SUPREME COURT OF QUEENSLAND

CITATION:	*The Proprietors Cathedral Village BUP 106957 v Cathedral Place Community Body Corporate* [2020] QCA 240
PARTIES:	**THE PROPRIETORS CATHEDRAL VILLAGE BUP 106957** (applicant) **v** **CATHEDRAL PLACE COMMUNITY BODY CORPORATE** (respondent)
FILE NO/S:	Appeal No 1690 of 2020 DC No 2754 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – [2019] QDC 210; [2019] QDC 238 (McGill SC DCJ)
DELIVERED ON:	4 November 2020
DELIVERED AT:	Brisbane
HEARING DATE:	29 May 2020
JUDGES:	Fraser and McMurdo JJA and Jackson J
ORDERS:	**1. Extend the time to apply for leave to appeal to 14 February 2020.** **2. Grant leave to appeal.** **3. Allow the appeal.** **4. Set aside the order made on 29 October 2019.** **5. Remit the proceeding to the District Court for determination of the respondent's claim and that part of the applicant's counter-claim which was for a money sum.** **6. The parties provide written submissions on the costs of this appeal, and the proceeding at first instance, not to exceed five pages in length, within 14 days of the delivery of this judgment.**
CATCHWORDS:	REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BODY CORPORATE: POWERS, DUTIES AND LIABILITIES – where the applicant is the community body corporate under a mixed-use scheme under the *Mixed Use Development Act* 1993 (Qld) ("the Act") – where the respondent represents the

retail and commercial building within the scheme – where for many years, the respondent has complained that the applicant has levied some contributions on all of the applicant's members which have been applied only in the interests of the residential owners – where the applicant commenced proceedings against the respondent for unpaid levies – where the respondent claimed that, upon a proper accounting of what should have been levied against them, they had overpaid the applicant and that it should pay them – where the trial judge concluded that s 174(4)(c) of the Act had the effect that it was not open to the respondent to dispute, in the applicant's action to recover the amount of this levy as a debt, whether the contribution levied against the respondent had been correctly determined – whether the trial judge erred in so holding

Mixed Use Development Act 1993 (Qld), s 174(4)(c), s 177(1)(h)

Builders' Licensing Board v Inglis & Anor (1985) 1 NSWLR 592, considered
Cathedral Place Community Body Corporate v The Proprietors Cathedral Village BUP 106957 [2020] QCA 239, related

COUNSEL: D Savage QC, with M Walker, for the applicant
M Amerena with L V Amerena for the respondent

SOLICITORS: PHV Law Solicitors & Consultants for the applicant
Grace Lawyers for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of McMurdo JA and the orders proposed by his Honour.

[2] **McMURDO JA:** This is another appeal in the long running dispute between different interests within the development at Fortitude Valley called Cathedral Place. It is a development which is the subject of a scheme under the *Mixed Use Development Act* 1993 (Qld) ("the Act"). The respondent, which I will call "CBC", is the community body corporate under the scheme. There are six members of the respondent, each of which is a body corporate under a building units plan for a certain part of the site. One of them, which is the applicant in this appeal, and which I will call "the commercial owners", represents the retail and commercial building on the site. The other members of CBC represent, in total, eight residential buildings.

[3] For many years, the commercial owners have complained that CBC, under the control of the residential owners, has levied contributions on CBC's members which have been applied only for the benefit of the residential owners. In essence, their complaint is that some of the contributions levied on them have been for the provision by CBC of amenities and services to other parts of the site from which they receive no benefit. Their complaint is that this conduct exceeds, or is a misuse of, CBC's powers under the Act.

[4] The dispute resulted in a proceeding in the District Court, commenced in 2010 as a claim by CBC, in an amount of $188,352.71 for unpaid contributions, against the commercial owners. They defended the case on the basis that those contributions,

as well as earlier contributions which had been levied against and paid by them, were excessive because they included amounts to provide benefits to only the residential owners (or some of them). The commercial owners claimed that, upon a proper accounting of what should have been levied against them, they had overpaid CBC such that it should repay money to them. They counterclaimed an amount of $246,719.

[5] After a five day trial, on 21 December 2018, McGill SC DCJ delivered extensive reasons for judgment, without then making any orders.[1] His Honour held that the Act did not authorise CBC to require the commercial owners to "subsidise" the provision of services and other benefits to the other bodies corporate, or the owners or occupiers of lots within those bodies corporate. At the same time, however, his Honour held that this did not provide a defence to CBC's claim, or a basis for the counterclaim against it, because of the effect which he attributed to s 174(4)(c) of the Act.

