EDITORIAL NOTE: NO SUPRESSION APPLIED.

IN THE DISTRICT COURT
AT AUCKLAND

CIV-2016-004-000500
[2017] NZDC 7961

	BETWEEN	YORK TRUSTEES LIMITED Plaintiff
	AND	BODY CORPORATE NUMBER 166208 Defendant

Hearing: 11 April 2017

Appearances: K Wendt for the Plaintiff
D Barr for the Defendant

Judgment: 11 April 2017

ORAL JUDGMENT OF JUDGE M-E SHARP

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[1] Introduction. The appellant, York Trustees Limited, is the owner of unit G at the apartment complex at 30 York Street, Parnell, known as the York Street Apartments. Respondent, Body Corporate 166208, is the body corporate constituted under the Unit Titles Act 2010 with respect to the York Street Apartments. 29 March 2016, the Tenancy Tribunal delivered a decision on levies and charges owed to the Body Corporate by the appellant. The Body Corporate was successful in recovering the levies and charges owed. The Tribunal found that the Body Corporate incurred costs of $32,563.05 in collecting the levies but only allowed what it considered to be a reasonable contribution to the solicitor client costs advanced by the respondent. As a result, we have two aggrieved parties, the first being the appellant and the second being the respondent which cross-appealed in respect of costs.

[2] The appeal. The appellant is unrepresented and no person appears on its behalf today, the Court having previously refused an adjournment application. However prior to hearing and determining the latest adjournment application, the

appellant did file a memorandum traversing what the author, Price, called three simple and straightforward strands. I take it that these are the basis of the appeal.

[3] The first strand is in relation to the ruling that the Body Corporate is entitled to charge for hot water by measuring gas used and charging this under s 125 Unit Titles Act 2010 as a charge recoverable by the Body Corporate. The appellant submits that the hot water charges made by the Body Corporate are invalid and the appeal should be allowed on that point. In relation to this particular matter the respondent says that this was conceded by it at the first hearing of the matter before the Tribunal and that concession was accepted by the Tribunal.

[4] I have read the order of the Tenancy Tribunal dated 25 September 2014 in this regard. The Tribunal says, "The Body Corporate accepts in its submission that water has been previously charged incorrectly at the apartments. However they consider any overcharging to York has been de minimis and therefore of no consequence. In discussing this, the Tribunal said at paragraph 39, "The difference between the amount of water used and what York must pay in both of these separate calculations is a difference of only $13.50 (as calculated by the Body Corporate)." At paragraph 42 the Tribunal said, "York disagrees but argues that a strict interpretation of s 125 Unit Titles Act precludes the Body Corporate from charging York for any of this water because it was not calculated by an accurate meter reading and is an estimated figure which is not sufficient for s 125 Unit Titles Act to apply."

[5] At paragraph 45 the Tribunal said, "In resolving the issue of water charges I have considered the purpose of the Unit Titles Act as set out under s 3 paragraph 46. I have also considered the intention of s 125 Unit Titles Act which appears to safeguard the unit holder from the Body Corporate making any profit from the amenities provided. Section 47, I have considered that s 176 Unit Titles Act includes all of part 3 of the Residential Tenancies Act 1986 (RTA) except for the noted exceptions."

[6] At paragraph 48, "This section allows the application of s 85 Residential Tenancies Act to be considered." At paragraph 57, the Tribunal found that in making its decision with regard to the payment of the water rates, it

considered that the fairest resolution was that York should have to pay for the water invoice as issued by the Body Corporate for the amount claimed regardless it does not fit with the strict interpretation of s 125 Unit Titles Act.

[7] Bearing in mind that under s 85 Residential Tenancies Act 1986 provides that, "The Tribunal shall determine each dispute according to the general principles of the law relating to the matter and the substantial merits and justice of the case, but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities." It is obvious that the Tribunal was within its legal rights and obligations to find as it did and this particular so-called band of appeal cannot be substantiated and must fail. I will discuss strands two and three in a moment but it is probably appropriate at this point to discuss the way in which appeals from findings of the Tenancy Tribunal proceed under the Residential Tenancies Act.

