**IN THE DISTRICT COURT**
**AT AUCKLAND**

**I TE KŌTI-Ā-ROHE**
**KI TĀMAKI MAKAURAU**

**CIV-2019-004-001125**
**[2020] NZDC 12662**

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| IN THE MATTER OF | AN APPEAL FROM THE TENANCY TRIBUNAL |
| BETWEEN | ROBYN KATHLEEN STENT<br>Appellant |
| AND | BODY CORPORATE 324525<br>Respondent |

Hearing: 23 June 2020

Appearances: B E Brill for Appellant
K M Wakelin for Respondent

Judgment: 6 July 2020

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**DECISION OF JUDGE G M HARRISON**

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## The appeal

[1] Ms Stent appeals against a decision of Adjudicator M Benvie of the Tenancy Tribunal of 25 October 2019 in which her application for an order that the Body Corporate (BC) pay her certain money pursuant to s 131 of the Unit Titles Act 2010 (UTA) together with interests and costs, was dismissed. She also appeals against a finding by the Tribunal that she pay two levies to the Body Corporate described as the annual levy, and the cashflow levy totalling $7902.50 plus interest of $1608.13.

[2] At the hearing Mr Brill withdrew the appeal against the annual levy, a rehearing having been granted in that regard, but the appeal in respect of the cashflow levy continued to be advanced.

[3] Ms Wakelin described the "long and tortuous history of litigation" in relation to the repair of the Bridgewater Apartments of thirteen previous judgments involving the parties.

[4] The Adjudicator adopted the background facts appearing in a decision of Associate Judge Bell in *Small & Ors v Body Corporate 324525.*[1] I have drawn from that history the facts relevant to the determination of this appeal.

[5] The Bridgewater Apartments are established in Paihia. They suffered from water penetration colloquially known as "leaky buildings" and commenced proceedings in October 2013 against the Far North District Council and others.

[6] In 2014 Mr and Mrs Wheeldon, the owners of Unit 204 sold it to Ms Stent. She was aware that the complex suffered weathertightness problems. She agreed with the Wheeldons that they would remain plaintiffs in the proceeding but she would run the case on their behalf and then share the proceeds of the claim. Her position was different from the other owners. Their relief was concerned with remedying the defects causing damage to the complex, recovering the costs of repair and associated losses.

[7] Ms Stent did not have a claim in her own right. She bought knowing about the defects. The Wheeldons could not sue for costs of repair because they no longer owned the unit. They could only sue for loss of value caused by the defects. Ms Stent's interest in running the Wheeldons' case was only in recovering loss of value. For the Wheeldons' case the scope and cost of repairs could only be relevant insofar as they went to the loss of value.

[8] During 2014 a minority of five unit owners including Ms Stent disagreed with the approach taken by the majority comprising the remaining 17 unit owners. The minority did not consider that comprehensive repairs were required to the units but the majority sought compensation for extensive remediation to their units.

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[1] *Small & Ors v Body Corporate 324525* [2018] NZHC 19.

[9] A mediation occurred in April 2017. It involved the Far North District Council (FNDC) mediating separately with the majority, and the minority located in a separate room at the mediation venue. The mediation was successful and a settlement resulted. Details of the settlement reached with the two factions remain confidential to this day.

[10] From the settlement funds the BC received a sum of $916,750 being the net proceeds of the common property settlement. On 11 May, the BC decided to distribute the CP fund to owners in proportion to the utility interests.

[11] Ms Stent's Unit 204 carried an ownership interest of 4.62%.

[12] In an email of 14 May 2017, Mr Craig Leishman, the account manager for the BC, specified how it was proposed to distribute the common property fund. It was proposed to distribute the fund according to the ownership interest in respect of each unit. As far as Ms Stent was concerned however the email contained the following:

> Noted above is a caveat around the split of common property – this is because Unit 204 was not a party in the defect litigation (the second plaintiffs being the previous owners the Wheeldons based on their loss of sale) and Ms Stent having purchased with knowledge has no entitlement to share in the common property settlement as advised to the BC by FNDC's solicitors and according to the principles established by Judge Heith in the seminal Sunset Terraces' decision. The Committee's view is that common property award can only be allocated amongst the second plaintiffs with an interest in common property – they are however aware a different view may be held by Ms Stent and/or remainder of some or all of the minorities. ….should the eventual distribution not include Unit 204 then a further $40,824 can be spread across the remaining 21 units who were represented in the remedial cost claims. …

[13] The next significant event was an application to the High Court in which the minority sought summary judgment. The claim was based on what the minority called the apportionment decision by which the majority owners were paid their shares of the settlement funds. They claimed that the decision was invalid, for having been made by committee members who had a conflict of interest, and that the decision was unreasonable and the consequence of bias. It was alleged that the committee members had breached their fiduciary duties for which they claimed that the BC was vicariously liable.

