IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CIV-2019-085-000200
[2019] NZDC 24174

BETWEEN	BODY CORPORATE 46112 (IN ADMINISTRATION) BY ITS ADMINISTRATOR PAUL CREW Plaintiff
AND	ALLAN CLAUDE GREGAN Defendant

Hearing: 26 July 2019

Appearances: J Mahuta-Coyle for the Plaintiff
F K Devine for the Defendant

Judgment: 5 December 2019

INTERIM RESERVED JUDGMENT OF JUDGE S M HARROP
AS TO PLAINTIFF'S APPLICATION FOR SUMMARY JUDGMENT

Introduction

[1] In this proceeding the plaintiff (the "BC") sues Mr Gregan for $119,388.47 together with interest and costs in respect of unpaid levies for four units within the BC premises at Buckley Road, Southgate, Wellington of which he is the registered proprietor. It has applied for summary judgment. The application is opposed by Mr Gregan.

[2] As noted in the intituling, the BC sues by its Administrator Paul Crew who was appointed by the High Court to that role initially on an interim basis by Cull J on 13 March 2018 then following a hearing on 22 May 2018 his appointment was extended by Thomas J for 12 months from the date of her judgment, 28 May 2018.[1]

[1] [2018] NZHC 1219. I understand that in a judgment of 21 August 2019 [2019] NZHC 2059

[3] In order to set the scene for the current proceeding it is helpful to set out some of the introductory paragraphs from Thomas J's judgment:

> "[1] The FIVE-O Apartments in Buckley Road, Wellington is a unit title development in respect of which little or no maintenance has taken place since its development around 40 years ago. Building works to the common property and building elements of the three buildings owned by the Body Corporate is now critical. The Body Corporate is, however, dysfunctional. There is no Body Corporate committee. No annual general meeting (AGM) has been held since 2014 and there is no operative governance structure. An administrator was appointed on an interim basis in March 2018. This decision confirms the appointment of an administrator for a 12 month period. It also addresses the costs of these proceedings. …
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> [3] FIVE-O Apartments comprises nine principal units and a number of accessory units. There are two blocks of apartments comprising Units A—H. The applicants own Units A, B, C, E and H. Mr Gregan owns Units D, F and G, and Unit I. Unit I, somewhat strangely, is part of the unit title development but is a stand-alone house, physically separated by some distance from the apartment blocks. Although the applicants comprise the majority of owners, Mr Gregan holds 59.9 per cent of the unit entitlement.
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> [4] Mr Gregan's family undertook the original development, a factor which might well have contributed to the current problems.
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> [5] Because of the somewhat anomalous makeup of the unit title development, the Body Corporate's decision-making up until 2010 tended to concern Units A—H only. Mr Gregan separately insured and maintained Unit I.
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> [6] The last time any determinative governance action occurred was in 2009. The 2009 AGM elected the co-owner of Unit B as chairperson. The Body Corporate's accountant was a Mr Gustafson. Unit owners paid a levy of $200 per quarter to cover insurance, ground maintenance and Mr Gustafson's fee. Self-evidently, the levy was insufficient for any building maintenance. It does not appear there was any long-term maintenance plan.
>
> [7] The need for maintenance works to the apartment blocks, being painting and window and roofing replacement, was discussed at the 2010 AGM. This would have required a large increase in the levies and a levy of $230 per unit per month payable from 1 September 2010 appears to have been agreed. Mr Gregan did not attend the 2010 meeting and takes exception to its validity. The basis for this objection was that notice of the AGM was not sent to him by registered mail, something Mr Gregan maintains is a requirement. In any event, it is

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Doogue J appointed Anita Reinecke of Oxygen Strata Limited to fill that role for 12 months from 21 August 2019, following Mr Crew's resignation. I am unclear whether Mr Crew was acting as Administrator between 28 May 2019 and 21 August 2019 but even if he was not that has no impact on this proceeding as the invoices sued on were issued and this proceeding was filed before 28 May 2019. The plaintiff is the BC, not Mr Crew.

clear Mr Gregan's dissatisfaction with the Body Corporate and/or the applicants stems from this time.

