elements and infrastructure that relate to or serve more than one unit[15] and that the Body Corporate therefore has a responsibility to undertake the works by virtue of s 138(1) of the UTA.

[47] From that premise it argues, that because of the emphasis in *Tisch* on any proposal under s 74 upholding the scheme for repairs contained in the Act and Body Corporate Rules, the fact that the Body Corporate now has responsibility for the work should be regarded as highly persuasive in favour of granting the application.

[48] However, even if that argument is not accepted it says that the application differs from *Tisch* and other schemes relating to weathertightness repairs in that the work relates to shared utilities and fire safety requirements which preserve the

[14] Unit Titles Act 2010, s 138(1)(b).
[15] Unit Titles Act 2010, s 138(1)(d).

integrity of the entire development for all owners. It says the situation is not therefore one which calls for cost apportionment based on strict adherence to boundary lines, and that an approach by which costs are shared according to ownership interest does better justice between the owners.

[49] It emphasises that what in fact is sought by the respondents is adherence to the formula in the existing scheme, not a demarcation based on unit and common property and that this compounds the inequity. It refers to the evidence of the respondents' own quantity surveyor Mr Johnson in terms that, assuming costs of $6 million for the new work on levels 1 – 3 and for the residential units and common property on the ground floor (i.e. excluding what Mr Johnson says is additional costs attributable to units 2 and 3 of $78,281 and units 4 and 5 of $26,936), units 2 and 3 would on a unit/common property basis contribute $125,715 and units 4 and 5 $92,422 to this $6 million figure.[16] It compares this with Mr Johnson's calculation of the sum payable under the scheme as sanctioned namely that, in addition to the costs of remediation of their own units, the owners of units 2 and 3 would respectively pay $15,660 and units 4 and 5 $11,512.80 only.[17]

[50] It further says that in assessing the fairness of the proposed amendment the Court might legitimately take into account the fact that the nature of the commercial activities on the ground floor exacerbates the risk of fire within the building.

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[16] $6,000,000 x 28.9% (common property) x UI (7.25% for units 2 and 3 and 5.33% for units 4 and 5) making a total cost for the additional work for units 2 and 3 $203,996 and units 3 and 4 $119,358. This however includes the basement and roof costs so a direct analogy is not available. A better analogy may be Mr Johnson's so called "Allocation Under the Unit Title Act" in respect of which he says Units 2 and 3 would contribute $46,980 and Units 4 and 5 $34,538 based on the formula [$6,000,000 x 90% (floors 1 – 3) x 8 % (common property)] + [$6,000,000 x 10% (ground floor) x 36% (common property)] x U 1(7.25% for units 2 and 3 and 5.33% for units 4 and 5). On that basis the total cost of the new works would be Units 2 and 3 $125,261 and 4 and 5 $61,474). I note this calculation does not precisely mirror the Act because it silos common property in two separate categories – that on the ground floor and that on levels 1-3.

[17] $6 million x 10 per cent (ground floor) x 36% (common property) x UI (7.25% and 5.33%). By way of further comparison Mr Johnson calculates the amount payable by the owners of units 2 and 3 under the proposed amended scheme as being (in addition to their actual costs) $455,000 and by the owners of units 4 and 5 $319,000. I do not however consider that calculation correct because it is premised on the owners of units 2 – 5 paying their actual costs of remediation for the additional work (with a corresponding reduction in the sum to which the unit entitlement calculation is applied), when, under the proposed scheme, all costs associated with repairs to the noncompliant structure and inadequate passive fire protection system and to the noncompliant extract risers would be paid for by owners of all units in proportion to their ownership interest. Accordingly a more accurate calculation would be to take the total costs of remediation, including to units 2 – 5, and to apply the unit entitlement calculation to that sum.

Accordingly, submits Mr Lewis, it is only right that the commercial owners make a reasonable contribution to passive fire protection works at all levels.

[51] Finally it says that in bringing the building up to a code compliant standard the value of all premises within it (including the commercial units) is restored such that every owner is a beneficiary of the work.

[52] In summary therefore the Body Corporate says it is arbitrary and artificial to say that the new works benefit any one occupant more than another and that the fair and appropriate way to apportion costs is by ownership interest.

