EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2018-090-001099
[2018] NZDC 26542

BETWEEN	ZHAN LI TANG Plaintiff
AND	BODY CORPORATE 183930 Defendant

Hearing: 13 December 2018

Appearances: Z Tang appeared in Person
K and M Wakelin for the Body Corporate

Judgment: 19 December 2018

RESERVED DECISION OF JUDGE P A CUNNINGHAM

Introduction

[1] Mr Tang has filed an appeal against a decision of the Tenancy Tribunal at Waitakere dated 26 April 2018. The Tribunal decision related to levies and other costs in relation to [Unit deleted], Tuscany Towers, 1 Ambrico Place, New Lynn which Mr Tang owns together with Hui Wang. The Tribunal was satisfied that the amount sought by the Body Corporate was payable as well as the interest and cost sought.

Background

[2] The largest of the amounts claimed by the Body Corporate relate to a levy in relation to remedial works. There is a considerable history to this which I summarise as follows. Tuscany Towers which comprises 97 townhouses was built between 1997 and 2001. Water tightness issues were first recognised in around 2002. Assessments

were obtained from the Water Tight Homes Resolutions Service which identified damage to both the exterior and interior of the building caused by defects in the design and construction. The Body Corporate was subsequently authorised by the unit owners to commence proceedings against the parties responsible. This was in the Weathertight Homes Tribunal in 2008.

[3] Eighty eight of the 97 unit owners were parties to the proceeding with the remaining nine either declining to take part or withdrawing their claims prior to resolution of the proceeding. A law firm, Legal Vision, was engaged to act for the Body Corporate in the proceeding. Legal Vision reviewed the strength of each unit owner's claim based on documents supplied by each owner. Legal Vision then sent a letter to each owner commenting on the strengths and weaknesses of their individual claims.

[4] The unit owners then entered into a conduct and distribution agreement which authorised Legal Vision to act on behalf of owners in the proceeding and established a committee to represent the unit holders including with authority to settle the proceeding through mediation or negotiation and with an obligation to call a further meeting of unit owners to agree on the distribution of any settlement monies.

[5] At an extraordinary general meeting ("EGM") held on 7 August 2010 Legal Vision advised owners as to the strengths or weaknesses of their claims. It also gave advice that the best possible result would be a settlement of around $8.6 million. There was a two day mediation in early October 2010 which resulted in a settlement agreement on 29 October 2010. The respondents paid $8.015 million in accordance with the settlement agreement. At a further EGM held on 5 February 2011, there was discussion about the remediation project and this included a resolution to raise levies from all owners for an average of $92,000.00 each for the repair of the units. The levies were accounted for from the settlement funds.

[6] At that meeting on 5 February 2011 it was recorded that the committee was reasonably confident that there would not be a budget blowout, but if that occurred there would be another EGM to raise extra money. As a result of concerns expressed by some unit holders a remedial works agreement was entered into dealing with issues

raised such as the actual cost of repairs to individual units. Some unit owners were assessed as having a contributory negligence percentage. Mr Tang signed the remedial works agreement. However it transpired that there were different versions of Schedule 3 to the remedial works agreement which subsequently became the focus in an appeal to the Court of Appeal in 2017.

[7] At an EGM on 28 April 2012 the chairperson informed the unit owners that the project's costs were anticipated to rise to $10.25 million which exceeded the amount available from the settlement money. It was proposed that there be top up payments in accordance with the remedial works agreement and taking into account each owner's contributory negligence deduction. This led to some disharmony and the remedial works ceased in May 2013 after settlement monies were exhausted. Consultants were engaged in mid-2014 which resulted in several proposals being presented to the Body Corporate. This led to a resolution to apply to the High Court for approval of a scheme under s 74 of the Unit Titles Act 2010.

[8] This led to a proceeding in the High Court where Justice Wylie approved the s 74 scheme which governs the manner in which owners are to contribute to the remedial works. The scheme was subsequently varied by the Court of Appeal to make changes to amounts that some owners were assessed as being contributory negligence. Mr Tang's original contributory negligence figure was 67% and by the time the revised Schedule 3 was accepted in the Court of Appeal it was reduced to 41%. Mr Tang was initially a party to the Court of Appeal action but withdrew shortly after the appeal was filed. The decision of the Court of Appeal dated 18 July 2017 is in effect the result of a cross appeal which approved the revised Schedule 3 as being operative.