[8] The then chairperson retired as chairperson at the 2010 AGM and the position has not been filled since.

[9] No AGM was held between 2011 and 2013."

Events since Mr Crew's appointment as Administrator

[4] After reviewing its history, Mr Crew caused the BC to pass long overdue resolutions establishing budgets for the 2010 through to 2018 financial years and then worked out, on an ownership interest basis, the levies required for each unit owner to meet that budget for each year. This was done 5 May 2018.[2] In setting in the budget and accordingly the levies for each of the years since 2010 Mr Crew simply adopted the same annual levy as had been established in that year. He sent emails explaining these matters to the unit owners and attaching the levy invoices on 6 April 2018, supplementing further information he had provided in an email dated 21 March 2018.

[5] On 18 June 2018 Mr Crew caused the BC to pass a resolution setting the budget for the financial year 1 April 2018 to 31 March 2019 and further resolutions imposing levies for that year and interest and an administration charge for late payment. The interest rate to be applied in the event of late payment was 10% per annum.

[6] The upshot of this was that the BC claims in this proceeding that Mr Gregan became liable for levies including interest of $18,573.61 in respect of each of his units D, F and G and $63,667.64 in respect of his larger unit, unit I. Payment of $16,306.17 which Mr Crew received (on a date not apparent from the evidence) from Mr Gregan was credited against the balance owing for unit I; I understand the $63,667.64 represents the reduced amount.

[7] When Mr Gregan failed to make payment in full following demands in September 2018 and March 2019 this proceeding was issued on 22 March 2019.

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[2] I note that the formal resolution attached as document PLC-5 to Mr Crew's affidavit of 22 March 2019, is dated 5 April 2018 not 5 May 2018. However, because the plaintiff's interest claim would be greater if that date were adopted and Mr Crew has deposed that the levies were imposed on 5 May, I will proceed on that basis.

[8] The summary judgment application was heard before me on 26 July 2019. At the conclusion of the hearing I issued a Minute containing quite detailed observations about the issues and suggesting that the parties have 14 days to consider whether some practical solution could be reached as to the way forward, particularly given the inevitably ongoing relationship between them. Further time was later provided for such discussions, but no resolution was reached. By the time this was clear, I was absent on leave and on my return when I checked with the parties Mr Mahuta-Coyle advised me that it would indeed be necessary for the court to issue a judgment on the BC's application for summary judgment. This is that judgment.

The grounds for opposition

[9] In his notice of opposition dated 31 May 2019 Mr Gregan through counsel Mr Devine clearly sets out the grounds on which summary judgment is opposed:

(a) The BC Administrator is not able to pass a resolution having retrospective effect imposing levies for expenditure that there is no evidence was ever incurred by the BC.

(b) If the BC Administrator is able to pass resolution having retrospective effect, he is barred by the Limitation Act from backdating these to 2010.

(c) The house in which Mr and Mrs Gregan live (unit I) should not be levied with the other units as it has been separately insured from the date the unit plan was deposited to the date of appointment of Mr Crew. It has not shared any expenses with other units and was excluded from the BC before Mr Crew's appointment.

[10] Mr Gregan filed an affidavit of 31 May 2019 expanding on these points and referring to other background matters.

[11] Mr Crew filed an affidavit dated 12 June 2019 in reply to that of Mr Gregan.

Summary judgment principles

[12] Rule 12.2 of the District Court Rules 2014 provides:

> "(1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to any cause of action in the statement of claim or to a particular cause of action."

[13] The principles applicable to the determination of an application for summary judgment are well settled and were recently summarised by Associate Judge Osborne (as he then was) in *Gidden v IAG New Zealand Limited*[3]:

> (a) Commonsense, flexibility and a sense of justice are required.
>
> (b) The onus is on the plaintiff seeking summary judgment to show that there is no arguable defence. The Court must be left without any real doubt or uncertainty on the matter.
>
> (c) The Court will not hesitate to decide questions of law where appropriate.
>
> (d) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.
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> (e) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.
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> (f) In assessing a defence the Court will look for appropriate particulars and a reasonable level of detailed substantiation – the defendant is under an obligation to lay a proper foundation for the defence in the affidavits filed in support of the Notice of Opposition.
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> (g) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.
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> (h) The need for judicial caution in summary judgment applications has to be balanced with the appropriateness of a robust and realistic judicial attitude when that is called for by the particular facts of the case. Where a last-minute, unsubstantiated defence is raised and an adjournment would be required, a robust approach may be required for the protection of the summary judgment process.