The respondents' case

[53] The respondents emphasise the Court of Appeal's observation in *Tisch* that benefit is not of itself a compelling reason to shift the burden of repairs,[18] but say that the extent of any benefit to them from the work on levels 1 – 3 is nevertheless questionable.

[54] They do acknowledge, consistently with the evidence of their expert Mr James, that the ground floor commercial units benefit from the intended work to the extract risers and suggest that this can be dealt with under the existing scheme.

[55] I cannot see how that can be the case absent some amendment, as the risers are located within unit property on the upper levels and under the existing scheme there is no liability on the part of the ground floor owners other than for repairs to their respective units (including the exterior) and an ownership interest contribution to ground floor common property together with basement and roof repair costs.

[56] In relation to the more significant steel framing costs, the respondents adopt Mr Manning's evidence that this was to ensure the overall remediation complied with the Building Code.

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[18] At [64].

[57] Mr Manning did not address how such works benefitted the commercial owners. That fell, in the first instance, to the chair person of the Body Corporate Mr Bennett who originally suggested that the apportionment formula under the existing scheme was no longer equitable on the basis that (1) the new work was "for the benefit of all the owners" and (2) "it was largely within common property".[19]

[58] The second of these points was later contradicted by Mr Manning who confirmed that 92 per cent of the work on levels 1 – 3 is in fact located within unit property.

[59] As to Mr Bennett's suggestion that the new work was to the benefit of all owners, the respondents' expert, Mr James, deposes that the principal objective of cl C of the Building Code (protection from fire) is set out in cl C1 in terms:

> The objectives of clause C2 – C6 are to:
>
> (a) safeguard people from unacceptable risk of injury or illness caused by fire.
>
> (b) protect other property from damage caused by fire; and
>
> (c) facilitate fire fighting and rescue operations.

[19] Affidavit of Campbell William Bennett dated 5 April 2016 at [21].

[60] His evidence in chief focuses on the provisions of cls C3 (spread of fire) and C4 (movement to a place of safety).[20] In respect of C3 Mr James says the objective is to ensure buildings are designed and constructed so that there is a low probability of external vertical fire spread to *upper* floors in the building. Therefore, although fire rating work on the ground floor provides a benefit to the units on that level and the units above, there is no equivalent benefit to ground floor units from passive fire protection works on levels 1 – 3.

[61] In respect of C4, Mr James says that the fire safety design must give the occupants of the building sufficient time safely to exit the building and that "the

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[20] Clause C3 relevantly provides:

C3.2 Buildings with a building height greater than 10 metres where upper floors contain sleeping uses or other property must be designed and constructed so that there is a low probability of external vertical fire spread to upper floors in the building.

C3.3 Buildings must be designed and constructed so that there is a low probability of fire spread to other property vertically or horizontally across a relevant boundary.

…

C3.5 Buildings must be designed and constructed so that fire does not spread more than 3.5 metres vertically from the fire source over the external cladding of multi-level buildings.

Clauses C4.1 and 4.2 provide:

C4.1 Buildings must be provided with:

(a) effective means of giving warning of fire, and

(b) visibility in escape routes complying with cl F6.

C4.2 Buildings must be provided with means of escape to ensure that there is a low probability of occupants in those buildings being unreasonably delayed or impeded from moving to a place of safety and that those occupants will not suffer injury or illness as a result.

Clause C6 in turn provides:

C6.1 Structural systems in *buildings* must be constructed to maintain structural stability during *fire* so that there is:

(a) a low probability of injury or illness to occupants,

(b) a low probability of injury or illness to *fire* service personnel during rescue and firefighting operations, and

(c) a low probability of direct or consequential damage to adjacent *household units* or *other property*.

C6.2 Structural systems in *buildings* that are necessary for structural stability in *fire* must be designed and constructed so that they remain stable during *fire* and after *fire* when required to protect *other property* taking into account:

(a) the *fire* severity.