The notice of appeal

[9] It appears to relate to the same issue that Mr Tang pursued at the hearing in front of me on 13 December 2018 which was as follows.

The hearing before me

[10] Mr Tang wanted to know how the assessment of his contributory negligence figure was reached in the remedial works agreement, the figure of 67%. He had been trying to get information about this from the Body Corporate. He stated there must be a document with the 67% in it. He said that if the figure was right then he would pay the levy but if the levy was based on wrong information he would not pay it.

[11] Ms Wakelin advised me that she was unaware whether or not such a document exists. From her knowledge of the file she was of the view it could be a figure that came out of the mediation. Ms Wakelin was able to tell me how the reduction to 41% occurred. When Mr Tang purchased [the unit] he was paid $17,250 by the previous owner. When the method of calculation on the first Schedule 3 was replaced with the revised Schedule 3 plus a further amount being credited to Mr Tang as a result of claims brought by him and another unit holder against a building inspector. This resulted in a 26% reduction from 67% to 41%.

[12] The reason for this appeal is that the Adjudicator in the Tribunal did not give Mr Tang the legal document that supports the Body Corporate levy and the remedial works agreement he signed.

Procedure on appeal

[13] Section 117 of the Residential Tenancies Act 1986 ("RTA") provides for appeals to the District Court. Although the section does stipulate the way in which an appeal is to be dealt with, the courts have general treated it as an appeal by way of a rehearing based on the record of the oral evidence given in the Tenancy Tribunal and subject to the power to rehear or any part of the evidence or receive further evidence (*Housing New Zealand Corporation v Salt*)[1], *Shotover Gorge Jetboats Ltd v Jamieson*[2].

[1] [2008] DCR 697.
[2] [1987] 1 NZLR 437 (CA).

[14] Courts have generally shown a reluctance apart from the findings of the Tribunal on the facts or to disturb discretionary decisions, for example, *Focus Contracting Ltd v Property Management (Marlborough) Ltd*[3] and *He v Bai*.[4]

The appellant's position on appeal

[15] The sole point pursued by Mr Tang at the hearing was that in order for the figure of 67% to have been reached there must be a document that sets out how that figure was reached.

The respondent's submissions on appeal

[16] The first point made in written submissions is that the levy of $30,628.79 was recoverable under the s 74 scheme that was sanctioned by the High Court and varied in relation to revised Schedule 3 in the Court of Appeal. So too is Mr Tang bound by the terms of the s 74 scheme. A time for raising any issues about how the shortfall in funding for the remedial works was to be met including how the contributory negligence figures are calculated was during the High Court or Court of Appeal proceedings. Consequently this appeal is an abuse of process and ought to be struck out.

[17] A second reason it was submitted that the proceeding should be struck out is that Mr Tang has failed to pay the security for costs directed by Judge Harrison on 16 November 2018.

[18] The Body Corporate seeks indemnity costs in defending this appeal pursuant to s 124 of the Unit Titles Act.

My assessment and decision

[19] I accept the submission of the respondent in relation to challenges to the amount that Mr Tang as an owner of [the unit] could have been raised in the High

[3] DC Blenheim CIV-2009-006-103.
[4] DC Waitakere CIV-2013-090-455 23 October 2013, Judge Wilson QC.

Court and the Court of Appeal cases. Further that the Body Corporate was bound to follow the calculation of the contribution of each owner based on the formula approved in the High Court and Court of Appeal decisions. Those matters are now both res judicata (the matter has already been judged). And it could not be raised either in the Tenancy Tribunal or on an appeal from a decision of the Tenancy Tribunal. To do so is an abuse of process.

Decision

[20] The appeal is struck out and the decision of the Tribunal requiring Mr Tang to pay $34,921.09 is upheld.

Costs

[21] Solicitor-client costs in defending this appeal are approved pursuant to s 124 of the Unit Titles Act.

Dated at Auckland this 19th day of December 2018 at am/pm.

P A Cunningham
District Court Judge