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3 [2016] NZHC 948 at [61]

(i) Once the Court is satisfied there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the [District Courts Rules] which provide for the just, speedy and inexpensive determination of proceedings.

(footnotes omitted).

Discussion

[14] During the hearing I raised the possibility that because Mr Crew was applying in his capacity as an Administrator appointed by the High Court this claim might appropriately be referred to the High Court in its supervisory jurisdiction. On reflection, even if it may have been possible to refer the matter to the High Court, whether on Mr Crew's application or that of Mr Gregan expressing concern about the way Mr Crew was exercising his powers, I am satisfied this court has jurisdiction to consider this claim. It is on its face a simple claim in debt by a body corporate (I note the BC is the plaintiff, not Mr Crew) for breach of the obligation every owner of a unit in a body corporate has pursuant to s 80(1)(f) of the Unit Titles Act 2010 ("the Act") to pay levies which are from time to time payable in respect of their unit.

Retrospectivity

[15] Mr Gregan does not dispute Mr Crew's ability to pass resolutions, but he does dispute his ability to pass resolutions which purported to set levies retrospectively based on "budgets" for the years 2011 to 2018. Mr Crew simply relies on the apparently broad power given to a body corporate under s 121 of the Act to raise funds and impose concomitant levies "from time to time".

[16] In developing the argument in his written submissions Mr Devine submitted this approach betrayed a fundamental misunderstanding of the meaning of the words "from time to time" in s 121. In essence he submitted that this should be taken to mean the time at which levies could be imposed rather than suggesting that they could be imposed in respect of a time period which has already passed. Common sense and practicality, he submitted, supported the contention that levies could only be imposed in respect of time periods following the imposition of the levies. He pointed out that a previous owner could not be held liable for levies imposed on the current owner.

Mr Devine pointed out, with reference to *Chan v Body Corporate 10564*[4], that irregularities in processes followed by a body corporate may subsequently be ratified by resolutions passed at a later AGM. Mr Devine submitted that such retrospective ratification indicated that passing resolutions with retrospective effect as Mr Crew has done here is not an appropriate manner of dealing with historical deficiencies. He said a body corporate could pass a resolution setting a "catch-up" levy if there was a shortfall, established by evidence, of its expenditure. But he said this would require a body corporate to present to the court evidence of what the income and expenditure had been for that period so that levies could be calculated on an informed basis.

[17] I do not accept Mr Devine's submissions on this issue. It is plain that the power to impose levies is unfettered and may be exercised at any time i.e."from time to time". There is no restriction in the Act on a body corporate adopting budgets and imposing consequential levies for previous financial years. Provided they are otherwise lawfully struck and related to the requisite funds set out in the Act, they cannot be challenged by a unit owner for retrospectivity.

[18] Here, because of the dysfunctionality of the BC, no levy had been imposed for the numerous years in question, so something had to be done by Mr Crew about that. It was for that reason the High Court appointed him. The power under s 121, in my view, is clearly wide enough for Mr Crew on behalf of the BC simply to have resolved, without referring to the previous years at all, that a certain sum of money (totalling the same as the combined levies imposed here) was *now* required for urgent maintenance work on the premises.

[19] This indeed is what Mr Devine contemplates in his reference to a "catch-up levy". Mr Devine submitted that the BC could not sue for unpaid catch-up levies unless the court was presented with evidence of what lay behind them by way of income and expenditure required and as to that which had been incurred. I do not consider the court is required to have such evidence. The BC is empowered by the Act to impose levies based on the information available to it and provided that is done with the appropriate authority at a properly convened meeting, or in this case by an

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4 [2015] NZHC 2491

Administrator appointed by the High Court, the unit owners are required to pay the appropriate share based on their ownership interest as levied, pursuant to s 80(1)(f). No doubt if clear evidence of an appropriate credit or offset is provided to the BC, it would need to take that into account but that does not in my view impact on the fundamental validity of the levies imposed.

