IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA639/2017
[2018] NZCA 396

BETWEEN	HAI MIN GU, JIAN HUA CHEN, QAYIUM ABDUL AND LUBNA ABDUL Appellants
AND	BODY CORPORATE 211747 Respondent

Hearing:	18 June 2018
Court:	Winkelmann, Simon France and Wylie JJ
Counsel:	J Heatlie and J M Wood for Appellants G B Lewis and B J Mills for Respondent
Judgment:	1 October 2018 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed in part. The respondent must prepare a further variation to take into account the amounts received by residential owners under the financial assistance package put in place by the Weathertight Homes Resolution Services Act 2006, and refer that varied scheme to the High Court for settlement under s 74(8) of the Unit Titles Act 2010.

B In all other respects, the appeal is dismissed.

C The respondent must pay the appellants one set of costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] The appellants own four of five commercial units on the ground floor of the Uptown apartment complex, situated at 83–91 New North Road, Auckland. The respondent is the body corporate for the complex.

[2] The complex comprises a four-storey building. There are 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 one to three, there are 18 residential units. Car parking is located in the basement within the building envelope, and also adjoining New North Road but outside the building envelope.

[3] The complex was completed in about 2002. It transpired that it had weathertightness issues that required substantial repair work. In October 2011, the High Court settled a scheme under s 74 of the Unit Titles Act 2010 (the 2010 Act) dealing with the reinstatement of the building to address these issues. In the course of undertaking the weathertightness work, additional defects became apparent. Additional work had to be done, significantly increasing the costs of remediating the building complex. The body corporate sought to vary the settled scheme pursuant to s 74(8) of the 2010 Act to apportion the additional costs between unit owners in accordance with their ownership interests.

[4] In an interim judgment dated 8 September 2017,[1] and in a final judgment dated 11 October 2017,[2] Muir J varied the earlier scheme largely in accordance with the body corporate's proposals.

[5] The appellants appeal these decisions.

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1 *Body Corporate 211747 v Gu* [2017] NZHC 2191, (2017) 18 NZCPR 814 [Interim judgment].
2 *Body Corporate 211747 v Gu* [2017] NZHC 2488 [Final judgment].

Background

[6] The cost of remediating the weathertightness issues was estimated at approximately $5,000,000 and in October 2011, prior to work being commenced, the body corporate obtained an order from the High Court settling a scheme under s 74 of the 2010 Act. That scheme provided for the allocation of costs for the remediation of the weathertightness issues as follows:

(a) all owners were to pay for the costs of repairs to the basement and roof in accordance with ownership (utility) interest;[3]

(b) the owners of the ground floor units (both residential and commercial) were to pay for repairs to their units and the exterior of their units (substantial parts of which were common property);

(c) other repairs required on the ground floor — for example, repairs to parking areas, lift access areas and fire egress points — were to be paid for by all owners according to ownership interest; and

(d) the owners of the residential units on levels one to three were to pay for repairs on those floors according to ownership interest (notwithstanding that parts of the exterior on those levels were common property).

[7] Physical works commenced in January 2015. In the course of undertaking the works, the contractors identified significant additional defects. They were described by Mr Manning of Maynard Marks Ltd, who were acting as consultants to the body corporate, as follows:

Passive fire protection

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3 Under the Unit Titles Act 1972, each owner had what was described as a unit entitlement. Under the Unit Titles Act 2010, the proportionate liabilities, rights and obligations of unit owners are determined by each unit's "utility interest". By s 222 of the 2010 Act, unit entitlements assigned under the 1972 Act are deemed to be an "ownership interest" assigned under s 38 of the 2010 Act. See *Body Corporate 114424 v LV Trust Holdings Ltd* [2014] NZCA 21, (2014) 7 NZ ConvC 96-008 at [5].

(a) 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.

(b) The inter-tenancy walls do not have adequate fire protection in that:

(i) The steel framing does not have an intumescent coating or fire rated 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.

(c) 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

(d) 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 cafe 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

(e) The ventilation extraction and air supply ductwork is defective in that:

(i) In apartments and common areas at levels 1 to 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.

[8] Further and substantial remediation was required to address these additional defects. The anticipated cost was approximately $6,630,000.

[9] The body corporate proposed a variation to the scheme which had earlier been settled by the High Court. The variation sought to retain the cost allocations set out in the earlier scheme, but with exceptions for expenditure on "structure and fire" and "extract risers". It proposed that the cost of the works required to remedy these items should be apportioned amongst all owners in proportion to their respective ownership interests. The costs associated with additional work resulting from grease contamination to the interior surfaces of the risers were to be paid for by the owner(s) of the unit(s) responsible for that contamination.

[10] Under the proposed variation, the commercial unit owners would be responsible for, in total, 15.4 per cent of the additional costs.[4] This equated to, on average, $257,339 for each commercial unit.[5] If the additional costs were apportioned in accordance with the settled scheme, the commercial unit owners would be required to pay, on average, $112,833 for each unit.