[8] The right of appeal under the Residential Tenancies Act is found in s 117(1) which provides that, "Any party to any proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in the proceedings may appeal to a District Court against that decision." Subsection (3) provides that, "The District Court has jurisdiction to hear and determine an appeal under this section notwithstanding any limits imposed on such courts in their ordinary civil jurisdiction by sections 74 to 79 of the District Court Act 2016." Subsection (4) of s 117 of the Residential Tenancies Act says, "The provisions of section 85 of this Act, with any necessary modifications, shall apply in respect of the hearing and determination by the District Court of an appeal brought under this section."

[9] I have already quoted s 85(2) but ss (1) says, "Subject to the provisions of this Act and of any regulations made under this Act, the Tribunal shall exercise its jurisdiction in a manner that is most likely to ensure the fair and expeditious resolution of disputes between landlords and tenants of residential premises to which this Act applies." So s 117(4) simply tells the Court that like the Tribunal in its original jurisdiction, it is to approach the exercise of its appellate jurisdiction in a practical not rule-bound and fair way and like the Tribunal, though bound to adhere to general principles need not do what otherwise the law might strictly require or impose.

[10] *Housing New Zealand Corporation v Salt*[1], judgment of Judge Roderick Joyce QC. It has long been determined that appeals from decisions of the Tenancy Tribunal will be by way of rehearing. It is in the nature of such an appeal that it is to be heard on the record of the oral evidence given below subject to there being a discretionary power to rehear the whole hearing, part of the evidence or even to receive further evidence and that the Court in question is not limited to correction of errors in the judgment or decision below that may take into account developments since. Of course that is not the situation here. I am dealing solely with the record below.

[11] Returning to the strands of appeal, second strand. This relates to costs that were awarded. The issues raised with respect to costs were addressed by the Tribunal at paragraphs 84 to 87 of the judgment on appeal, being that dated 25 September 2014. The Tribunal found that the loss suffered resulting in costs lying where they fell up to 25 September 2014. Specifically, in its claim the now appellant sought a determination that legal fees charged to the Body Corporate by Kevin Gould barrister and then on charged to the appellant were not recoverable under s 124 Unit Titles Act 2010. (inaudible 16:18:42) a determination that all legal fees have already been satisfied by way of a High Court order and any additional payment would be a double dip. (inaudible 16:18:50) 3, a determination that the charging for water by the Body Corporate is invalid as it does not comply with s 125 Unit Titles Act as no accurate meter reading has been taken (already dealt with) and other matters but specifically the Tribunal dealt with costs at paragraphs 84 to 87 of a judgment dated 29 March 2016. Determining that the Body Corporate's claim for costs is relevant to its two applications. Up to the hearing 8 July 2014 the costs claimed by the Body Corporate as supported by exhibited documentation in the Body Corporate's memorandum in respect to costs dated 24 November 2015 amount to $11,985.82 and 86, following the 8 July 2014 hearing and as per the Tribunal's decision dated 25 September 2014, it did transpire that relevant to 1 April 2014 York Trustees indebtedness was quantified as $10,289.03 in levies and interest and that amount was ordered numbered 1A and 1B above.

[1] *Housing New Zealand Corporation v Salt* CIV-2007-004-002875 May 9, 2008

[12] At 87 however the 25 September 2014 decision indicated a mixed result in favour of both parties and accordingly, no costs are ordered up until 8 July 2014. At 88, subsequent to 8 July 2014 the Body Corporate (inaudible 16:21:40) $36,187 (inaudible 16:21:44) costs as set out in invoices attached to and marked E to K in the Body Corporate's memorandum in respect of costs dated 24 November 2015. At paragraph 90, however I do note that the invoice marked E does contain some reference to a High Court matter (inaudible 16:22:00) be proceeding. So to address that issue and any other miscellaneous reference to any matter in the other invoices not necessarily relevant to these proceedings, (as I note that the subsequent invoices relate overwhelmingly to these drawn out Tribunal proceedings) I have denied the first invoice marked E for $3674.48. Paragraph 91, I am now having regard to a cost claim for $32,563.05.

[13] At paragraphs 92 to 98 the Tribunal traversed what it called "Cost principles" and I cannot find anything in error in that discussion except the reference to a reasonable contribution to costs which I will traverse when I come to the cross-appeal.