[20] I note that this conclusion is supported by two judgments to which Mr Mahuta-Coyle referred me: *Body Corporate 37466 v Kumar*[5] and *BC16279 v Gilbert*[6]. In the latter case, as Mr Mahuta-Coyle points out, a BC resolved at an AGM on 19 September 2014 to impose levies for the financial year 1 July 2013 to 30 June 2014. Under that resolution levies became immediately payable, retrospectively, from 1 July 2013. The case was disputed on various grounds all the way to the Supreme Court but there was no suggestion that the timing of the resolutions in relation to the financial year in question was an issue.

[21] I accept also Mr Mahuta-Coyle's submission that what Mr Crew has done is consistent with the mission imposed on him by the High Court to get the BC's finances into order so as to address its long overdue maintenance needs.

[22] It is helpful to consider the wider context in which any dispute between a unit owner and a body corporate arises. Thomas J made a point of reinforcing this, particularly for the benefit of Mr Gregan, when addressing the issue of increased costs[7]:

> "[72] In order to provide the context for this decision, and in particular to ensure Mr Gregan understands the position, it is necessary to give a brief summary of the makeup of a body corporate and its obligations. It is frequently a failure of a unit owner properly to understand the underlying principles of bodies corporate which leads to problems.

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5 [2010] DCR 553 at [8] to [24] (Judge Blackie).
6 [2014] NZHC 567
7 [2018] NZHC at [72] to [74]

> [73] When a unit plan is deposited in the designated land registry office for the creation of a unit title, a body corporate is created and is the body corporate for the unit title development. The members of the body corporate are the owners of all the units in the unit title development. The common property in the unit title development is owned by the body corporate. The owners of all the units own the common property as tenants in common in proportion to their ownership interests. The body corporate has statutory powers and duties, including to establish and maintain a long-term maintenance plan, to insure the buildings and other improvements and to repair and maintain the common property and building elements.
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> [74] The owners of the units within a unit title development *are* the body corporate. Although a distinct legal entity, the body corporate is not independent from the unit owners and funded by some third party. It is comprised of and managed by the unit owners and funded by the unit owners. If unit owners do not pay their levies, the body corporate will not have the funds to pay insurance or maintenance. Any failure of the body corporate to comply with its statutory obligations is, in effect, a failure of the unit owners."

[23] Accordingly, Mr Gregan in refusing to pay properly-imposed levies is in a real sense, and in large measure given the number of units he owns, opposing himself. The BC, which represents his interests along with those of all the other owners, is empowered to impose levies under the Act. No one owner who is outvoted, or in this case unhappy with an Administrator's levy decision, may refuse to pay on that account. Mr Gregan's greater level of unit ownership does not give him any more right than any other owner to refuse to pay them.

A limitation problem?

[24] Mr Devine submitted that given this proceeding was issued on 22 March 2019, and because the invoices purport to include or relate to expenditure incurred in 2011, 2012 and the early part of 2013, to that extent the levies fell foul of the six-year limitation in the Limitation Act. He referred to s 11 of the Limitation Act 2010 which provides that it is a defence to a claim for work done more than six years before the date the claim is filed. Without evidence of the date when expenditure was incurred, which he contends a plaintiff is required to provide, on the face of it the portion of the claim which relates to the period more than six years before the proceeding was issued on is statute-barred.

[25] I reject this submission for the reason pointed out by Mr Mahuta-Coyle. The cause of action sued on here is not one for recovery of work done or expenditure incurred by the BC but rather for non-payment of the levies imposed under s 121. Although those levies to relate to periods of time which extend back beyond six years, there was no cause of action until the resolutions at 5 May 2018 and 18 June 2018 created liability to pay. The cause of action only arose when there was non-payment following receipt of those levies. On this basis there is no limitation issue.

Estoppel arising from the way unit I has previously been treated by the BC?