(b) any automatic fire sprinkler systems within the *buildings*,

(c) any other active *fire safety systems* that affect the *fire* severity and its impact on structural stability, and

(d) the likelihood and consequence of failure of any *fire safety systems* that affect the *fire* severity and its impact on structural stability.

C6.3 Structural systems in *buildings* that are necessary to provide firefighters with safe access to floors for the purpose of conducting firefighting and rescue operations must be designed and constructed so that they remain stable during and after *fire*.

C6.4 Collapse of building elements that have lesser *fire* resistance must not cause the consequential collapse of elements that are required to have a higher *fire* resistance.

installation of fire rating" to the floors above ground floor achieves compliance with C4 by allowing:

> … the occupants on those floors … sufficient time to traverse the areas they need to in order ultimately to safely reach and use the stairs. The fire rating on those floors does not aid the occupants of the ground floor units to reach a place of safety.

[62] In respect of such ground floor occupants, he makes the obvious comment that:

> On the ground floor the units open directly to the car park and the means of escape is from one fire cell directly to the outside of the building.

[63] In reply, the Body Corporate's expert, Mr Dixon, did not contradict any of Mr James' observations in respect of C3 and C4 but stated that:

> … Mr James does not appear to have taken into account the important purpose this repair has in maintaining the structural integrity of the steel framing of the building. The steel framing supports the entire building. If the fire on an unprotected critical framing member is sufficiently severe then the collapse of the building is possible.
>
> The fire remedial work to the steel framing on the upper levels is designed to protect against both catastrophic and local structural failure. This work therefore provides a benefit to the units below….

[64] In his response dated 8 May 2017 Mr James accepted that in the event of a catastrophic fire the application of intumescent paint would aid the fire's retardation. He also accepted that if a fire was sufficiently severe a collapse of the building was possible. However, he said historically both nationally and internationally this was a very unlikely event and that typically the worst case scenario is that the building suffers severe deformation but not collapse.

[65] He expanded on those propositions in cross-examination, acknowledging (i) that the application of the paint on the steel framing reduces the risk of collapse of the building in the event of catastrophic fire and (ii) that there would be benefit to the ground floor occupants in preventing catastrophic failures, not in terms of their safety (because it would take a significant period for a fire of relevant magnitude to develop and they would have long since escaped), but in terms of their property protection. He later qualified that observation however by saying it was beyond his

area of expertise to identify just how catastrophic a collapse would be necessary to the upper levels before the ground floor "imploded" as well. He re-emphasised that such catastrophic failures are exceptionally rare and limited, in his observation, to situations like the Twin Towers where there have been major explosions inside the relevant buildings as opposed to the usual incremental spread of fire. He also emphasised that the construction of the Up Town building ensured that each apartment constituted a separate fire cell so the probability of fire getting from one apartment to another was low and that such spread in turn assumed a failure of the sprinkler system, which he described as having 90 per cent reliability.

[66] The respondents rely on this evidence to say that any benefit to the ground floor owners is therefore "not substantial and somewhat remote". They submit that the passive fire protection measures have the principal purpose of giving additional time before structural collapse so as to facilitate safe egress by the level 1 – 3 residential owners. They acknowledge that in the case of a truly catastrophic fire the risk of collapse remains but say that in that scenario the overall structure would in any event be so significantly damaged that, irrespective of whether the upper floors had collapsed through the ground floor, no one would be living in or trading from the site and reconstruction would be in the hands of the Body Corporate's insurers.

[67] The respondents further say that of the 15.4 per cent ownership interest attributable to the commercial properties, 2.64 per cent is attributable to 24 outside carparks adjacent to the road frontage and 0.66 per cent to carparks within the building but either uncovered or not wholly enclosed. They say that the proposed scheme is demonstrably unfair by linking the level of the commercial owners' contribution to building works to an ownership interest in part inflated by entitlements which either have nothing or only a very limited amount to do with the building.

[68] In addition, and although not identified in their notice of opposition the respondent's submissions raised the prospect of double recovery if the proposed scheme amendments were sanctioned. The basis of this argument was that in claims against the Government under its Financial Assistance Package (FAP) for residential owners and in the payment plan subsequently sanctioned by the Ministry of Business

Innovation and Employment (MBIE) the proposed contribution by the commercial owners (themselves ineligible to participate in the FAP) had not been recognised.

