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

IN THE DISTRICT COURT
AT ROTORUA

I TE KŌTI-Ā-ROHE
KI TE ROTORUA-NUI-A-KAHUMATAMOMOE

CIV-2019-063-000318
[2019] NZDC 23477

BETWEEN	BODY CORPORATE S90876 Appellant
AND	MONTESSORI FOUNDATION LTD Respondent

Hearing: 24 October 2019

Appearances: C Baker for the Appellant
D Hayes for the Respondent

Judgment: 9 December 2019

JUDGMENT OF JUDGE P W COOPER
[On appeal from decision of Tenancy Tribunal]

The appeal

[1] This is an appeal from a decision of the Tenancy Tribunal dated 28 May 2019 dismissing the application of the appellant Body Corporate S90876 to recover money allegedly outstanding in respect of body corporate levy, interest and legal costs said to be owed by the respondent; the unit title holder Montessori Foundation Ltd.

The claim

[2] The total amount claimed, including legal fees on the solicitor/client basis and interest from 28 February 2018 (the date the levy was said to be due) was $16,403.97. This is set out in the submissions of counsel for the Body Corporate that accompanied the application to the Tenancy Tribunal as follows:

"**Summary**

22. The applicant is seeking the following amounts:

Outstanding levies	6,230.59
Body Corporate Secretary debt collection charges	287.50
Legal fees and disbursements including GST (on a time and attendance basis as per out time records)	7,713.03
Appearance at hearing ($400.00 p/hr x 2 hours approximately, plus GST)	920.00
Application filing fee	850.00
Interest to 30 January 2019	402.85
TOTAL	**16,403.97**"

[3] The fact that the claim specifically related to the levy for the period 8 June 2017 to 8 June 2018 can be seen from the application itself, which refers to the precise figure for the 2017/2018 levy $6230.59. The submission of the Body Corporate which sets out the particulars of the claim and importantly, for the purposes of this appeal, specifically states that the claim does not relate to the levy for the period 2018/2019 as **that levy will not be due until 8 June 2019** (my emphasis).

[4] The specific references in the submissions of the Body Corporate which accompanied the claim are set out below:

General meeting Minutes striking levy	**Levy details**	**Levy due date**	**Levy amount outstanding**	**Levy invoice details**
AGM Meeting held 28 April 2017	Annual levy period 08/06/17 to 08/06/18	28/2/18	$6,230.59	Invoice emailed on 15 May 2017 to [email address deleted]
AGM Meeting held 23 April 2018	Annual levy period 08/06/18 to 08/06/19	08/06/19	$6,390.33	Invoice emailed on 24 May 2018 to [email address deleted]

> "**Body Corporate administration collection costs**
>
> Although there is a balance outstanding for the operational levy for the period 2018 to 2019, the appellant does not seek an order for the amount outstanding on that levy as it will not be due until 8 June 2019."

Background

[5] The amount of the levy for the 2017/2018 year was in fact $10,364.36. The amount of the claim is $6230.59, being what is alleged to be amount outstanding.

[6] Administration of the charges to and payments from owners in the Body Corporate is undertaken by a separate entity, Body Corporate Administration Limited (BCA). The ledger for Montessori is a running total in chronological order of the charges and payments made by Montessori. Charges to Montessori include such items as the annual levy, maintenance charges, and electricity. Payments from Montessori were made in a somewhat haphazard way.

[7] At times there were very specific amounts charged for electricity and there are corresponding payments of the same various specific amount which one can say were clearly intended to relate to the electricity charge. There also appears to be consistent payments of $278.44 by Montessori but at irregular time periods. There are also occasional payments of larger amounts, for example, $2000, $1000, $500.

[8] All of the payments shown in the ledger for Montessori are in chronological order with the running total and without attribution to any particular charge or debit in the ledger.

[9] On 24 May 2018, the levy charge for the 2018/2019 year appears in the ledger alongside a due date, 15 June 2018.

[10] It is common ground that if the rule in *Clayton's case*[1] applies to the account for Montessori and payments in were credited to the earliest debt (ie the debt incurred first in time) then the amount of the 2017/2018 levy would have been paid in full at the time the proceedings were issued by the Body Corporate.

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[1] *Devaynes v Noble* (Clayton's case) 35 ER 781; (1816) 1 Mer 529,572.

[11] The rule in *Clayton's case* is:

> "Where there is a current account – one entire account into which all receipts and payments are carried in order of date so that all sums paid into it form one blended account – then the presumption is that the first item on the debit side of the account is intended to be discharged or reduced by the first item on the credit side, and that the various items are appropriated in the order in which the receipts and payments are set off against each other in the account."

The Tenancy Tribunal decision

[12] There were a number of issues argued before and decided by the Tribunal. Relevant to the present appeal the Tribunal found:

(a) That if the rule in *Clayton's case* was found to apply, then the 2017/2018 levy would have been paid in full – which is the position taken by Montessori.

(b) That the rule in *Clayton's case* did not apply to the Montessori account because the account was not a "blended account such as an overdraft facility". That the ledger recorded separate and distinct debts for which invoices were issued, for example operational levies, contributions to the interior maintenance fund and electricity charges. That the ledger serves solely as a record of distinct debts and payments made.

(c) Alternatively, the Tribunal held that if the rule in *Clayton's case* could apply to the Montessori account, the rule in *Clayton's case* was based on presumed intention which could be displaced "by evidence of an agreement to the contrary or of circumstances from which a contrary intention could be inferred." The Tribunal held that the manner in which payments were made – at times corelating to specific debts owed (for example electricity) and at other times there being no correlation to any specific date – was evidence of circumstances in which a contrary intention could be inferred.