[26] In his affidavit Mr Gregan says, among other things:

> "24. I note at paragraph 14 that Mr Crew has included 'unit I' in his calculation of levies. Until Mr Crew's appointment as Administrator, the house at 17 Southgate Road (unit I) had always been excluded from the BC. Indeed the founding minutes of the BC always treated unit I as a separate entity for the purposes of exacting levies. That arrangement was continued by all the secretaries that managed the affairs of the BC. If the other members of the BC were unhappy with that arrangement then I would have expected them to say something to the secretary to correct it. I note the financial statements and minutes for the BC attached to Mr Crew's affidavit do not include 'unit I' for the purposes of calculating levies and voting.
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> 25. Unit I (my home and the home of my wife Margaret) was separately insured and had no shared expenses with the other units. We paid all the outgoings, including insurance premiums. This unit has never been an expense to the BC and has never received any demands for monies, that is, until Mr Crew's appointment.
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> 26. The BC's solicitor led me to believe that the Administrator would act promptly to see a long term solution was arrived at to this problem of unit I being lumped in with the BC. Subdivision in principle was suggested as one of those possible solutions.
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> 27. I do not believe that it should be included in the budgeting or imposition of levies either now or dating back to 2011. Removing our home from the BC would significantly alter the total levies claimed from me."

[27] In his affidavit in reply Mr Crew said on this issue:

> "3. It appears that Mr Gregan appears (sic) to be saying that there was no evidential basis on which to impose a budget that provisioned for insurance payable over unit I between 2010 and 2017 on the basis that Mr Gregan has previously insured that unit himself.

4. The BC has accepted throughout that if Mr Gregan has in fact personally paid for insurances in relation to unit I then any such amounts would be able to be credited to him.

5. However, the starting point is that the scheme of Unit Titles Act simply doesn't allow Mr Gregan to make his own arrangements for unit I, whatever his views on the matter are or whatever he says the history of arrangements within the BC were. Indeed, as I understand it, a purpose of obtaining an order for the appointment of an Administrator was to regularise the BC's affairs and remedy its ongoing noncompliance with the Act.

6. The Act requires the BC to provide insurance for all of the buildings (s 135) and then to impose a levy in accordance with each unit owner's unit entitlement. Where an owner meets a cost directly related to them then the BC is able to offer some credit in relation to that.

7. The BC's solicitor has previously written to Mr Gregan saying they would offer a credit if he provided evidence of his payment of insurance premium's throughout the relevant times. As appears to be his practice, he has done nothing in response to that, until absolutely required to by the Court. Even now, he has provided no such evidence that any insurance premiums were actually paid by him (other than an assertion of this in his evidence) so at present there is no basis for the BC to offer Mr Gregan any credit. Annexed and marked **"PLC-1"** is a true copy of the email issued by its solicitors to Mr Gregan's on this point."

[28] Mr Crew's response does not address the key point made by Mr Gregan in his affidavit namely that *the BC* – not just Mr Gregan – has treated unit I as not being part of the BC (despite it legally being so) right up until the time Mr Crew was appointed. Mr Crew's response focusses on the question of whether insurance could properly be charged to him as part of a levy imposed in circumstances where Mr Gregan claims he has already paid for the insurance of unit I. I accept the point made by Mr Mahuta-Coyle that Mr Gregan despite asserting that he has paid the insurance for unit I has not despite being asked on several occasions provided any evidence of this. But there is no dispute advanced by Mr Crew as to Mr Gregan's assertions about the separate way in which unit I has always been treated (not just in relation to insurance), at least until Mr Crew was appointed. I note that the plaintiff has not filed an affidavit in reply from anyone having personal knowledge of the way unit I was treated by the BC prior to Mr Crew's appointment.

[29] There is therefore unchallenged evidence from Mr Gregan about the mutually agreed exclusion of unit I from the BC as a matter of fact, if not law. Further, what he says is corroborated by other documents. I first note that in the statement of financial performance for the year ended 31 March 2010 which was annexed to Mr Crew's initial affidavit, there is no reference to unit I, only to the other eight units. It records that no income had been received in any of the years ended 31 March 2008, 2009 and 2010 from Mr Gregan in his capacity as the owner of unit I, as opposed to his capacity as owner of his other three units which form part of the main block.