[11] The proposed variation was carried at an extraordinary general meeting of the body corporate on 7 March 2016. The only opposition was from the first two named appellants, Mr Gu and Ms Chen, who own commercial units two and three.

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4 The utility interests of the commercial unit owners are as follows: unit one — 2.82 per cent; units two and three — 7.25 per cent; units four and five — 5.33 per cent. The utility interests of the residential principal units range from 1.11 per cent to 1.57 per cent.

5 See also footnote 25 below.

[12] On 5 April 2016, the body corporate made an application to the High Court under s 74(8) of the 2010 Act seeking to vary the settled scheme. Mr Gu and Ms Chen opposed the application. They were joined by the owners of commercial units four and five — the other two appellants, Mr Abdul and Mrs Abdul.

[13] Units two and three are used as a restaurant. Unit four is a coffee shop and unit five is used as a mini-mart. The use of the other commercial unit — unit one — was not disclosed in the papers filed.

[14] The additional works have been completed and paid for.

The High Court decisions

[15] Before Muir J, the appellants argued that the additional expenditure required to attend to the fire protection works, the non-compliant extract risers and the extraction/air supply duct work, should be apportioned in accordance with the settled scheme.[6] This would have seen the commercial unit owners responsible for the additional works within their own units, but not for the additional works required on levels one to three. The appellants did concede that they should contribute to the costs of remediating the extract risers based on ownership interest, given that they benefit from that particular building element, along with the owners of the residential units.[7] Further, there was no challenge to the variation insofar as it provided that additional costs resulting from grease contamination should be paid by the unit owner(s) responsible.

[16] Muir J began his analysis by referring to the principle outlined by this Court in *Tisch v Body Corporate No 318596*,[8] namely that "the scheme of the [2010] Act and [Body Corporate] Rules is in the context of any s 74 application to be departed from no more than is reasonably necessary".[9] He noted that the majority of owners purchased their units under the Unit Titles Act 1972 (the 1972 Act), and that "their

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6 Interim judgment, above n 1, at [18].
7 At [18].
8 *Tisch v Body Corporate No 318596* [2011] NZCA 420, [2011] 3 NZLR 679.
9 Interim judgment, above n 1, at [72].

expectations as to the incidence of remedial costs as between owners … will have been conditioned by that legislative framework".[10]

[17] The Judge accepted that the body corporate was responsible for the additional works under the body corporate rules.[11] He observed that s 138 of the 2010 Act made this clear.[12] He then stated as follows:

> [76] From this premise a presumption arises that payment for body corporate works should be made on a unit entitlement basis … 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 …
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> (footnotes omitted)

The Judge identified the central question as being "… whether in the circumstances of the case the presumption should be considered rebutted".[13] He commented that "… an inquiry into whether the logic of the existing scheme survives the unexpected events which occurred during the course of the weathertightness remediation" is tied to that question.[14]

[18] Muir J examined the competing arguments and concluded that the presumption he had identified was not displaced.[15] He found that the logic behind the original scheme did not survive the discovery of the additional defects.[16] He considered that application of the existing scheme would result in "only nominal contributions" by the owners of the commercial units to the levels one to three repair costs:[17]

> … 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

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10 At [72].
11 At [73]–[74].
12 At [75].
13 At [77].
14 At [77].
15 At [96].
16 At [78].
17 At [78].

> building, including the roof on which all owners ... ultimately rely for their weathertightness.

[19] The appellants had submitted that the provisions of cl C of the Building Code,[18] dealing with protection from fire, principally focus on the protection of occupants by ensuring sufficient structural stability in the event of fire such that the safe egress is not impeded.[19] They had argued that work done to address cl C concerns did not benefit them because ready egress is available for the occupants of their units at ground floor level.

[20] Muir J disagreed. He considered that the integrity of the building in the event of a catastrophe is the overarching consideration. He said:

> [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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> [82] It is unrealistic in my view for the commercial owners to claim that they do not benefit in this respect. ... 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. ...

[21] He rejected the appellants' argument that they derive no material benefit from the additional works. On the contrary, he found:[20]

> 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.

[22] In the Judge's view, the varied scheme better aligned cost apportionment with the scheme of both the 1972 and the 2010 Acts. He commented:[21]

> 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

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18 Building Regulations 1992, sch 1.
19 Interim judgment. above n 1, at [80].
20 At [91].
21 At [95].

> 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.

