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-2018-004-000567
[2018] NZDC 19792

BETWEEN	BODY CORPORATE NO 209774 Appellant
AND	SISI WU Respondent

Hearing: 20 September 2018

Appearances: C Baker for the Appellant
J Anderson for the Respondent

Judgment: 24 September 2018

RESERVED JUDGMENT OF JUDGE AA SNCLAIR

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[1] This is an appeal from a Tenancy Tribunal decision dated 13 February 2018 dismissing the claim by the appellant ("the Body Corporate") for payment of a levy in the sum of $3,087. The Tribunal subsequently ordered the Body Corporate to pay costs to the respondent ("Ms Wu") in the sum of $2,415. This costs order is separately appealed.

Factual Background

[2] The respondent entered into an agreement for sale and purchase of [address and unit number deleted]. Pursuant to s 147 of the Unit Titles Act 2010 ("the Act"), the Body Corporate issued a pre-settlement disclosure statement ("disclosure statement") in which the Body Corporate certified in respect of this Unit:

> (e) THAT the costs relating to repairs to building elements or infrastructure contained in the unit are unpaid in the sum of $ nil.

At the bottom of the document the following statement is included:

> **The (sic) may be further costs payable by and attributable to the unit/unit owner regarding remediation for contractors/consultants for which the owner for the time being will become liable.**

[3] Between 2015 and 2016 remedial work had been undertaken to remedy weathertightness defects throughout the complex including the exterior cladding. A Code of Compliance Certificate was issued by Auckland Council on 12 July 2016.

[4] Between April and May 2017, the Body Corporate received additional invoices from two contractors involved in the remedial work. It was necessary to raise a further levy to pay these invoices. At an extraordinary general meeting held on 17 June 2017, the Body Corporate resolved to strike an additional levy to cover these costs.

[5] On 10 July 2017, an invoice in the amount of $3,087 was emailed to Ms Wu.[1] Ms Wu did not consider that she was liable for this levy and refused to make payment. Proceedings were subsequently issued in the Tenancy Tribunal.

Tenancy Tribunal decision

[6] Ms Wu claimed that this levy related to costs incurred prior to her purchase of [the Unit] on 2 August 2016. She contended that in the disclosure statement the Body Corporate certified that no costs relating to repairs to building elements or infrastructure contained in the Unit were unpaid. Pursuant to s 153 of the Act, she was entitled as buyer, to rely on the information contained in the disclosure statement as conclusive evidence of the accuracy of the matters described in that statement.

[7] The adjudicator found that the evidence supported Ms Wu's claim that the work invoiced by the contractors was carried out prior to the issue of the disclosure statement in which the Body Corporate had warranted that there were no outstanding payments due for this work. She went on to state:

> The Body Corporate was wrong and whereas I may have some sympathy given the tardiness of Maynard Marks and Boss's invoicing, the Body

[1] This account also included a further amount of $550.48. Payment of this amount was subsequently waived.

> Corporate was in a position to make enquiry as to whether any further payments were due before issuing the notice, the respondent was not. Having failed to assure itself that no further payments were due, it is not now entitled to pass this failure on to the respondent.

[8] The adjudicator was not persuaded that the "rider" added to the disclosure statement assisted the Body Corporate. She was of the view that the rider referred to future liability that may arise from future or further remediation. The adjudicator considered that it did not refer to any liability for debts that had already arisen. She went on to state:

> To read this rider differently undermines both the Body Corporate certification that there are no outstanding costs relating to repairs to building elements or infrastructure contained in the unit and that the buyer's right to rely on the integrity of the information provided. The rider cannot be used to rectify errors in the statement even if those errors are inadvertent.

[9] In a subsequent decision dated 13 March 2018, the adjudicator awarded costs to Ms Wu in the sum of $2,415. She did so in reliance upon s 102(1)(b) of the Residential Tenancies Act 1986 which provides that the Tribunal may make an order for costs "where any of the parties was represented by counsel". Ms Wu's lawyer did not represent in the Tribunal but had provided advice to her in relation to the claim.