[30] I note to that in Mr Crew's report as Interim Administrator dated 9 April 2018 he says at paragraph 33:

> "As the last valuation obtained by the BC was completed by NAI Harcourts in 2012 the BC's cover is not to the current full insurable value of the buildings and improvements. Also the 2012 valuation *covered only eight units* ie the eight, two storey apartments in two blocks." (emphasis added)

[31] Again, this is appears to confirm that Mr Gregan is correct that unit I was not, until Mr Crew's appointment, treated for at least levy or insurance purposes, as part of the BC.

[32] In Thomas J's judgment the correspondence which led up to the application to the High Court for the appointment of an Administrator is recounted. The correspondence was between Mr Greenwood, the solicitor for the BC and Mr Gregan.

[33] Thomas J said[8]:

> "[48] Mr Gregan was particularly exercised by the extent and cost of work which the building report suggested needed to be carried out to his stand-alone house, unit I. His family having built the development, he considers the idea of the window requiring replacement is ridiculous as is the proposed cost.
>
> [49] What the discussion did reveal, and indeed as was highlighted by Mr Greenwood in his correspondence with Mr Gregan, is that there is no logical basis for unit I to be part of the unit title development. If, as Mr Gregan contends, work is not required to unit I, or certainly not to the extent the professionals have identified, then the best course is for unit I to be split off from the unit title development. That way, the Body Corporate would not have any potential responsibilities and

[8] [2018] NZHC [48] to [50]

> liabilities for any structural issues with the house and Mr Gregan could choose if, and the extent to which, he maintains it. For this reason, it was agreed the draft order should be amended to provide for this as a specific option.
>
> [50] That will not resolve matters completely, however, given Mr Gregan still owns three units in the apartment blocks. Mr Gregan did indicate he would sell those units."

[34] As envisaged by this, one of the options that Mr Crew was directed by the High Court to explore following his appointment as Administrator was:

> "cancellation of the unit plan, separation of unit I and reconstitution of the remaining units as a Body Corporate"[9]

[35] All of this indicates that, leaving aside Mr Crew's decision to include unit I in the 2018 levies, *both the BC and Mr Gregan* have consistently treated unit I, despite its legal inclusion in the BC, as excluded from it. There is no evidence that it has ever been levied to contribute to the costs of maintenance or insurance or any other outgoings of the BC nor any evidence that it has received any benefit from the BC in relation to such matters.

[36] This gives rise to the question of whether, against that factual conclusion on the basis of the affidavit evidence provided to me, there is an arguable defence based on estoppel.

[37] Mr Mahuta-Coyle submitted that the prior conduct i.e. the exclusion of unit I was unlawful whether intentionally or otherwise and that could not found a defence to a claim for recovery of lawfully-imposed levies. I do not agree, as a matter of principle. The BC was entitled to deal with its constituent owners as it saw fit, as long as it operated within the Act. After all the owners effectively *are* the BC. Conduct by a body corporate may found an estoppel just as may conduct by any other person or entity.

[38] As Mr Mahuta-Coyle himself acknowledged, a body corporate is entitled to recognise and give credit to a unit owner where a unit owner has met costs that are otherwise the body corporate's responsibilities. Consistently with that Mr Crew

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9 Paragraph [85](c)(iv) of Thomas J's judgment.

expressly told Mr Gregan that if he were able to provide evidence of having met insurance costs in respect of unit I due credit would be given. This, rightly in my view, emphasises that the imposition of levies in a lawful manner is not necessarily the last word. There may be a basis on which judgment should not be given because of some form of set-off or other equitable basis such as estoppel.

[39] While Mr Gregan has provided no evidence to back up his claim of having met insurance costs for unit I, he has provided evidence, not controverted by Mr Crew, that *both he and the BC* have always treated unit I as separate from the other eight units and that includes for levying purposes. I consider this undisputed course of conduct over many years essentially amounts to a representation by the BC that it will not levy Mr Gregan in respect of unit I as long as he will not claim any maintenance or other costs from the BC in respect of unit I. On that basis, Mr Crew's action in including unit I in the levies, which in isolation and in principle was perfectly lawful, indeed understandable, appears to be contrary to the conduct and implied (if not express) representations by the BC over many years.