He concluded that fairness did not require the owners of the commercial units to be relieved of the presumption that payments for body corporate work should be on an ownership interest basis.[22] On the contrary, he found that a fairness analysis reinforced the body corporate's approach.[23]

[23] The Judge did, however, make an exception in respect of ownership interest entitlements which attach to the 24 uncovered carparks on the road frontage of the building complex but outside the building envelope.[24] He called for a further amended scheme to reflect this exception,[25] and it was the scheme so amended that was ultimately approved.[26]

The respective cases

The appellants

[24] The appellants submitted that the variation approved by Muir J departs from the 1972 Act, the 2010 Act and from the body corporate's rules, and that it does not do justice between all owners. They said that the variation results in the owners of the commercial units paying substantially more than the owners of the residential units for repairs to inadequate fire protection work which is mostly required within the residential units and was for the benefit of the owners of those units. They argued that this is manifestly unfair. Specifically, the appellants submitted that Muir J erred:

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22 At [96].
23 At [97].
24 At [98]–[101]. All of these carparks are accessory units attaching to the principal commercial units one to five.
25 At [102]. The effect of this amendment was to reduce the amount required to be paid by owners of the commercial units. Counsel for the appellants advised us that this reduced the sum required to be paid by each owner by approximately $35,000.
26 Final judgment, above n 2.

(a) by applying the presumption that costs in a body corporate are shared by ownership or utility interests when the body corporate does the work;

(b) as a consequence, by placing a burden on the appellants to prove that ownership or utility interest should be departed from; and

(c) by finding that the appellants derive a benefit from work done to other owner's private property because it either results in a code-compliant building or provides them with protection as contemplated by the Building Code.

The respondent

[25] The body corporate submitted that Muir J correctly decided that the scheme of the 1972 Act, the 2010 Act and the body corporate rules made the body corporate responsible for undertaking the additional works required, and that owners should be levied for this work in accordance with ownership interest. The body corporate argued that if the existing scheme were to apply to the additional works required, the vast majority of the costs would have to be borne by the level one to three residential owners. It submitted that the approach taken in the varied scheme is to require that the additional works are paid for on the basis of benefit, and that it is artificial to say that the additional works benefit any one occupant more than another. It said that the fair and appropriate way to apportion the cost of the additional works is by ownership interest.

Analysis

The statutory scheme

[26] First, it is necessary to briefly outline the statutory regime for dealing with applications of this kind.

[27] The application was brought under s 74 of the 2010 Act. Relevantly, it provides:

> **74 Scheme following destruction or damage**
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> (1) This section applies if any building or other improvement comprised in any unit or on the base land is damaged or destroyed, but the unit plan is not cancelled.
>
> (2) The High Court may, by order, settle a scheme on the application of—
>
> (a) the body corporate; or
>
> ...
>
> (3) A scheme under subsection (2) may include provisions—
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> (a) for the reinstatement in whole or in part of the building or other improvement; or
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> ...
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> ...
>
> (6) On any application to the High Court under subsection (2), the following persons have the right to appear and be heard:
>
> (a) any person having or claiming to have any estate or interest in any unit or in the whole or part of the base land; or
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> ...
>
> (7) In the exercise of its powers under subsections (2) and (3), the High Court may make any orders that it considers expedient or necessary for giving effect to the scheme, including orders—
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> ...
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> (b) directing payment of money by or to the body corporate or by or to any person; or
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> ...
>
> (d) imposing any terms and conditions that it thinks fit.
>
> (8) The High Court may cancel, vary, modify, or discharge any order made by it under this section.
>
> (9) The High Court may make any order for payment of costs that it thinks fit.

[28] The predecessor to s 74 was s 48 of the 1972 Act, and the leading authority dealing with s 48 is the decision of this Court in *Tisch v Body Corporate No 318596*.[27] The Court there interpreted s 48 in accordance with s 5 of the Interpretation Act 1999. It rejected a submission that the section has a "plain and unconstrained intention" which "affords a discretion that is to be — or can be — exercised without regard to the other provisions of the Act, in particular ss 15 and 16".[28] The Court agreed that the 1972 Act gave ownership of and responsibility for common property to the body corporate, and ownership of and responsibility for units to unit owners, and it accepted that s 48 is an exception to this general rule. It then stated:

> [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.

[29] The Court concluded that the 1972 Act imposed a three-step process on a court considering an application to settle a scheme under s 48:[29]

(a) the court must be satisfied that the building has been damaged or destroyed;

(b) if so satisfied, the court must decide whether to settle a scheme; and

(c) if the court decides a scheme is appropriate, it must then decide what the terms of the scheme should be.

[30] As to the third step, the Court stated that 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".[30] The Court, without precluding other considerations, identified five guiding principles which had emerged from case law:

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27 *Tisch v Body Corporate No 318596*, above n 8.
28 At [28].
29 At [35].
30 At [44].

> [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. This will not invariably be so, because a majority of owners may support a scheme that is unfair to the minority. ...
>
> [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. ...
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> [48] Fourthly, work should normally be done to the same standard and at the same time. ...
>
> [49] Fifthly, ... 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. An exception to this fifth guiding principle is a scheme unanimously agreed to by all unit owners.