[14] The second strand or ground of appeal relating to costs sets out from (i) through (xi) the various points on appeal but basically they all revolve around the same central point which is that none of the costs incurred are chargeable. Quite why, I fail to understand. Section 124(2) Unit Titles Act provides that, "The amount of any unpaid levy together with any reasonable costs incurred in collecting that levy is recoverable as a debt due to the Body Corporate." And in the Court of Appeal decision in *Body Corporate 162791 v Gilbert*[2] the Court said that the use of the words reasonable costs does not compel the conclusion that solicitor/client costs cannot be recovered, rather it compels the conclusion that it is only reasonable solicitor/client costs objectively assessed that can be recovered.

[15] It does not seem to me that there is any evidence or was any evidence before the Tribunal during the hearing that the costs claimed by the Body Corporate did not emanate from its attempts to collect the levies which were payable. That being so, s 124(2) of the Act appears to be satisfied. The amount of unpaid levies might be

[2] *Body Corporate 162791 v Gilbert* [2015] NZCA 185

recovered together with any reasonable costs incurred in collecting the levy. They are recoverable as a debt due to the Body Corporate but I fail to see how it is that the Tribunal fell into any error in respect to its determination on costs, apart from the issue of reasonable contribution to which I will refer when I deal with the cross-appeal. The second strand of appeal must therefore fail

[16] The third strand relates to the figure that the Body Corporate claim. The Body Corporate submits that at no stage, although invited to do so, did the Body Corporate produce a statement that started with a zero balance thus, says Mr Price in his written submissions, the figure claimed is not supported. It includes claimed amounts unpaid without detailing what they are, it includes levies that have been claimed (like the water) but are not claimable.

[17] Mr Price goes on, under the third strand, at (b) and (c) to make additional submissions. But on 16 July 2015 the respondent, Body Corporate, filed a memorandum which detailed all payments and charges since the appellant became the registered owner of the unit on 1 March 2005. Thus the record would tend to give the lie to the proposition advanced by the appellant that at no time did the Body Corporate produce a statement that started with a zero balance.

[18] Paragraphs 23 to 42 of that memorandum, which was filed with the Tenancy Tribunal, stated at paragraph 23 under the heading "Background to opening balance" in a number of paragraphs, that the purchase of the relevant apartment was succeeded by a number of charges, all of which had been detailed and every payment made in respect of the relevant partner from the date of purchase has been tracked through. So as Mr Barr, or the Body Corporate, said, in other words, Body Corporate went through a decade of invoices, bank statements et cetera relating to the unit to satisfy the Tribunal that the amount claimed was correct. No substantive response was received other than to say that there was a payment of $5750 made by the appellant in 2011. However the appellant says that this was paid into the trust account of Kevin Gould. As Mr Barr was entitled to point out to me and I know of my own knowledge, Gould does not have a trust account because at all material times he was and is a barrister. Thus that statement is definitively incorrect and I find that there is no merit in the submissions based on the third strand

of appeal. That is a backward way of saying that I believe that the Tenancy Tribunal was in possession of all the relevant information that it required in order to find the levies imposed upon the appellant were correct and substantiated. That third strand of the appeal must also fail. Accordingly and in summary, the appeal will now be dismissed and I turn to the respondent's cross-appeal.

[19] The Tenancy Tribunal delivered its decision to which I have already referred, on 29 March 2006 with respect to levies and charges owed to the Body Corporate by the appellant. As I have already discussed, the Body Corporate was successful in recovering those amounts. The Tribunal found that the Body Corporate incurred costs of $32,563.05 in collecting the levies and noted its statutory entitlement pursuant to s 124 Unit Titles Act 2010 but then went on to, as Mr Barr says, wrongly direct itself as a matter of law to the necessity to ask what a reasonable contribution to costs would be.

[20] At paragraphs 106 and 107, the Tribunal said this, "The ultimate question for me is what is a reasonable contribution in this case bearing in mind all of the above and the Tribunal's first tier ranking within the jurisdiction hierarchy. I determine that an award equivalent to 60 percent of the actual costs is a reasonable cost contribution on this occasion." Thus the Tribunal then awarded costs of $19,537.83.

[21] The appellant submits that the Tribunal wrongly imported the word "contribution" into the statute and thereby changed the plain and ordinary meaning, the one that cannot be found within the bounds of principles of statutory interpretation.