[40] Although submissions were not advanced on the basis of estoppel by either party, I raised the question during the hearing. I am satisfied for the particular purposes of summary judgment application that there is a sufficient basis in the evidence before me on which Mr Gregan may have an arguable defence based on estoppel to the part of the claim that relates to unit I. Whether or not, assuming the argument proceeds, this defence is ultimately successful is of course another matter and one on which I make no comment beyond indicating it appears to be arguable. I therefore refrain from any extensive discussion of the potential estoppel argument which would essentially be based on the unconscionability of the BC going back on its word. It is sufficient to refer to what the Court of Appeal said in *Wilson Parking New Zealand Limited v Fanshawe 136 Limited*[10]:

> [72] The doctrine of equitable estoppel has undergone much change, particularly over the last three decades. Equitable estoppel was described by Mason CJ in *Commonwealth of Australia v Verwayen* as "a label which covers a complex array of rules spanning various categories".[11] He saw all these categories as having the same

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10 [2014] 3 NZLR 567

11 *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 409

fundamental purpose, namely "protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted."[12]

[73] Our review of the authorities suggests that the focus of the inquiry into an appropriate equitable remedy has moved away from the removal of detriment (if that term is construed in a narrow sense) to an inquiry into what is necessary in all the circumstances to satisfy the equity arising from a departure from the expectation engendered by the relevant assurance, promise or conduct on the part of the defendant. An assessment of the nature and extent of the element of unconscionability forms part of the analysis.

[74] This change has been reflected in this country. Delivering the judgment of this Court in *National Westminster Finance NZ Ltd v National Bank of New Zealand Ltd* , Tipping J described the rationale of the doctrine in this way:[13]

> "The decisions of this Court in *Wham-O Manufacturing Co v Lincoln Industries Ltd* [1984] 1 NZLR 641 and *Gillies v Keogh* [1989] 2 NZLR 327 have emphasised the element of unconscionability which runs through all manifestations of estoppel. The broad rationale of estoppel, and this is not a test in itself, is to prevent a party from going back on his word (whether express or implied) when it would be unconscionable to do so."

…

[114] Nevertheless some principles may be stated with a degree of confidence even if the application of those principles in particular cases may be a matter of some difficulty. The three main elements relevant to relief stem from the ingredients necessary to establish equitable estoppel in the first place. These are the quality and nature of the assurances which give rise to the claimant's expectation; the extent and nature of the claimant's detrimental reliance on the assurances; and the need for the claimant to show that it would be unconscionable for the promisor to depart from the assurances given."

Preliminary conclusion

[41] As a result of this discussion I conclude in principle that there is no arguable defence to the portion of the claim the plaintiff makes in respect of the three units owned by Mr Gregan within the main block of eight units but there is one in respect of the part of the claim relating to Unit I.

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12 *Verwayen* , above n 11, at 409 as cited in *Sidhu v Van Dyke* [2014] HCA 19, (2014) 308 ALR 232 at [1].

13 *National Westminster Finance NZ Ltd v National Bank of New Zealand Ltd* [1996] 1 NZLR 548 (CA) at 549.

[42] However, I consider there are two difficulties in entering judgment for the BC on the undisputed part of the claim. First, the information supplied to me at various points in the documents filed by the plaintiff is somewhat confusing as to the correct calculation of those sums. Also, given the delay in issuing this judgment the interest calculation would need updating and it would of course need to be applied to that part of the claim only. In addition, I understand that the $16,306.17 paid by Mr Gregan (it is not clear to me when this was paid) was credited to the debt in respect of unit I. On the view I take of the matter, pending of course determination of whether there is ultimately a defence to the unit I – related part of the claim, I consider that sum ought instead to be credited to the debt in respect of the other three units for which I find Mr Gregan is liable. If that were the only issue I would defer final judgment pending submissions from counsel as to the correct amount for which judgment should be entered. I expect it would be readily clarified, being simply a matter of making the correct calculations. But for that reason alone this judgment is labelled as an interim one.