Discussion

[10] In this case, it is necessary firstly to consider the disclosure statement provided to Ms Wu. Section 147 of the Act provides that a seller must provide a disclosure statement to the purchaser no later than the fifth working day before the settlement date. This statement must contain (a) the prescribed information; and (b) a certificate given by the Body Corporate certifying that the information in the statement is correct.[2] The prescribed information is contained in Reg 34 of the Unit Titles Regulations 2011 ("the Regulations"). The information to be provided includes:

> (j) Where any costs relating to repairs to building elements or infrastructure contained in the unit are unpaid and, if so, the amount of unpaid costs;

[2] A buyer may also request additional information under s148 of the Act.

[11] Section 138 of the Act sets out the body corporate duties of repair and maintenance. Subsection 1 states:

> (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.

Subsection 4 states:

> (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.

[12] Mr Baker for the Body Corporate submits that the costs referred to in paragraph (e) of the disclosure statement are costs for which an owner is liable pursuant to s 138(4) of the Act. These are costs incurred by the Body Corporate in carrying out repairs to or maintenance of building elements and infrastructure contained within the principal unit. Importantly, these costs are to be distinguished from levies imposed under s 121 of the Act.

[13] Mr Baker further submits that the adjudicator erred in finding that the rider contained in the disclosure statement referred to future liability that may arise from future or further remediation. He submits that it applied in respect of costs for work which had been done, but not yet unbilled, and of which the Body Corporate was unaware at the time the disclosure statement was issued. The purpose of the rider was to indicate to the purchaser that there may be future levies, and that any such costs would be payable by the purchaser via a levy.

[14] It is apparent having regard to Reg 34(j) and s 138(4), that the costs referred to in paragraph (e) of the disclosure statement are those costs incurred by the Body Corporate relating to repairs to or maintenance of building elements and infrastructure contained within the boundaries of the unit in respect of which the certificate relates,

and not to costs otherwise incurred by the Body Corporate in the repair and maintenance of the common property, in respect of which a levy may be struck under s 121 of the Act.

[15] In the present case, the work which had been carried out but not yet invoiced, did not relate to repairs or to maintenance of items contained within [the Unit] and therefore it did not fall within s 138(4). Accordingly, the information contained in the disclosure statement was correct.

[16] Further, I do not agree with the adjudicator's interpretation of the rider. There would be little purpose including a rider relating to future liability that may arise from future or further remediation. In my view, that would be self-evident that a unit owner would face liability for such work. In my view, the rider was clearly inserted to cover the very situation which subsequently arose namely, where work had been completed but not yet invoiced.

[17] For the above reasons, I consider that the adjudicator erred in reaching her decision dismissing the Body Corporate's claim and the Tribunal's order is quashed accordingly.

[18] The Tribunal also awarded costs in the sum of $2,415 to Ms Wu. It follows that this order is also quashed. In addition, I note that I consider that the adjudicator erred in making this costs order. The Tribunal has limited power to award costs under s 102 of the Residential Tenancies Act 1986. One of the exceptions is "where any of the parties was represented by counsel". The adjudicator held that this exception applied because the Body Corporate was represented at the hearing by counsel. Accordingly, Ms Wu, while not represented, was entitled to recover the legal costs which she had incurred in obtaining legal advice from her solicitor before the hearing. I do not consider that this is a correct application of the exception which in my view, clearly relates to the recovery of legal costs incurred where the successful party has been represented by counsel in the Tribunal. That was not the position in this case.

Decision

[19] The orders of the Tenancy Tribunal are quashed, and judgment is entered for the Body Corporate in the sum of $3,087.

[20] The Body Corporate is also entitled to costs. Having regard to the principles set out in Rule 14.2 of the District Court Rules 2014, these are fixed on a 2A basis together with disbursements. I would expect counsel to be able to agree costs. However, if that is not possible, memoranda are to be filed. The appellant's memorandum is to be filed and served within 10 working days from the date of this judgment and the respondent's memorandum is to be filed and served within a further 5 working days.

AA Sinclair
District Court Judge