[31] It has either been held or assumed that the *Tisch* principles continue to apply to applications made under s 74 of the 2010 Act, and the parties proceeded on this basis before us.[31] Neither sought to argue that *Tisch* did not apply — rather they were at odds as to its application.

[32] At the time of Muir J's interim judgment, there was only one decided case which discussed applications to vary settled schemes.[32] That was the decision in *Body Corporate 172108 v Manchester Securities Ltd*.[33] There, Fogarty J held that on a variation application, the Court should follow *Tisch*.[34] The Judge went on to observe that coupled with this is an inquiry into whether the logic of the existing scheme has been rendered inapplicable due to events that were unforeseen at the time the original scheme was settled.[35]

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31 See for example: *Body Corporate 114424 v LV Trust Holdings Ltd*, above n 3, at [27]; *Body Corporate 183930 v Chua* [2015] NZHC 2122 at [64]; and *Body Corporate 199380 v Cook* [2018] NZHC 1244 at [100].

32 Interim judgment, above n 1, at [20].

33 *Body Corporate 172108 v Manchester Securities Ltd* [2017] NZHC 329.

34 At [66].

35 At [67].

[33] Adopting this approach, Muir J in his interim judgment stated that "the principles established in *Tisch* continue to underpin the relevant analysis".[36]

[34] In the time that elapsed between Muir J's interim judgment and the hearing of this appeal, this Court heard an appeal against Fogarty J's judgment.[37] The Court dismissed the appeal, endorsing the *Tisch* principles and Fogarty J's application of them in the variation context.[38]

[35] Although s 74 of the 2010 Act applies, we consider the position under each Act and then the body corporate's rules. Of the 65 unit owners in the Uptown apartment complex, 62 bought at the time the 1972 Act was in force. The remaining three bought after the introduction of the 2010 Act. The rights of those owners who bought at the time when the 1972 Act was in force must be assessed against that Act.

Is there a presumption?

[36] As noted at [17] above, Muir J found that the body corporate was responsible for the additional works. He went on to find that there was rebuttable presumption that payment for body corporate works should be on a unit-entitlement basis.

[37] The appellants argued that neither the 1972 Act, nor the 2010 Act, nor the body corporate rules, support this presumption. They accepted that the body corporate can levy owners in advance for work that it is empowered or obliged to undertake only in accordance with owners' respective ownership or utility interests, but they went on to argue that the ultimate allocation of costs falls to be determined in accordance with those parts of the 1972 and 2010 Acts which deal with contributions. They submitted that there is no presumed or inevitable overlap between the responsibility of the body corporate to do the work, and who is ultimately required to pay for it.

[38] The body corporate argued that bodies corporate generally are required to levy in accordance with ownership or utility interest in the first instance, and that after any repair works are complete, they have the power to reallocate the costs of repair in the

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36 Interim judgment, above n 1, at [27].
37 *Manchester Securities Ltd v Body Corporate 172108* [2017] NZCA 527, (20170 19 NZCPR 65.
38 At [54]–[55].

limited circumstances set out in both the 1972 and 2010 Acts. It said that the contribution or cost reapportionment provisions are designed to achieve fairness after the work has been done in the circumstances recognised in those Acts, and that they are not relevant to the starting point identified in *Tisch*.

The 1972 Act

[39] The duties of a body corporate were set out in s 15 of the 1972 Act. Inter alia, a body corporate was required to carry out any duties imposed on it by its rules, keep all buildings and other improvements insured (including against fire), comply with any notice or order served on it,[39] and keep the common property in a good state of repair.[40] The body corporate was required to establish and maintain a fund for administrative expenses and for the payment of outgoings, including repairs, and the discharge of any other obligations on the body corporate.[41] It was required to determine from time to time the amounts to be raised, and "[r]aise amounts so determined by levying contributions on the proprietors in proportion to the unit entitlement of their respective units".[42]

[40] Section 37(1) of the 1972 Act provided that the control, management, administration, use and enjoyment of units and common property, and the activities of the body corporate, were to be regulated by the body corporate's rules. Schedule 2 set out default rules applicable to each body corporate, but provided that they could be amended by unanimous resolution.

[41] In 2002, the body corporate amended the default rules. Relevantly, the amended rules largely followed the default rules. Rule 2(b) provided that the body corporate was responsible for repairing pipes, wires, cables, ducts "and all other apparatus and equipment of whatsoever kind and wheresoever situate[d]...". Unit owners were required to permit the body corporate to access their units for this purpose.[43]

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39 This would include a notice to rectify a fire hazard issued under s 64 of the Building Act 1991 (now repealed) or ss 121 and 124 of the Building Act 2004.
40 Section 15(1)(a)–(b) and (f)–(g).
41 Section 15(2)(a).
42 Section 15(2)(b) and (c).
43 Rule 1(a).

[42] The appellants pointed to r 1(e). It provided that a unit proprietor was to repair and maintain his or her unit.