[43] There is another, more fundamental, issue which has come to my attention, on which as a matter of fairness counsel must have an opportunity to make submissions. This is the question of whether I am empowered to enter judgment for only part of the BC's claim. It seeks judgment under one simple cause of action described as a claim in debt under s 80(1)(f) of the Unit Titles Act 2010.

[44] Rule 12.2(1) of the District Court Rules 2014 provides:

> "The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to any cause of action in the statement of claim or to a particular cause of action."

[45] On the face of this the BC in order to obtain summary judgment must satisfy the court that Mr Gregan has no defence (at all) to the whole of its (one and only) cause of action. As there is only one here the second possibility mentioned in the rule is redundant. But on the face of it finding there is no defence to part of the claim i.e. to only a part of the cause of action is not sufficient to give the court power to give summary judgment.

[46] I must say based on long experience as a civil practitioner and latterly a civil-designated judge, I had assumed there would be no difficulty about entering judgment for part of a claim, part of a cause of action. To do so would certainly be consistent with the object of the Rules as set out in r 1.3:

> "…to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application."

[47] If there is what the court finds to be an undisputed portion of the claim, at least of more than a nominal amount, it is surely in the interests of justice that the plaintiff be able to obtain judgment for that amount pending final determination of the balance of the claim in respect of which the court finds there is an arguable defence. Any unfairness could be addressed by granting a stay, rather than refusing to enter judgment.

[48] However, the plain wording of the rule does not appear to permit this approach. Significantly too, there is a clear distinction with the equivalent High Court Rule, r 12.2(1) which provides:

> "The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim **or to a particular part of any such cause of action**." (emphasis added)

[49] Clearly, the High Court on an application for summary judgment has the express ability to give judgment if satisfied that the defendant has no defence to a particular part of a cause of action.

[50] Rule 152(1) of the District Court Rules 1992 provided:

> "The Court may give judgment against a defendant if the plaintiff satisfies the Court that the defendant has no defence to a claim in the statement of claim or to a particular part of the claim."

[51] Curiously, between 1 February 2009 and 14 May 2009 the High Court Rules were in the same form as the District Court Rules 2014 now are. My research has been unable to find any reason why there was a change in wording within that period or subsequently. It may well have been a drafting oversight, perhaps associated with the state of the respective sets of rules in early 2009. However there is no doubt about

the current materially different wording of the respective District and High Court Rules.

[52] The predecessor of the District Court Rules 2014, the District Court Rules 2009 simply applied the equivalent High Court provision: see r 12.17. But that course was not adopted when the 2014 Rules were enacted with the effect that there is now a clear divergence between the two. On the face of it given that the two sets of rules were previously expressly aligned, one must treat the decision to diverge as deliberate, though I am unable to conceive of a good reason for this.

[53] Being a creature of statute a District Court Judge may only do what he or she is empowered to do by legislation. My current view is that I am not empowered by r 12.2(1) to grant summary judgment to the BC for part of its claim or cause of action; it must satisfy me there is no defence to any part of it.

[54] For this further reason I have labelled this judgment as an interim one and final determination of the summary judgment application is deferred pending receipt and consideration of further submissions. If the plaintiff wishes to proceed with its application for summary judgment it will need to file further submissions explaining why, in light of the findings reached and the views expressed I am able to enter summary judgment and, if so, in what sum. Obviously Mr Devine must have the opportunity to make submissions in response if the BC does wish to proceed with its application.

[55] I direct that the BC file and serve **by 15 January 2020** either a memorandum indicating that the summary judgment application is no longer pursued and seeking further directions as to the way forward, or alternatively making submissions as to my jurisdiction to enter summary judgment for part of the claim and the amount for which it considers I should enter judgment.

[56] In the event the BC wishes to pursue the application for summary judgment Mr Devine is to file and serve submissions in reply of those of the BC by **31 January 2020** and the file is then to be referred back to me for consideration. If the summary judgment application is not to be pursued, then the file may be directed to the first

available civil-designated judge for further directions following the filing of a joint memorandum of counsel proposing the way forward.

[57] In the meantime, for the avoidance of doubt, I reserve costs.

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Judge S M Harrop
District Court Judge

Date of authentication: 05/12/2019
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.