[6] By s 174, a body corporate, in this case CBC, may levy contributions which it has determined to be necessary to meet its actual or expected liabilities. By s 174(4)(a), a contribution so levied is payable to the body corporate in accordance with its decision to make the levy, and by s 174(4)(c) "may be recovered as a debt by the body corporate in a court of competent jurisdiction."

[7] After a further hearing, his Honour delivered a judgment on 29 October 2019, by which it was ordered that the commercial owners pay CBC $290,077.44, including $106,419.24 by way of interest.[2] This is an appeal against that judgment.

[8] Another hearing occurred on 7 November 2019, from which there was a further judgment delivered on 29 November 2019. On the basis of his earlier conclusion, that the Act did not authorise CBC to require the commercial owners to subsidise the provision of services and other benefits to others within the scheme, his Honour granted a declaration and injunctions in favour of the commercial owners.[3] CBC appealed against those orders. That appeal was heard by a differently constituted Court, which allowed the appeal, in part, by a judgment delivered on 3 November 2020.[4] In that judgment, which I will call the first appeal judgment, the Court determined many of the issues, each involving the interpretation of the Act, which would otherwise have required a determination within this judgment. It is necessary to read this judgment with the first appeal judgment, although some repetition is unavoidable.

[9] In the first appeal judgment, the Court differed from the trial judge's interpretation of the Act in some respects. The Court accepted that there was a necessary constraint on the exercise of CBC's powers, in that it should not require the funds raised by contribution from all proprietors to bear the cost of the provision of an amenity or service for particular proprietors or occupiers.[5] More specifically, it was

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1 *Cathedral Place Community Body Corporate v The Proprietors Cathedral Village BUP 106 957* [2018] QDC 275 ("the first judgment").

2 *Cathedral Place Community Body Corporate v The Proprietors Cathedral Village BUP 106957 (No 2)* [2019] QDC 210 ("the second judgment").

3 *Cathedral Place Community Body Corporate v The Proprietors Cathedral Village BUP 106957 (No 3)* [2019] QDC 238 ("the third judgment").

4 *Cathedral Place Community Body Corporate v The Proprietors Cathedral Village BUP 106957* [2020] QCA 239.

5 [2020] QCA 239 at [65].

held that this was a limitation on CBC's power under s 176(c), under which a body corporate may enter into an agreement for the provision of amenities or services by it or another person to a lot, the proprietor or occupier of a lot, or a parcel comprised in a building units or group titles plan. Ultimately, it was the exercise of that power which, CBC had long maintained, entitled it to bring the cost of the provision of such an amenity or service into account under s 177(1)(h)(ii). The effect of this limitation on CBC's power under s 176(c) is that any agreement of that kind had to be on terms by which CBC would recover at least its costs of its performance of the agreement, so as to avoid those costs becoming the burden of others who would not benefit from the amenity or service.

[10] However, the Court recognised that circumstances could arise in which, despite the terms of the relevant agreement, a community body corporate would not recover its costs in the provision of the amenity or service. The Court gave examples of those circumstances before holding that, in such cases, the unfunded cost to the body corporate would have to be brought into account under s 177(1)(h) (or in some cases under s 177(1)(l)).[6]

[11] The Court held that this was a consequence of the position that, by the text of s 177(1)(h), a community body corporate is given no discretion to exclude a "liability" according to whether its burden should fall on only one or some of its members, and that s 174 does not permit it to discriminate between its members in levying contributions.[7]

[12] A further example can be added here. Let it be assumed that CBC has provided an amenity or service, to one or more of the residential buildings or owners or occupiers within them, for which it has not entered into an agreement, or at least an agreement by which it would recover the costs to it of doing so. In such a case, if a cost has been incurred, so that there is, in the terms of s 177(1)(h)(ii), a "liability of the body corporate", the community body corporate would be bound to include that liability in the contributions to be levied on all members, either according to s 177(1)(j) or s 177(1)(l). Absent a right to recover the cost from those who received the benefit of the service or amenity, the Act would provide no other means of raising the funds which would be necessary to meet it.