[69] Although this issue resulted in an adjournment of the proceedings to facilitate additional evidence from MBIE and cross-examination of the Body Corporate's consultant expert Mr Levie, I am satisfied that it does not require further consideration by me. That is because the final claims by the residential owners under the FAP are yet to be settled; there are very substantial unresolved aspects to the claim totalling in excess of $1.1 million (and including a day works claim of $585,000); and, as best the Body Corporate can currently calculate it, allowing for the payments yet to be made by MBIE in favour of the residential owners and the credit MBIE would receive for the contribution by commercial owners under the proposed amended scheme, it is unlikely that any net sum will be repayable to the Crown. But, to the extent some such sum may be payable the Body Corporate has provided a comprehensive undertaking to the Court to do so in accordance with the Homeowner Agreement entered into between the Body Corporate and MBIE. Correspondence between the Body Corporate and MBIE shortly before the resumed hearing of the application in August confirms MBIE's acceptance of that commitment.

[70] I accept that where remediation is being undertaken simultaneously with an application for approval of a scheme, where FAP contributions are involved and the proposed scheme includes commercial owners with no FAP entitlements, there can be opportunity for temporary "mismatches" as the two processes proceed in parallel. What is critical is the end result, which cannot logically be arrived at until the Court has determined the outcome of the scheme application. I am satisfied on the undertakings the Court has received that the end result is not one which gives rise to concerns about double recovery.

[71] Nevertheless, the commercial owners say that in assessing the fairness of the proposed scheme the Court should take into account the fact that the residential owners are receiving a 25 per cent contribution to their costs from the government.

Discussion

[72] I start, as *Tisch* requires the Court to do, with the principle that the scheme of the Act and Rules is in the context of any s 74 application to be departed from no more than is reasonably necessary.[21] For the reasons advanced by the Body Corporate that involves a consideration of the position under both the old and new Acts. The majority of the owners purchased under the old regime and their expectations as to the incidence of remedial costs as between owners (which underpins the reasoning in *Tisch*) will have been conditioned by that legislative framework.

[73] I accept the submission of the Body Corporate that under the old Act and the Rules the Body Corporate adopted, it was empowered (or in some cases obliged to) undertake the passive fire protection works and works to non-compliant risers and extraction ductwork, despite such works occurring substantially within unit property. That is because the Body Corporate was under a statutory obligation to keep and maintain the common property in good repair (s 15(1)(f) of the 1972 Act) augmented by its obligation under rr 1(a), 2(a) and 2(b) in respect of the repair of pipes, wires, cables or ducts passing through units or capable of being used with other units or the common property. As Harrison J said in *Young v Body Corporate 120066*:[22]

> The statutory intention is plain. A body corporate must have all powers reasonably necessary to protect the common property in a building including the power to repair or maintain parts of the external structure [in that case in unit ownership] the condition of which might expose the common property to consequential physical damage.

[74] In the present case all the work which Mr Manning identifies as relating to fire stopping, extract risers and extraction duct work was, in my view, included in the obligations imposed on the Body Corporate under the Rules. I also consider that the Body Corporate would have been empowered to undertake the passive fire protection works as appropriate protection for the common property given that any

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[21] I do not overlook the other requirements in *Tisch* as recorded in [29] above. The amendment adjusts in one respect only a scheme already approved and held by the Court to satisfy these other requirements. Insofar as the amendment is concerned I note that it has wide support but this has limited importance given that it is (with the exception of one commercial owner) demonstrably to the benefit of those supporting it.

[22] *Young v Body Corporate 120066*, above n 14, at [32].

deformation or collapse of the steel structure within unit property could result in the spread of fire to common property or affect its structural integrity.

[75] Under the new Act the position is even clearer because s 138 imposes an obligation on the Body Corporate to repair and maintain any building elements and infrastructure that relate to or serve more than one unit. There is no issue that each of the passive fire protection works and works to risers and duct work fall into this category.