[14] Associate Judge Bell decided that the minority had not established that there were no defences to the claim. Consequently the application for summary judgment was dismissed. I understand that proceeding has now been discontinued.

[15] Ms Stent then applied to the Tenancy Tribunal contending that pursuant to s 131 UTA the Body Corporate was required to distribute a share of the common property fund, namely $42,349.70 plus interest, to her as owner of Unit 204.

**The Tenancy Tribunal decision**

[16] The Adjudicator first referred to s 131 UTA, to which I will return. The essence of the decision appears at [21] where the Adjudicator said:

> Moreover, the section refers to surplus money being distributed in the same proportions as it was "raised" – in this case the money at issue was raised by way of the Body Corporate taking proceedings (on behalf of both the majority and minority owners) against the District Council to recover the cost of repairs to common property. Ms Stent had no claim, and could not make a valid claim, against the District Council for any repair costs as she purchased her unit with full knowledge of the defects and at a reduced purchase price that reflected this – see *Body Corporate 188529 v North Shore City Council*[2] *("Sunset Terraces")*.

[17] In my view that decision is correct for the following reasons.

**Is there a valid claim to the CP fund?**

[18] Mr Brill put the issues succinctly in his submissions:

> 16. The Tribunal order gives rise to two legal questions:
>
> - Was the CP fund distribution made under s 131 of the UTA?
> - If so, are the proportions described in s 131 mandatory?

[19] Section 131 provides:

> The body corporate may distribute money or personal property in its possession and surplus to its requirements among the unit owners in the same proportions in which the money was raised or the money which was used to pay for the property was raised.

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[2] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [289].

[20] Mr Brill's submission was that the BC has a discretion whether or not to distribute money, by the use of the word "may". I accept that is correct. This is confirmed by Associate Judge Bell in the Bridgewater Bay Apartments' case[3] where he said:

> The section gives a power, but does not impose a duty.

[21] Mr Brill's point is that once the BC, in the exercise of its discretion, decides to distribute funds then, there is a mandatory requirement to distribute the funds among the unit owners "in the same proportions in which the money was raised".

[22] That requires an analysis of "raised".

[23] Ms Wakelin's response supports the decision of the Adjudicator in that she submits that s 131 does not operate to compel the Body Corporate to pay Ms Stent a share of the common property settlement monies as she had no legitimate interest or stake in the "raising" of these settlement monies.

[24] There is no doubt that the fund available for distribution was paid by the FNDC following the mediation on 20 April 2017. That mediation settled the claims in the High Court proceeding by the majority and minority unit owners against the Council. Ms Stent was not a claimant. She could not be. When she purchased Unit 204 from the Wheeldons in or about July 2014 she paid $213,000 which was at a significant undervalue. As part of the settlement the Wheeldons retained their right to continue with their claim against the Council but only in respect of the loss of value they had suffered. Apparently they agreed that Ms Stent should have some part of any settlement.

[25] When Ms Stent purchased Unit 204 she acquired the unit itself but also a share of common property. This is confirmed by the Certificate of Title and the supplementary record sheet to it under Identifyer 132412. The supplementary record sheet records as follows:

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[3] At [37].

> Ownership of common property
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> Pursuant to s 47 Unit Titles Act 2010:
>
> (a) the body corporate owns the common property; and
>
> (b) the owners of all the units are beneficially entitled to the common property as tenants in common in shares proportional to the ownership interest (or proposed ownership interest) in respect of their respective units.

[26] Ms Stent acquired her share of the common property at a significant undervalue. In time, once repaired, her unit will have a value commensurate with all other units in the development including common property. She will therefore recover full value for her share of the common property having paid significantly less than its value at the time of her purchase.