[13] In a case of that kind, or of the kinds described in the first appeal judgment at [70], the cost to the community body corporate would have to be brought into account as a matter of necessity. In the terms of s 177(1)(h), the costs would be part of the amounts "necessary … to be raised by way of contributions". In the first appeal judgment, the Court noted its agreement with an injunction, which was not appealed against, requiring CBC to keep accounts which separately record costs incurred for the maintenance of restricted community property covered by by-law 27.[8] According to by-law 27, those costs must be paid to CBC by the residential bodies corporate, under a separate charge pursuant to that by-law. Those costs could not be raised by contributions under s 174, because they are not, in the terms of s 177(1)(h), amounts "*necessary* … to be raised by way of contributions".

The reasoning of the trial judge

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6 [2020] QCA 239 at [70].
7 [2020] QCA 239 at [71]-[72].
8 [2020] QCA 239 at [77].

[14] The trial judge analysed s 174 of the Act, which relevantly provides:

> "**174 Levies by bodies corporate on members**
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> (1) A body corporate may levy—
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> (a) the contributions determined by it under section 177(1)(h);
> …
>
> …
>
> by giving its members written notice of the contributions payable by them.
>
> (2) Contributions must be levied, and are payable by the members of the body corporate, in shares proportional to their voting entitlements at the time the contributions are levied.
>
> …
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> (4) A contribution—
>
> (a) is payable to the body corporate in accordance with its decision to make the levy; and
>
> …
>
> (c) may be recovered as a debt by the body corporate in a court of competent jurisdiction."

[15] The critical part of s 174, in his Honour's analysis, was subsection (4)(c), by which a contribution "may be recovered as a debt by the body corporate". His Honour commenced with a consideration of the interpretation of the same words by the New South Wales Court of Appeal in *Builders' Licensing Board v Inglis & Anor*.[9]

[16] In that case, the respondents were licensed builders who had contracted with a homeowner to carry out certain building work. Under a statutory scheme administered by the Builders' Licensing Board, the owner was paid an amount by the Board to compensate him for unsatisfactory work by the builders. The Board then commenced proceedings against the builders, seeking reimbursement of that amount. Under the statute, the Board had an entitlement to recover such an amount "in a court of competent jurisdiction as a debt from the person by whom the building work was carried out …".[10]

[17] The Board's claim against the builders was pleaded simply on the basis that it had paid this sum to the homeowner under the scheme, and that recovery was sought from him under that provision of the statute. The builders sought particulars which were ordered by a magistrate. The particulars set out the calculation of the Board's claim including amounts for items described as "major structural defects" and "general defects". The builders sought further particulars, to which the Board responded that its claim was for a debt created by statute, and as such the Board was not required to provide particulars of things such as the nature of the work allegedly carried out by the builders and the rectification carried out by the Board. The magistrate ordered further particulars. A case was stated to the Supreme Court at the request of the

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9 (1985) 1 NSWLR 592 ("*Inglis*").

10 *Builders Licensing Act* 1971 (NSW), s 34(3).

Board and the judge at first instance dismissed the appeal. That was upheld by the Court of Appeal.

[18] Discussing the meaning of the words "recovered as a debt" in that statute, Kirby P said:[11]

> "The word 'debt' can seldom be construed to include damages, for example, for breach of covenant. The procedural advantages of recovery of a debt have been known to our law for a very long time. They include the entitlement to sue upon a default summons, to require a sworn defence, to secure default judgment without more proof of the claim, and so on. But for the statutory provision that the amount paid for repair of a defective building could be recovered "as a debt", it would not be susceptible to default procedures. It would require the Board, in every case, to sue for the recovery of the sums paid. The Board would then have to prove, in every case, even uncontested cases, the defects complained of, the repairs effected, the reasonableness of the costs incurred, and so on. It is this necessity to which I take s 34(3) of the Act to be addressed. In many cases the builder will not contest the Board's claim. Such claims can then be sued in debt. The costs of litigation, leading to default judgment, will thereby be reduced. And the sum recoverable from the builder will be fixed by the default judgment.
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> But where, as here, there is a contest, the entitlement to recover as a debt should not, in my view, bypass the normal requirement that, when a claim is disputed, he who alleges must particularise and prove. In short, I read the subsection as addressed to a procedural impediment, not to removing rights so fundamental as are at stake here.
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> The respondents point out that any other result would deprive them effectively of a right to be heard and to resist the Board's claim in a meaningful way. Statutes may, of course, do this. But they will be construed, where possible, to avoid such a result: see *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 109. Especially will they be so construed where, as here, we are dealing with the procedures of the ordinary courts, not special tribunals with particular circumscribed procedures, specially laid down in the legislation: cf what was said by Dixon CJ and Webb J in *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395–396."