(d) The Tribunal then considered whether the Body Corporate had the right to appropriate payments to debts other than the 2017/2018 levy. The

Body Corporate's position was that it had that right and it did allocate part of the payments to the 2018/2019 levy charge, thus leaving a balance owing on the 2017/2018 levy debt.

(e) The Tribunal found that there had been no express direction from Montessori or any intention that could be discerned by inference as to how payments were to be allocated. In those circumstances, the Tribunal held (applying *Cory Brothers and Co Ltd v Owners of Turkish Steamship Mecca*)[2] that the Body Corporate as creditor would have the ability to appropriate part of the payments to the 2018/2019 levy **if that levy was due** (my emphasis).

(f) The Tribunal held that the levy for the 2018/2019 year was not due until 8 June 2019. That was in accordance with how the claim was presented to the Tribunal (see paragraph [2] earlier) and also because an option for Montessori to defer payment of the levy was still available even though it had not been exercised at the time of the purported allocation. In fact, Montessori did exercise the option to defer payment and make instalment payments of the 2018/2019 levy prior to the date of hearing of the claim.

[13] Given the finding that the 2018/2019 levy was not due until 8 June 2019, the Tribunal held that the Body Corporate could not allocate payments to that levy before it fell due. Therefore, the Tribunal held that at the time the proceedings were commenced, the 2017/2018 levy had been paid in full and the claim was dismissed.

Appellant's submissions on appeal

[14] Mr Baker, for the Body Corporate, submitted that the due date for the payment of the 2018/2019 levy was 15 June 2018 and the Tribunal was wrong to hold that the due date was 8 June 2019. This argument was advanced before the Tribunal but rejected for the reasons mentioned in paragraph [12](f) above.

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2 *Cory Brothers and Co Ltd v Owners of Turkish Steamship Mecca* [1897] AC 286.

[15] Mr Baker referred to the Minutes of the AGM of the Body Corporate held on 23 April 2018. Those Minutes record in Resolution 11:

> "It was resolved by the Body Corporate by ordinary resolution that the levies to be imposed on each unit title owner until the next general meeting will be as per the 2018/2019 budget."

[16] The 2018/2019 budget sets out the budget figures for that year and contains the following footnote:

> "**LEVIES**
>
> - Subject to sufficient funds, the Body Corporate Manager was authorised to pay accounts for the body corporate as they fall due and to issue invoices to proprietors from time to time to recover their respective proportionate share of costs set by the budget in accordance with section 84(1) of the Unit Titles Act 2010.
>
> - The levies will be raised in one GST invoice for the year, and if owners choose to pay by instalments, they may set out their own AP or Direct Debit Accounts to BCA Ltd, and notify BCA Ltd of their payment arrangements (whether due in monthly or quarterly instalments etc.)
>
> - The Body Corporate Manager advised that a levy statement will be distributed to owners with a coy of the minutes and that payment of the levy for the forthcoming year should be paid by the date stipulated so that the insurance premium can be paid."

[17] The invoice to Montessori stated, "due date: 15/06/2018".

[18] Mr Baker's submission is that the submissions to the Tribunal that accompanied the claim which stated that the due date for the 2018/2019 levy was 8 June 2019 was clearly incorrect and a mistake, and that (referring to the resolutions referred to) the actual date the levy was due was the date specified in the statement, 15 June 2018.

Respondent's submissions

[19] In summary, the respondent submits, in relation to the due date of the levy, that the Tribunal was entitled to rely on the statements in the Body Corporate submission accompanying the claim that the due date for the 2018/2019 levy was 8 June 2019. The respondent submits that the Tribunal was correct in holding that the

Body Corporate had no ability to allocate payments to the 2018/2019 levy because the levy was not due at the time the purported allocation was made. Mr Hayes also submits that the Tribunal was correct in taking the view that the due date stipulated in the invoice (8 June 2018) was overridden by the further wording providing for an option to pay the levy by instalments.

Analysis

[20] There is obviously something of an ambiguity in that the invoice for the 2018/2019 levy states that the due date for payment of the levy is 15 June 2018 but allows for payments to be deferred and made by instalments.

[21] However, the greater difficulty for the Body Corporate in this case is section 124 Unit Titles Act 2010. This section provides:

> "**124 Recovery of levy**
>
> (1) A body corporate must fix the date on or before which payments of levies are due.
>
> (2) The amount of any unpaid levy, together with any reasonable costs incurred in collecting the levy, is recoverable as a debt due to the body corporate by the person who was the unit owner at the time the levy became payable or by the person who is the unit owner at the time the proceedings are instituted."

[22] The process adopted by the Body Corporate did not "fix the date" on or before which payments of the levies are due. In my view, the wording of the section requires the Body Corporate to fix a specific calendar date. Until this is done, the levy does not become payable. The process adopted by the Body Corporate did not fix a specific calendar date, rather the resolution simply refers to the budget and the budget has the footnote, "The levy for the forthcoming year should be paid by the date stipulated." The correct process was for the Body Corporate by resolution to fix the date, being a specific calendar date, on or before which the payment of levies are due and the invoice should reflect that date.

[23] As the date for payment had not been fixed, the levy for the 2018/2019 year had not become payable and it was impermissible for the Body Corporate to allocate

monies received from Montessori to the 2018/2019 levy. This means that at the date of the commencement of proceedings, the 2017/2018 levy had been paid in full.

Conclusion

[24] The appeal is dismissed.

P W Cooper
District Court Judge