[22] The cross-appellant refers the Court to *Body Corporate 162791 v Gilbert* as I have already discussed, in respect to the third strand of the substantive appeal. *Gilbert* is binding on the Tribunal and on this Court. There is no discretion. In that in the particular paragraph in question, 78, where Wylie, J the Court went on to say, "The use of the words reasonable costs does not compel the conclusion that solicitor/client costs cannot be recovered, rather it compels the conclusion that it is only reasonable solicitor/client costs objectively assessed that can be recovered." Thus a higher Court than this determined that it is not the contribution which is to be

looked at, what is to be looked at in an objective manner is whether the solicitor/client costs claimed are reasonable.

[23] I have looked carefully at all the invoices which were proffered to the Tribunal and I cannot see why they should be considered unreasonable, particularly given the number of hoops through which the Body Corporate has had to jump in order to have arrived at a hearing (inaudible 16:35:29) determination. Given that I find the Tenancy Tribunal misdirected itself as to the legal position in respect to reasonable solicitor/client costs, it follows that it was wrong for the Tribunal to only award 60 percent of the reasonable costs incurred. It should have determined that the Body Corporate was entitled to its actual reasonable costs of $32,563.05.

[24] Accordingly, I am now prepared to quash the order of the Tribunal in that regard and substitute for it the order that I have just named, that is that the Body Corporate is entitled to its actual reasonable costs of $32,563.05 which is to be paid to it by the unsuccessful appellant.

[25] Costs on both the cross-appeal and the appeal. The respondent has succeeded today on both the appeal and the cross-appeal. It now seeks solicitor/client costs of $30,792.80 on both pursuant to s 124 Unit Titles Act 2010, saying that these are reasonable costs which were incurred in recovering its levies and thus are recoverable as a debt due to it from the unsuccessful appellant. As Mr Barr said in section 7 of his written submissions, "The proceedings are on foot solely as a consequence of unpaid levies and the respondent's steps to recover those levies." I agree.

[26] In the alternative, the respondent Body Corporate, seeks solicitor/client costs under r 4.6(4) District Court Rules as a result of the appellant's failure to progress proceedings. I do not find it necessary to make any determination about the latter or alternative ground because of s 124 Unit Titles Act 2010 although I do note that the appellant has singularly failed, either wilfully or negligently I am not sure which, to progress its appeal at every step of the way.

[27] Between 28 June 2016 and 6 March 2017, counsel for the respondent has invoiced the respondent $37,567.14 including disbursements and GST. I have sighted those invoices which are attached to the memorandum of counsel for the respondent dated 11 April 2017. However of that sum, as I understand it, $6774.34 is the subject of a pending costs claim before the Tenancy Tribunal in respect of further unpaid levies subsequent to the issue of the decision on appeal and that sum thus is to be deducted from the total sum invoiced, being $37,567.14. Hence the application for solicitor/client costs of $30,792.80 cents. Those solicitor/client costs are the balance of the costs incurred in recovering unpaid levies from the appellant and it is appropriate therefore that they are deducted. The respondent is foregoing a claim for unbilled fees on a solicitor/client basis for the preparation of recent memoranda, hearing preparation and attending this hearing.

[28] In the alternative, the respondent seeks costs in respect to the attendances on the appeal, cross-appeal and the application to rescind the stay in the Tenancy Tribunal on a scale basis but I do not feel the need to consider these on that basis. Given that I consider that all of these costs, these additional costs are payable under s 124 Unit Titles Act, given that they are both reasonable and were incurred in collecting the unpaid levies. Accordingly, I now grant to the respondent Body Corporate solicitor/client costs of $30,792.80 in respect of both the appeal and cross-appeal.

[29] In summary. Because the appeal has failed I now dismiss it; the cross-appeal however succeeds and I quash the order made by the Tribunal and substitute for it the order that I have already enumerated, being to order the unsuccessful appellant to pay the actual and reasonable costs to the Body Corporate in the sum of $32,563.05. In addition I order the unsuccessful appellant to pay costs on the appeal and cross-appeal including the interlocutory proceedings which came before the Court in the matter of the application to rescind the stay granted by the Tenancy Tribunal in the sum of $30,792.80. Thank you.

Judge M-E Sharp
District Court Judge