[43] We do not consider that the obligation imposed by r 1(e) extended to the additional works that were required to remedy the defects identified by Mr Manning.[44] Some of the additional work required — the non-compliant extract risers and the extractor/air supply duct work — falls squarely within r 2(b) and thus on the body corporate. Rule 2(b) did not expressly extend to repairs to structural steel but, in our view, it covered this work. Structural steel falls within the words "other apparatus and equipment of whatsoever kind" which was reasonably necessary for the enjoyment of the rights, including the right of support, which were recognised in s 11(1) of the 1972 Act. In effect, r 1(e) yielded to r 2(b).

[44] We agree with Mr Lewis, counsel for the body corporate, that it can hardly have been intended that each owner was responsible for repairing only that section of, for example a pipe or structural steel, that passed through his or her unit. Any other interpretation could lead to an absurd and unworkable outcome. Indeed, this Court has accepted that the default rules contained in the 1972 Act envisaged that a body corporate might have to repair unit property in some circumstances, including when maintaining and repairing pipes, wires, cables, ducts and other apparatus in accordance with the default r 2(b).[45] It stated as follows:[46]

> Given that pipes, conduits, ducts and so on will often be situated within ceiling cavities, wall cavities or other enclosed spaces, it is implicit in these provisions that, as an incident of performing its responsibilities, a body corporate may be obliged to repair unit property. In principle, we see no reason why this should not be so in other situations as well.

The Court found that the body corporate in that case was entitled to assume responsibility to repair a roof under the default r 2(a), notwithstanding that only 20 per cent of the roof was common property because the duty to repair could fairly be seen as incidental to the duty to maintain and repair common property.[47]

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44 See discussion at [7] above.

45 *Berachan Investments Ltd v Body Corporate 164205* [2012] NZCA 256, [2012] 3 NZLR 72 at [44].

46 At [44] (footnotes omitted).

47 At [46].

[45] We also agree with Mr Lewis that a purchaser considering the 2002 body corporate rules at the time of purchase is likely to have concluded that the body corporate was responsible for the additional works required to remedy the defects described by Mr Manning. A purchaser is likely to have assumed that the repair of structural building elements, risers and ducts were a body corporate responsibility, not only because of the rules but also because such items pass through both individual units and common property, and because deformation or collapse of such items within unit property would likely affect common property.

[46] We agree with Muir J that the additional works described by Mr Manning were a body corporate responsibility under the body corporate's original rules. It follows that under the 1972 Act, the body corporate could levy owners in respect of the cost of those works and, pursuant to s 15(2)(c), it could only do so on a unit entitlement basis.

[47] The appellants referred us to s 33 of the 1972 Act. It provided as follows:

> **33 Recovery of money expended for repairs and other work**
>
> Where the body corporate does any repair, work, or act which it is required or authorised by or under this Act ... but the repair, work, or act is substantially for the benefit of one unit only, or is substantially for the benefit of some of the units only or benefits one or more of the units substantially more than it benefits the others or other of them, any expense incurred by it in doing the repair, work, or act shall be recoverable by it as a debt in any Court of competent jurisdiction in accordance with the following provisions—
>
> (a) So far as the repair, work, or act benefits any unit by a distinct and ascertainable amount, the proprietor at the time when the expense was incurred and ... the proprietor at the time when the action is instituted shall be jointly and severally liable for the debt; or
>
> (b) So far as the amount of the debt is not met in accordance with the provisions of paragraph (a), it shall be apportioned among the units that derive a substantial benefit from the repair, work, or act rateably according to the unit entitlements of those units, and in the case of each such unit the proprietor at the time when the expense was incurred and ... the proprietor at the time when the action is instituted shall be jointly and severally liable for the amount apportioned to that unit:
>
> Provided that, if the Court considers that it would be inequitable to apportion the amount of the debt in proportion

to the unit entitlements of the last-mentioned units, it may apportion that amount in relation to those units in such shares as it thinks fit, having regard to the relative benefits to those units.

[48] The effect of this section is to distinguish between levying for authorised works and the recovery of monies paid in undertaking those works. Where the authorised work is for the benefit of, or substantially benefits, one or more units then the cost of that work is recoverable by the body corporate as a debt in any court of competent jurisdiction.[48]

[49] We accept that any purchaser of a unit considering his or her potential responsibilities must be assumed to know of this provision, and can be taken to have appreciated that the body corporate could seek to recover money expended for repairs and other works undertaken by it if the repair or work was substantially for the owner's benefit, or substantially for the benefit of that owner and other unit owners.

The 2010 Act

[50] The position is substantially the same under the 2010 Act.

[51] Section 138(1) of that Act provides as follows:

> **138 Body corporate duties of repair and maintenance**
>
> (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 1 unit.
>
> ...

[48] See also Elizabeth Toomey (ed) *New Zealand Land Law* (3rd ed, Thomson Reuters, Wellington, 2017) at [12.6.04]; and Thomas Gibbons *Unit Titles Law and Practice* (2nd ed, Lexis Nexis, Wellington, 2015) at [5.3.2].