[76] From this premise a presumption arises that payment for body corporate works should be made on a unit entitlement basis. This is recognised both in the decision of Asher J in *L v Trust Holdings Ltd*[23] and Wylie J in *Body Corporate 183930 v Chua*.[24] However, that presumption may be displaced in appropriate cases and its force is also tempered by the fact that under the new Act, s 138(4) provides for potential recovery by the Body Corporate from unit owners of the cost of repair to building elements and infrastructure located within principal units. So too s 126 (for which the equivalent provision under the old Act was s 33) provides for the recovery from the owner concerned of the costs for repair work benefitting any unit by a distinct and ascertainable amount and requires apportionment of costs not in that category to units deriving a "substantial benefit from the repair work". So there is a potential for reattribution of costs, albeit not one which is specifically engaged on the application currently before the Court. Nevertheless, for the reasons which follow and in particular the benefit which all owners equivalently receive from obtaining a code compliant building, it seems to me to be unlikely that the Body Corporate would wish to seek recovery against any one or more owners under ss 138(4) or 126(2). Certainly there is no current indication it intends to do so.

[77] The central question is therefore whether in the circumstances of the case the presumption should be considered rebutted. Allied to that is an inquiry into whether the logic of the existing scheme survives the unexpected events which occurred during the course of the weathertightness remediation.

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[23] *LV Trust Holdings Ltd v Body Corporate 114424* [2012] NZHC 3578, (2012) 14 NZCPR 344 at [65].

[24] *Body Corporate 183930 v Chua* [2015] NZHC 2122 at [70].

[78] In some obvious respects that logic does not in my view survive. At a fundamental level the existing scheme was premised on there being a fair quid pro quo between the costs the ground floor owners would assume for the repair of exterior walls in common property and the costs for which they were to be relieved in respect of common property on levels 1 – 3. There was a symmetry to the proposal which cannot be replicated in the context of what was subsequently discovered. That is because so much of the required repair work, albeit that it relates to building elements or infrastructure affecting more than one unit and/or the common property, has been undertaken within unit property.[25] So, as discussed in [49] above, application of the existing scheme results in only nominal contributions by the commercial owners to the level 1 – 3 repair costs despite the fact that there is common property within those levels and the passive fire protection works are to the structure which supports the entire building, including the roof on which all owners (the respondents included) ultimately rely for their weathertightness.

[79] Similarly, the symmetry of the original scheme does not capture the work subsequently undertaken in respect of the risers and extraction duct work from which the commercial owners demonstrably benefit. In respect of the risers they concede as such and I am satisfied on the evidence that they similarly derive obvious benefit from undefective extraction and air supply duct work.

[80] As to the primary inquiry, the commercial owners rely heavily on the fact that the provisions of Clause C of the Building Code (protection from fire) have as their principal focus the protection of occupants from fire by, inter alia, ensuring sufficient structural stability in the event of fire that their safe egress is not impeded. They say there is an obvious benefit to the level 1 – 3 residential owners in this respect which has no equivalent in their own case because of ready egress at ground floor level.

[81] I accept that the focus of Clause C is occupant safety and not preservation of the building as such, but I do not consider the point decisive. Both the Body Corporate and respondents' fire experts accept that the protective works to the steel framing reduce the risk of collapse of the building in the event of catastrophic fire.

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[25] One of the very significant costs involved has been removal and replacement of linings in the units to facilitate application of intumescent paint to the steel framing.

[82] It is unrealistic in my view for the commercial owners to claim that they do not benefit in this respect. As Mr Dixon records, the steel framing supports the entire building including the roof structure. The ground floor units form part of one integrated structure. A collapse of the building, even if Mr James considers that unlikely, is an outcome sufficiently catastrophic from the commercial owners' perspective that protections against it must necessarily be recognised as of benefit to them. Not only would their premises be lost, but also the livelihoods of those operating from them. By contrast a fire in the upper stories, but one against which structural collapse had been protected, may well allow the ongoing conduct of business from the ground floor.

[83] Even more significantly, the work to steel framing protects against distortion which, as Mr Dixon says, can create gaps in the fire rated partitions allowing fire and smoke to spread above, to the sides and, importantly, below the relevant unit. Mr Jones accepted this was the case although suggesting that the spread of fire to the ground floor would be "unusual".