Samuels and Mahoney JJA agreed.[12]

[19] The trial judge here referred to cases in this Court which have cited *Inglis*, namely *Edwards v Bray*[13] and *Westpac Banking Corporation v Body Corporate for Wave Community Title Scheme 36237*.[14] It is unnecessary to discuss them, each of which involved different legislation and which, in neither case, questioned the reasoning in *Inglis*.

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11 (1985) 1 NSWLR 592 at 597-598.
12 (1985) 1 NSWLR 592 at 599.
13 [2011] 2 Qd R 310 at 317-318; [2011] QCA 72.
14 [2014] QCA 73.

[20] The trial judge then said that:[15]

> "On the face of it *Inglis* (supra) supports the defendant, in holding that the party sued to recover something payable as a debt is still entitled to dispute whether the amount is properly payable."

Nevertheless, his Honour continued as follows:

> "However, it is important to bear in mind that the reason for that conclusion in *Inglis* was that otherwise there would be no capacity for the person sued to dispute whether the debt had properly arisen. In the present case however there is such a capacity, at least in the form of the dispute resolution mechanism provided under the 1980 Act."[16]

His Honour was there referring to the dispute resolution procedure, under the *Building Units and Group Titles Act* 1980 (Qld), which applied to "a dispute about the operation of this Act or the rights and obligation of persons under this Act" by s 214A of the *Mixed Use Development Act* 1993 (Qld).

[21] After an extensive discussion of the applicability of that regime for a dispute of this kind, and a consideration of whether there had been a binding determination by a referee before whom something of this dispute had come, his Honour did not return to the reasoning in *Inglis*, before discussing the terms of s 174 and s 177, in these passages:

> "[114] As to whether a challenge can be brought to the amount of any particular levy in a proceeding to enforce the levy, in my opinion it is necessary to focus on what it is that is made recoverable as a debt under the Act. By s 174(4) what is recoverable as a debt is "a contribution … payable to the body corporate in accordance with its decision to make the levy … ." That in turn is a reference to the duty imposed on a body corporate by s 177(1)(h) and (j). Having determined the contributions under s 177, the body corporate then levies the contributions on its members by giving them written notice of the contributions payable by them under s 174(1). But the amount recoverable is the contribution payable in accordance with the decision to levy the contribution, which under s 177[(1)](h) is a decision to "determine the amounts necessary in its opinion to be raised by way of contributions" for the specified purposes.
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> [115] If therefore a body corporate has made a determination in accordance with s 177[(1)](h), that determines the amount to be raised by contributions overall, with the share of each individual member being determined in accordance with s 174(2). In principle a situation could arise where a purported decision under s 177(1)(h) was a nullity, on what might be concisely described as administrative law grounds. That is to say, if a decision maker in arriving at a particular decision makes what may be described as a jurisdictional error, the

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15 The first judgment [107].

16 Ibid.

> effect is that the purported decision is a nullity, and, in the context of a case like the present, there would have been no contribution validly determined, and therefore nothing to enforce by recovery as a debt."

[22] His Honour then turned to the question of whether the irregularities of which the commercial owners complained meant that the determination of the amounts necessary, in the opinion of CBC, to be raised by contributions was not "validly made" and was "ineffectual."[17] He said that "[i]n effect, the argument is that because of errors of this nature, the determination is a nullity."[18] His Honour said that for two reasons, on the correct interpretation of s 177, the determination was not a nullity.