All of the additional works required to remedy the defects identified by Mr Manning fall squarely within the provisions of s 138(1)(a) and/or (d). The work is a body corporate responsibility and the body corporate can levy owners on an ownership interest (unit entitlement) basis in respect of the work.[49]

[52] The body corporate adopted new rules under the 2010 Act. They were lodged in September 2012. They do not, however, address responsibility for the repair of building elements. They did not need to do so given s 138(1).

[53] Costs incurred by the body corporate can be recovered by it from unit owners in some situations. Section 138(4) was introduced under the 2010 Act and provides as follows:

> (4) 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.

[54] Section 126 of the Act largely mirrors s 33 of the 1972 Act in that it allows the body corporate to recover the cost of repair work where the work is substantially for the benefit of one or more of the units. Both of these sections permit the body corporate to recover in whole or in part costs it has met.[50]

[55] Muir J concluded that because the additional works are a body corporate responsibility, it follows that there is a rebuttable presumption that payment for those works is on an ownership interest basis. He cited two judgments of the High Court, *LV Trust Holdings Ltd v Body Corporate 114424* and *Body Corporate 183930 v Chua*.[51] In both, it was observed that there is a presumption that payments for body corporate work should be on a unit entitlement (ownership interest) basis.

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49 Unit Titles Act 2010, ss 115–119, 121(2).

50 See *Body Corporate 199380 v Cook*, above n 31, at [25] and [96]–[99].

51 Interim judgment, above n 1, at [76]; citing *LV Trust Holdings Ltd v Body Corporate 114424* [2012] NZHC 3578 at [65]; aff'd in *Body Corporate 114424 v LV Trust Holdings Ltd*, above n 3; and *Body Corporate 183930 v Chua*, above n 31, at [70].

[56] Bodies corporate have a host of responsibilities. The costs of carrying out those responsibilities are levied to members and levies can only be struck on an ownership interest basis. In the present case, what is in issue is liability for costs incurred for work done within individual units and, on the appellants' case, for the benefit of those units. The presumption appropriate in this case is that levies for body corporate work are required to be struck on a unit entitlement (ownership interest) or utility interest basis, that the body corporate pays for those works it is responsible for using the monies so raised, and that the body corporate can, in appropriate cases where the works benefit any unit by a distinct and ascertainable amount, recover from the relevant unit owner(s) the costs of repairs undertaken on or to that unit either in whole or in part.

[57] Work that clearly benefits a unit can be for the unit holder's account and this is inconsistent with the presumption applied by Muir J that payment for body corporate work should be made on a unit entitlement basis. For these reasons, we consider that the presumption cited by Muir J was wrong.

Burden

[58] We also consider that Muir J wrongly placed the burden on the appellants to prove that ownership or utility interest should be departed from. Although he did state that the body corporate carried the onus on a s 74(8) application,[52] he approached the matter on the basis that the central question was whether, in the circumstances of the case, the presumption he identified should be considered rebuttable.[53] Because he adopted the wrong presumption, he approached the matter on the wrong footing. We do not however consider that his analysis of the fairness of the proposed cost allocation was in error.

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52 At [95].
53 At [77].

Fairness / benefit

[59] Both counsel sought to address the issue of whether there was a direct and equal benefit to the commercial owners from the additional work required to be undertaken by the body corporate. Muir J also referred to benefit in his decision.[54]

[60] Adopting the *Tisch* analysis, the issue was not one of assessing relative benefits. Indeed, such analysis was criticised in *Tisch*.[55] We do not, however, consider that Muir J erred in this regard. Rather, he was using the word "benefit" as a proxy in seeking to determine what was fair in this case where the choice was between the settled scheme and the variation to the settled scheme proposed by the body corporate, and where neither was totally consistent with either the 1972 Act or the 2010 Act.[56]

[61] We acknowledge that there are competing arguments in this regard. The existing approved scheme did not expressly contemplate the additional work required to be undertaken. It seems likely that the majority of the costs would have fallen on the owners of residential units on levels one to three — see above at [6(d)]. It was common ground that 90 per cent of the additional works required was to levels one to three (and that 92 per cent of that 90 per cent was within unit property and eight per cent within common property). Only 10 per cent of the work required was on the ground floor (with 64 per cent of that 10 per cent within unit property and 36 per cent within common property).

[62] As we have noted, the scheme of both the 1972 Act and the 2010 Act recognises that unit holders may be required to pay for works done on their units by the body corporate, but only if the works benefit a unit or units by a distinct and ascertainable amount. In the present case, we consider, for the reasons that follow, that the additional works required to be undertaken by the body corporate were for the benefit of the Uptown apartment complex as a whole and that the works did not confer a distinct benefit capable of ascertainment on any individual unit or units.