[84] A further example of what I consider to be an unduly narrow focus by the commercial owners arises in the context of the fire stopping works, that is work designed to prevent the passage of fire and smoke around pipes, cables and ducts where they penetrate, for example, inter-tenancy and corridor walls. Mr Manning's evidence establishes that there was significant work in this respect in relation to the ground floor residential units. Again this was work contained within unit titles for which, under the existing scheme, the commercial owners would have no liability to contribute but they are direct beneficiaries of work designed to prevent the spread of fire and smoke from their adjoining ground floor occupants. And in the upstairs areas such fire stopping prevents the migration of fire into the risers on which, for example, the ground floor café and restaurant premises are dependent to ventilate their kitchens and thus to operate.[26]

[85] These examples demonstrate that fire protection systems within any building are, as Mr Lewis submits, "interlinked". A weakness at one point has the capacity

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[26] Mr James stated that the risers have their own fire protection features but conceded in cross-examination that a fire of sufficient intensity would eventually overwhelm them.

(even more so than in the case of a leaky building and particularly one such as the present where the evidence was upstairs leaks were prevented from reaching the ground floor) to have significant and immediate implications for other owners. No one owner or group of owners is in that sense an "island".

[86] However, there is an even more significant respect in which all owners in the Up Town development equivalently benefit from the additional works, and that is as a result of them achieving a code compliant building in respect of which a Code Compliance Certificate will issue.

[87] In this case what was uncovered during the course of the initial remedial works was a structure which, even at the time it was completed, was non-compliant with the provisions of the Building Code relating to protection from fire. Likewise it was non-compliant with the code current at the time such initial works were undertaken, with the result that s 112 of the Building Act 2004 required that the provisions of the current code with regard to the means of escape from fire be satisfied as nearly as practicable. In the result, as Mr Levie said, the initial round of remediation works became subject to site instruction from Auckland Council in terms of what deficiencies needed to be addressed to make the building fire compliant. If such had not been addressed, no Code Compliance Certificate would have issued for leaky building remediation, even if, which Mr Levie considered highly unlikely, Auckland Council had permitted the Body Corporate to continue without addressing the fire protection works.

[88] The Body Corporate was in that sense presented with no alternative but to develop, in association with its consultants, a scope of works to address the Council's requirements. The commercial owners do not suggest that such works in any way exceeded such requirements (so as to constitute betterment) and, in any event, the Body Corporate has authorised the works with the result that only the issue of apportionment now arises.

[89] A similar issue arose in the decision of *Body Corporate 207650 v Speck*,[27] albeit that this was a case involving interpretation of an existing scheme rather than

[27] *Body Corporate 207650 v Speck* [2017] NZHC 966.

an application to amend. Lang J held that the repair of additional defects discovered during the course of remedial works was properly considered within the scheme which had as its objective restoration of the building to a sufficient standard to achieve code compliance. He held:[28]

> This was no doubt highly important to all unit owners because without code compliance the value of their units would remain severely impaired.

[90] Without the fire protection works the commercial owners would have at best inherited weathertight units but without a Code Compliance Certificate. Inevitably the uncertainties of such status would have significantly detracted from the value of their properties. Basic inquiries within the Body Corporate's records would have revealed the building's fire compliance problems to any prospective purchasers.

[91] I do not therefore accept the commercial owners' argument that they derive no material benefit from the works. There is direct benefit in terms of the performance of the building and, even more significantly, the benefit associated with the issue of a Code Compliance Certificate for the remedial works. Again what the code compliance issue underscores is the interconnected nature of all of the units in the building in relation to fire protection mechanisms on each level.

[92] Nor do I accept the respondent's submission that the amended scheme should appropriately take into account the fact that the costs of the residential owners are being met as to 25 per cent by government contributions under the FAP.

[93] Such submission is in substance one that part of the government's assistance package for residential owners be redistributed to non-residential owners.