[23] The first of them came from the words "in its opinion" in s 177(1)(h), from which, his Honour said, "the body corporate's determination is not conditioned upon its having made a correct assessment of the amounts properly payable in accordance with the Act". He said that "[a]s long as a body corporate has formed a particular opinion on a bona fide basis, that is, has been attempting in good faith to give effect to its obligations under the Act, it is difficult to say that the statutory provision has not been complied with."[19]

[24] The second reason came from what his Honour said was the significance of the contributions in the operation of a body corporate.[20] In his opinion, "it would be exceedingly inconvenient if an incorrect view as to what matters should or could properly be taken into account in determining the amounts necessary to be raised by way of contributions had the effect of invalidating the process of levying contributions from members."[21] He said that if it emerged that there had been errors, they could be corrected subsequently by adjustments to future levies.[22]

[25] For those reasons, his Honour concluded that it was not open to the commercial owners to dispute, in CBC's action to recover the amount of this levy as a debt, whether the contribution levied against the commercial owners had been correctly determined.[23] He added that it would have been open to the commercial owners to have applied to a referee for an order that the amount of the contribution be varied.[24]

[26] On that reasoning, his Honour did not have to make findings as to what amounts should not have been included in the assessment or assessments which ultimately led to the levying of the contributions which were in issue.

The submissions for the commercial owners

[27] For the commercial owners, it was argued that the trial judge was wrong to apply concepts of administrative law, and that the true analogy was with a contractual relationship, in this case between CBC and its members. On that basis, it was

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17 The first judgment [118].
18 The first judgment [119].
19 The first judgment [120].
20 The first judgment [121].
21 The first judgment [121] citing *Westpac Banking Corporation v Body Corporate for Wave Community Title Scheme 36237* [2014] QCA 73 at [46], [59].
22 Ibid.
23 The first judgment [122].
24 The first judgment [125].

argued, CBC could not recover a contribution which it had levied, unless it performed its obligations according to the Act and the by-laws, which it had failed to do.

[28] Further, it was said that the application of administrative law principles, particularly the concept of a jurisdictional error, was something which neither side argued at the trial.

[29] Alternatively, it was submitted that on his Honour's interpretation of the provisions, he ought to have held that there was a jurisdictional error, such that the levying of these contributions against the commercial owners was a "nullity", effectively for the following reasons. Firstly, the contributions which were levied included expenses which the by-laws required to be paid by members of CBC who were not the commercial owners or owners or occupiers of their building and according to s 167(9), CBC was obliged to enforce those by-laws. Secondly, by s 167(9)(b), CBC is required to do all things that are necessary and *reasonable* for the enforcement of its by-laws (and the control, management and administration of the community property), meaning that the assessment under s 177(1)(h) had to be "reasonable", which it was not in this case.

[30] It was further argued that whilst "money is the lifeblood of any corporation", that is not a relevant consideration in interpreting these provisions. It was said that it could not have been the intent of the legislature to allow contributions to be levied which were not for proper purposes.

The submissions for CBC

[31] In effect, the argument for CBC adopted the reasoning of the trial judge. The argument disputed the commercial owners' submission that the relationship was effectively contractual, and their further submission that the power under s 177(1)(h) was conditioned by what a tribunal or a court reviewing its exercise might consider reasonable. It was said that to impose that condition would undermine the timely and effective management of a mixed use development site and its community body corporate.

Consideration

[32] Section 177(1)(h) requires a community body corporate to form an opinion about the amounts necessary to be raised by way of contributions by a levy under s 174. That requires the body corporate to assess its actual or expected liabilities incurred or to be incurred under s 177(1)(b), as well as what funds are required for the payment of insurance premiums, rates or any other liability of the body corporate (other than amounts referred to in paragraph (l)).

[33] In many cases, the quantification of the "liabilities", meaning expenditures in this context, of the kinds described in (h)(i) and (ii) will be straightforward and uncontroversial. In other cases, it will require an assessment about which minds could differ. Some undertaking the assessment might be relatively conservative, erring on the side of the determination of a higher amount to be raised by way of the contributions, whilst others might be more optimistic about the need for funds to be raised from the body corporate's members. Inevitably, any assessment will involve a prediction about the future, rather than only an assessment of the amounts of existing liabilities. Further, in some instances, the body corporate may have

incomplete or inaccurate information from others (even assuming the correctness of its own records) from which to make this assessment.

[34] For these reasons, in many cases at least, there will not be a single correct answer to the ultimate question in the determination under s 177(1)(h). I therefore agree with the trial judge that there is a significance in the words "in its opinion" within paragraph (h).

[35] Once there is a determination, which discharges the duty of the body corporate under s 177(1)(h), the body corporate is bound to levy contributions to raise the amounts so determined: s 174 and s 177(1)(j). In that event, I agree with the trial judge that the levying of contributions in the amounts so determined could not be challenged in a proceeding under s 174(4)(c).