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54 At [79]–[91].
55 *Tisch v Body Corporate No 318596*, above n 8, at [64].
56 *Body Corporate 114424 v LV Trust Holdings Ltd*, above n 3, at [38].

[63] The appellants referred to s 112 of the Building Act 2004. It deals with the grant of building consent where there are alterations to an existing building. The section is concerned primarily with ensuring that the building complies, as nearly as is reasonably practicable, with the provisions of the Building Code that relate to the means of escape from fire.[57] The appellants also point to the provisions of cl C of the Building Code.[58] Those provisions have as one of their objectives safeguarding people from an unacceptable risk of injury from fire.[59] Clause C4.2 requires that buildings be provided with means of escape to ensure that there is a low probability of occupants being unreasonably delayed or impeded in the event of a fire. The appellants argued that there is an obvious benefit in this regard to the level one to three residential owners, but that there is no similar benefit to the ground-floor commercial owners from the additional works because there is already ready egress for occupants of the commercial units at ground floor level in the event of fire.

[64] We do not accept this argument for the following reasons:

(a) The objectives for the Building Code address not only the provision of safe egress routes, but also the protection of other property from damage caused by fire, and the facilitation of firefighting and rescue operations. In our view, the appellants' arguments focus unduly on the provision of safe egress.

(b) There was evidence before Muir J, given by the body corporate's fire engineer, Mr Dixon, that the application of an intumescent coating to, or the location of fire-resistant panels around, the structural steel framing was necessary to maintain the structural integrity of the framing in the event of a fire. Mr Dixon was not challenged on this evidence. Mr James, the expert appearing for the appellants, accepted at the hearing that the protection of other property referred to in cl C.1 of the Building Code extends to the other apartments or unit titles in the Uptown complex.

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57 Building Act 2004, s 112(1)(a)(i).
58 Building Regulations, sch 1.
59 Clause C1(a).

(c) Mr Dixon explained in evidence how the additional works required on the structural steel framing on the upper levels would protect against both catastrophic and local structural failure, and how this would provide a benefit to the units below. Mr James, in his initial brief, stated that fire protection works on levels one to three did not provide a benefit to the ground floor units but accepted in his reply evidence that a fire affecting unprotected steel framing could lead to collapse of the building, albeit that such collapse was very unlikely. He acknowledged that the application of intumescent paint to the structural steel framing would reduce the risk of collapse of the building in the event of a catastrophic fire. He also accepted that if the structural steel distorts, a fire could spread to the ground floor. Mr James conceded that steps taken to prevent structural failure were a benefit to ground floor owners.

(d) The evidence was also to the effect that the additional works would protect against distortion of the steel framing, which would help prevent gaps in the fire-rated partitions, thus minimising the risk of fire and smoke spreading to units above, to the side and, importantly, below the unit where any fire starts.

(e) There is logic in the body corporate's argument that it undertook the additional works in accordance with Council requirements, and that it had to do so in order to obtain a code compliance certificate for the whole building, for the benefit of all unit owners, whether commercial or residential.

[65] We agree with Muir J that the additional works required to address the defects identified by Mr Manning are interlinked, and that a weakness at any one point has the capacity to have significant and immediate implications for other owners. As Muir J observed: "[n]o one owner or group of owners is in that sense an 'island'".[60]

[66] We also agree with Muir J that the ground floor units form part of the integrated structure of the building and that a collapse of the building, even if unlikely, is an

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60 Interim judgment, about n 1, at [85].

outcome sufficiently catastrophic from the perspective of all owners that protection against it should be recognised as being a benefit to all.[61] In our judgement, the additional works required in this case are similar to the roof discussed by this Court in *Berachan Investments Ltd v Body Corporate 164205*.[62] Functionally, the structural steel within the building is part of the building fabric. It is necessary for the structural integrity of the building. It had to be repaired as a whole.

[67] The appellants criticised Muir J's finding that obtaining a code compliance certificate is a benefit to all owners.[63] The appellants argued that obtaining a code compliant building is not the type of benefit the courts have previously taken into account when assessing the allocation of costs as between owners.

[68] In interpreting an existing scheme, the High Court has observed that it is "highly important to all unit owners [to obtain a code compliance certificate] because without code compliance the value of their units would remain severely impaired".[64]

[69] We agree with this view. Under the Building Act, an owner must apply to the relevant building consent authority for a code compliance certificate after all building work to be carried out under a building consent granted to that owner is completed.[65]

[70] Here the body corporate sought a building permit to do all of the remediation works required on the Uptown apartment complex. When the work was completed, it had to apply for a code compliance certificate. When it was obtained, all owners obtained the benefit of having a code compliant building. Without a code compliance certificate, it would have been difficult to insure or sell a unit. There might well be difficulties in running a commercial business from a unit within a non-compliant building. In our view, in determining what is fair for the purposes of a s 74 scheme or a variation to a settled scheme under s 74(8), it is appropriate to take into account the

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61 At [82].
62 *Berachan Investments Ltd v Body Corporate 164205*, above n 45.
63 Interim judgment, above n 1, at [86].
64 *Body Corporate 207650 v Speck* [2017] NZHC 966, (2017) 18 NZCPR 742 at [48].
65 Building Act 2004, s 92(1).

need to obtain a code compliance certificate for the works carried out under the building consent granted. It is not an issue that can be ignored.