[94] The FAP is government policy of which the exclusive beneficiaries are residential owners. Numerous authorities establish the obvious proposition that it is not the role of the courts to second guess the policy decisions of Parliament and that the courts should be wary of supplementing their own.[29] It would in my view subvert Parliament's evident intention to assist residential owners in the costs

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[28] At [48].

[29] See *M v Police* HC Christchurch AP 294/92, 4 November 1992 at 12, *Proceedings Commissioner v A* [1999] 1 NZLR 188 (HC) at 200, *Refugee Council of New Zealand Inc v Attorney-General (No 2)* [2002] NZAR 769 (HC).

associated with the remediation of leaky buildings if such assistance, having been given with one hand, was effectively taken away by another.

[95] In some ways this is an unusual case. The proposed amended scheme in fact better aligns cost apportionment with the scheme of the Act (and its predecessor) and the presumption previously referred to than does the original scheme. In opposing the amendment, the commercial owners are the parties seeking what is, within the scheme of the Act, an exceptional outcome. That is the converse of what usually occurs in a s 74 context and, without detracting from the onus which the Body Corporate must be presumed to carry on a s 74(8) application, creates its own challenges for the commercial owners. If the new circumstances are such that the logic of the existing scheme no longer applies, then the role of the Court must be to look at the matter afresh, through the lens of *Tisch*, giving due emphasis to the fact that owners purchase knowing the regime to which they are subject and departing from the regime only to the extent which is necessary to achieve fairness.

[96] As will be apparent from the previous discussion I do not consider (other than in the limited respect I address below) that fairness dictates the commercial owners should be relieved of the presumption that payments for Body Corporate work should be on an ownership interest basis.

[97] If anything, in my view, a fairness analysis reinforces the approach adopted by the Body Corporate.

[98] The exception I identify is in respect of ownership interest entitlements which flow from the 24 uncovered carparks at the front of the building. As indicated, these "bulk up" the commercial owner's entitlements by 2.64 per cent. On total fire protection related remedial costs of approximately $6,500,000 the levies attributable to such additional percentage would be in the order of $170,000.

[99] The Body Corporate says it is appropriate that the commercial owners' obligations be benchmarked against their full unit entitlement. It says that not only does this better protect the overall integrity of the scheme under which the development was established, but also that purchasers of the commercial units would

have understood that their liabilities reflected their overall ownership interest. It also says that the carparks are accessory units to principal units which have their value restored as a function of the works and that it is artificial to distinguish between the two.

[100] I do not accept the Body Corporate's position on this issue. What is being funded are the repair costs of the building. A fair attribution of those costs is one in my view based on the respective interests within that building. It would be entirely serendipitous from the perspective of the residential owners if their costs in relation to repair of the building were effectively subsidised by an element of ownership interest which was unrelated in that sense. The jurisdiction is one where a departure from a formulaic approach will be warranted when necessary to avoid unfairness. Whatever reluctance judges may have about being the ultimate arbiters of fairness, particularly when there is no or little guiding principle, that is an inescapable responsibility on an application such as this. In my view a fair approach requires that the ownership interest associated with the 24 outside carparks be deducted from the commercial owners' ownership interest and that the resultant shortfall (2.64 per cent) be met pro rata by the commercial owners (i.e. as to 12.76 per cent) and the residential owners (as to 84.6 per cent).

[101] I do not consider the same approach appropriate in relation to the carparks which are either semi-covered or freestanding on the ground floor of the building (Accessory Units 88-99). Each benefit from the structural integrity of the building, which is itself enhanced by the fire protection measures. They are a part of the building to which the repairs are directed.

[102] It follows from what I have said that the proposed amended scheme will need further refinement before resubmission for approval. In similar circumstances the approach adopted in *Body Corporate 183930 v Chua* was to issue judgment on an interim basis and invite a new scheme which is consistent with the judgment and which all parties support. If that is possible the matter can be dealt with on a consent basis. If a further hearing is required it can be convened as appropriate.

[103] In the interim I reserve all issues as to costs. I am advised that the incidence of costs may be affected by various offers which were made by the respondents to settle the litigation and to which I am not currently privy.

[104] In accordance with the undertakings of the Body Corporate I direct that a copy of the judgment be provided to MBIE.

Muir J