[36] The question then is whether the purported determination or determinations in this case did discharge CBC's duty under s 177(1)(h). At this point, the argument for the commercial owners understandably focusses upon the amounts which, the trial judge found, could and should have been recovered in another way, namely pursuant to by-law 27.

[37] The amounts recoverable under by-law 27 were discussed by the trial judge in the first judgment at [83] and [84]. They were costs associated with the maintenance of the "restricted community property" on the podium level of the community property for the scheme. As his Honour observed, it was not necessary here to be concerned with any implication against subsidisation, because by-law 27(c) required CBC to collect, by levies *on the residential bodies corporate*, sufficient funds to enable it to meet its budget for the maintenance of the relevant area. He concluded that there could be "no dispute therefore that all of those costs [normal operating costs and anticipated periodic capital costs] must be met by levies only on the residential bod[ies] corporate".

[38] Respectfully, I am unable to agree with the effect of his Honour's reasoning that levies quantified by the inclusion of these amounts could not be challenged. The irrelevance of these costs, in a determination under s 177(1)(h), is indisputable. It may be accepted (there being no allegation of bad faith pleaded by the commercial owners) that CBC may have considered that it was entitled to levy contributions for amounts which included those costs. However, CBC had to consider whether it was *necessary* to raise contributions by levies on each of its members, so that these costs could be met. CBC could not have thought that it was necessary to do so, and it must be inferred that CBC did not consider that question. It was not said that these costs were included by an oversight or a clerical error. They were included because CBC, in the purported discharge of its duty under s 177(1)(h), did not do what the provision required, which was to form an opinion of whether it was necessary to raise an amount for expenditures by way of contributions under s 174.

[39] The same may be said of the cost of maintaining the exclusive use car parks, and the recoverability of that cost from certain owners under by-law 21, which was the subject of findings in favour of the commercial owners in the first judgment at [85].

[40] There may be other costs, which were included in the relevant determinations by CBC, which fall into the same category. It is unnecessary to identify them here, given my conclusion as to the proper outcome of this appeal.

[41] However, in this judgment it must be said that many of the commercial owners' complaints are in a different category. Some of them are cases where the costs ought not to have been incurred, absent an agreement by which those costs would be recovered from those members, owners or occupiers who would benefit from the expenditure. As I have discussed earlier at [12], absent another means of funding this expenditure, CBC was obliged to include it within its determination under s 177(1)(h), and to levy contributions accordingly. The same may be said of the category of cases which are discussed earlier at [10]. For many reasons, therefore, the extent to which expenditure was wrongly made by CBC will not correspond with the extent to which contributions were not able to be levied against the commercial owners. In short, although the expenditure was wrongly made, it was necessary to levy contributions to fund it.

[42] Nevertheless, the categories of expenditure, under by-laws 21 and 27, sufficiently demonstrate that CBC did not form an opinion under s 177(1)(h). Contributions could not be levied under s 174, in sums which resulted from something which purported to be, but was not, a determination under s 177(1)(h). In the language of the primary judgment, the purported determination was a nullity.

[43] The trial judge thereby erred in holding that there was no defence to CBC's claim. The judgment in favour of CBC should be set aside, as should the dismissal of the counter-claim. CBC's claim, and that counter-claim which sought a money sum, should be remitted to the District Court for further determination according to this Court's judgments in these two appeals. As the parties appeared to accept, in this appeal the Court could not determine the monetary extent to which CBC's claim, or any of the counter-claim, should succeed, because of the absence of specific findings on each of the commercial owners' complaints and the effect of them upon the defence and counter-claim.

[44] The commercial owners apply for leave to appeal, but require a short extension of time in which to do so. This appeal is clearly one part of the larger controversy between the parties which was the subject of CBC's appeal. An extension of time and leave to appeal should be granted.

Orders

[45] I would order as follows:

1. Extend the time to apply for leave to appeal to 14 February 2020.
2. Grant leave to appeal.
3. Allow the appeal.
4. Set aside the order made on 29 October 2019.
5. Remit the proceeding to the District Court for determination of the respondent's claim and that part of the applicant's counter-claim which was for a money sum.
6. The parties provide written submissions on the costs of this appeal, and the proceeding at first instance, not to exceed five pages in length, within 14 days of the delivery of this judgment.

[46] **JACKSON J:** I agree with McMurdo JA.