[71] We can see no good reason why the costs of the additional works — incurred for the benefit of all owners — should not be apportioned between the owners by reference to their ownership interests. The additional works were not for the benefit of individual unit owners. Apportioning the cost between the owners by reference to the ownership interest of each is consistent with both the 1972 and 2010 Acts. It is also fair. The works benefit all, and all should contribute to them.

[72] The scheme settled in 2011 did not contemplate the additional works. They were not anticipated at the time. The cost of the additional works was significant, and the symmetry which the commercial owners and the other owners on the ground floor achieved by agreeing to pay for most ground-floor works, as against the owners of the residential units on levels one to three who agreed to pay for all the works on those floors, cannot be replicated in the context of the additional works that are required. This is because so much of the additional work was required to be undertaken within the residential units on floors one to three.

[73] It was suggested before us that the costs of the additional works could simply be apportioned pro rata between all unit owners. We reject this suggestion. It is not in accordance with either the 1972 Act or the 2010 Act. It also ignores differences in unit size.

Conclusion

[74] In summary, we are not persuaded that the approach adopted by Muir J of apportioning the costs of the additional works on the basis of ownership (utility) interest was wrong.

[75] We accept that, as a result, there is a heavy burden falling on the commercial owners. Muir J recognised this and mitigated that burden by excluding from the calculation of each commercial unit's ownership interest the carparks on the road frontage falling outside the building envelope. The body corporate has accepted this.

[76] Muir J also noted that the costs of residential owners would be met as to 25 per cent by a contribution from the Government under the financial assistance package put in place for residential owners under the Weathertight Homes Resolution Services Act 2006.[66] This package is not available to commercial owners.[67]

[77] Muir J considered that the courts should not second guess the policy decision by Parliament that the financial assistance package was for the exclusive benefit of residential owners.[68] He declined to make any orders in relation to it.

[78] We are not persuaded that he was correct in this regard. Mr Levie, who heads a consultancy service to homeowners and bodies corporate dealing with defective building issues, gave evidence in regard to the financial assistance package. He explained that the financial assistance package was based on the repair plan proposed by the body corporate for the whole building. He said that the package available to residential owners was reduced by 15.4 per cent, being the ownership interest attaching to the commercial units.

[79] We cannot, however, see why the amounts received by the residential owners in respect of the additional works required should not be applied to the repair of the building before allocating the rest of the costs between unit owners. We do not consider that, if we were to so direct, we would be second guessing a policy decision made by Parliament. Rather, we would be achieving further fairness between the owners. The amount received was paid to the body corporate as agent for the residential owners. It has already been discounted because of the commercial units. Parliamentary policy is not undermined if the court exercises the wide discretionary powers conferred by s 74(7). The court can direct payment of money by or to the body corporate or by or to any other person. It can also impose any terms or conditions it thinks fit. A scheme can therefore be approved which involves an element of cross-subsidisation and, in our view, cross-subsidisation is appropriate in this case to reduce the burden the commercial owners face.[69]

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66 Interim judgment, above n 1, at [68]–[71].
67 Weathertight Homes Resolution Services Act 2006, s 125BA.
68 Interim judgment, above n 1, at [94].
69 *Body Corporate 183930 v Chua*, above n 31, at [69].

[80] In our judgement, fairness requires that the residential owners apply the amounts they have received under the financial assistance package in respect of the additional works necessary to repair the Uptown apartment complex to the cost of those works. The owners of all units, whether residential or commercial, should then contribute to the balance by reference to their respective ownership (utility) interests.

[81] To this end, we allow the appeal in part and direct that an amended scheme be prepared and referred to the High Court for settlement.

Costs

[82] The appellants have succeeded in part and failed in part. Nevertheless, we consider that they are entitled to their costs. They have established that Muir J proceeded on a wrong presumption, and they have obtained an order requiring that an amended scheme be prepared to allow for the payments received by residential unit owners under the financial assistance package. The body corporate is to pay the appellants one set of costs for a standard appeal on a band A basis, together with usual disbursements.

Result

[83] The appeal is allowed in part. The respondent must prepare a further variation to take into account the amounts received by residential owners under the financial assistance package put in place by the Weathertight Homes Resolution Services Act, in accordance with the observations we have made above, and refer that varied scheme to the High Court for settlement under s 74(8) of the Unit Titles Act 2010.

[84] In all other respects, the appeal is dismissed.

[85] The respondent must pay the appellants one set of costs for a standard appeal on a band A basis and usual disbursements.

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