[27] That is why the Body Corporate submits that for Ms Stent to succeed in her claim will amount to "double dipping" or a double recovery in circumstances where neither she nor the Wheeldons were legally able to make a claim in respect of the common property fund.

[28] In that sense therefore Ms Stent has not taken any part in the "raising" of the money which is now available for distribution.

[29] Ms Wakelin put it this way:

> 45. In purchasing at a significant "discount", Ms Stent has already obtained any compensation she might otherwise have been entitled to. Her significant discount would also have been inflated by her recovery of the "diminution in value" claim from the Wheeldons. Put another way, she cannot be compensated twice in respect of the same loss. If Ms Stent were to receive a share of the common property settlement distribution, she would, in effect, be double dipping – once in respect of the discounted purchase price that she paid, and again in respect of the settlement paid by FNDC.

[30] This is confirmed to a degree by Associate Judge Bell in *Body Corporate 207624 v Grimshaw & Co*[4] where, after a consideration of s 131 the Judge said:

[4] *Body Corporate 207624 v Grimshaw & Co* [2020] NZHC 34.

> [21] …Because claims on the fund include those by unit owners in their own right, the body corporate does not have the only say in how the settlement proceeds are to be applied. A resolution in general meeting is unlikely to be effective to oust unit owners' personal claims on the fund. On the other hand, those who elected not to become plaintiffs could presumably not claim a personal interest in the fund as they did not claim for any damage they had suffered.

[31] Consequently, I dismiss the appeal insofar as it relates to the claim to a share of the common property fund for the reason that Ms Stent took no part in the "raising" of the funds now available for distribution.

**The appeal against levies**

[32] Before the Tenancy Tribunal the BC claimed $7902.50 plus interest in respect of two levies described as the annual levy and the cashflow levy. As far as the annual levy is concerned the Tribunal granted a rehearing in respect of:

(i) the Body Corporate's application of monies paid by Ms Stent for levies;

(ii) the quantum of the second levy amount claimed by the Body Corporate.

[33] At the hearing Mr Brill withdrew any appeal in respect of the annual levy and that remains to be reheard before the Tribunal.

[34] As far as the cashflow levy is concerned it is unclear whether the order for rehearing covers that as well because the orders refers to "monies paid by Ms Stent for levies". That appears to encompass both levies.

[35] Furthermore, in his substantive decision of 3 June 2019[5] the Adjudicator said:

> Towards the end of the hearing, Ms Stent stated that she accepted that she must pay both of these levies. However, because I am uncertain whether this was intended as a full admission in respect of both levies, I have considered below the argument made by Mr Brill as to whether the Body Corporate can recover default interest where the amounts of these levies include components of fees

[5] At para [26].

> and charges incurred by the Body Corporate for financing the unit owners' non-payment of earlier (building) levies.

[36] The Adjudicator went on to then determine that the Body Corporate could not recover against unit owners' interest paid on financing, and default interest provided for in s 128.

[37] The Adjudicator determined that the defence to the claim made for the unpaid levies failed.

[38] At para 104 of his submissions Mr Brill submitted:

> The appellant submits that the rehearing of these issues ought to proceed before the Tribunal. This is because they comprise a number of small sums, each of which raised disputed issues of both fact and law – and it would not be efficient for those matters to be reargued before this Court. Besides, once the larger questions are addressed here, those minor amounts may well be capable of settlement before the rehearing.

[39] Because of the uncertainties surrounding whether or not Ms Stent agreed to pay the levies, albeit not interest or costs, and because the major issue has now been determined, it seems to me the most appropriate way forward is to adjourn that part of the appeal relating to the imposition of these two levies to permit the rehearing to be undertaken.

[40] In the event that settlement is not effected or the issues involving the levies are not resolved by the Tribunal then the appeal presently before the Court in respect of the levies only can be amended if necessary, or otherwise brought back before this Court for determination.

**Costs**

[41] Costs were not determined in the Tribunal. The Body Corporate seeks that costs before the Tribunal and in this Court be fixed by this Court. Ms Stent also sought costs in this Court and as I understand it that costs before the Tribunal should lie where they fall.

[42] Leave is therefore reserved to the Body Corporate to submit a memorandum as to the costs it seeks within 10 days of the delivery of this decision with any response from Ms Stent to be filed within a subsequent period of 10 days.

G M Harrison
District Court Judge