IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-003833
[2014] NZHC 567

BETWEEN	BODY CORPORATE 162791 Plaintiff
AND	JOHN GILBERT First Defendant
	QSM TRUSTEE LIMITED (IN RECEIVERSHIP AND LIQUIDATION) Second Defendant

Hearing: 25 November 2013

Appearances: T J G Allan for plaintiff
D G Chisholm QC for first defendant (reciever)

Judgment: 25 March 2014

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me 25 March 2014 at 4pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors:
Grove Darlow & Partners, Auckland
Tompkins Wake, Hamilton

Counsel:
D Chisholm QC, Auckland

[1] The plaintiff (the body corporate) is the body corporate established under statute[1] for a unit title development at 239 Queen Street, Auckland, known as "Mid City". The second defendant (QSMTL) is the registered proprietor of five units in that development (the units) as trustee of the QSM Trust.

[2] The first defendant, Mr Gilbert (the receiver), was appointed receiver of QSMTL on 25 July 2013, the day before it was placed into liquidation.

[3] Body corporate levies for the units have not been paid for a considerable time. There has been a long-running dispute between the body corporate and the owner of the units (from time to time) over a proposed redevelopment of the units (which originally comprised a cinema complex). The disputes currently before the Court in this proceeding include a claim by the body corporate for payment by the receiver of body corporate levies in respect of the units since QSMTL went into receivership.

[4] The body corporate has applied for summary judgment for a declaration that the receiver is liable for levies since his appointment, pursuant to s 32(5) of the Receiverships Act 1993 (the Act), and for judgment for so much of the levies as are outstanding as at the date of judgment, together with interest on the overdue amounts and costs.

[5] The receiver disputes that he has any obligation to pay the levies. He says that s 32(5) does not apply, but if it does the Court should exercise its power under s 32(7) of the Act to relieve him of personal liability in the circumstances of this case.

[6] The parties are agreed that the critical issue is whether on its proper construction s 32(5) imposes an obligation on the receiver to pay levies during the term of the receivership. If so, the Court must also determine whether summary judgment is appropriate given that the receiver seeks relief, in that event, under s 32(7) of the Act.

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[1] Originally Unit Titles Act 1972, s 3; now constituted under Unit Titles Act 2010, s 23.

Background

[7] The strata title development known as Mid City comprises three distinct areas: a basement, a mid-level comprising two floors of a number of individually owned units used as retail or food premises, and a third level, originally developed as a movie theatre complex extending over three floors but now comprising the five principal units (3A – 3E) registered in the name of QSMTL.

[8] Floors 1 to 5 include as common property an arcade on the first (ground) floor, arcades giving access to the units in the higher floors and surrounding open (void) areas looking down to the first floor arcade, and stairs and escalators giving access between the floors. The body corporate is the owner of all common property in the development, although the owners of the units are beneficially entitled to that common property as tenants in common in shares proportional to the ownership interest of their respective unit.

[9] The units have had a chequered history since the cinema complex was closed, with proposals for development as a parking facility, and later residential apartments, being investigated but not ultimately pursued. In 2006 this court made a declaration that the then owner of the units was entitled to enforce a redevelopment covenant.[2]

[10] In September 2010 two businessmen, Mr A Copeland and Mr K Finnigan, settled a trust known as 239 Queen Street Trust with a view to the trust acquiring the units. A company, 239 Queen Street Trustees Ltd (239QSTL) was incorporated and became the first trustee of the trust. At that point body corporate levies payable in respect of the units were substantially in arrears (approximately $939,000). As part of the acquisition process, 239QSTL negotiated with the body corporate for a waiver of the historic levies and for a licence of the common areas on the three floors of the development comprising the units, including the airspace above. It is common ground that, at least in part, this was in exchange for 239QSTL replacing the roof as part of the redevelopment.

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2 *Myers Park Apartments Ltd v Sea Horse Investments Ltd* (2006) 7 NZCPR 454 (HC).

[11] The negotiations between the body corporate and 239QSTL resulted in a letter of understanding dated 24 November 2010. The material parts provide:

> 1 A lump sum one off payment on settlement on 25 February 2011 of $65,000.
>
> 2 The balance of arrears (currently at $939,846.18) will be written off on completion by our client of the roof replacement.
>
> 3 The Body Corporate has agreed to a levy holiday on settlement through to 1 April 2011.
>
> 4 The Body Corporate has agreed to allow our client to capitalise the next three months levies and to pay these on 31 July 2011.
>
> 5 Our client completing a variation to the covenant registered against the titles removing any reference to common property within the complex but retaining the option for development of the airspace.
>
> 6 All legal costs in relation to any licence, variation of covenant and transfer of common property are to be met by our client purchaser.

[12] In May 2011, 239QSTL took a transfer of the units from the mortgagee of the then registered proprietor.

[13] During 2012, the body corporate and 239QSTL, through their respective legal advisors, negotiated (but did not conclude) the terms for either a common area licence or a variation of the existing redevelopment covenant.

[14] On 25 September 2012, the body corporate applied to put 239QSTL into liquidation on account of the unpaid levies.

[15] On 21 December 2012, QSMTL was incorporated. At that point the body corporates' application for liquidation of 239QSTL was awaiting hearing (scheduled for 25 January 2013).

[16] On 7 January 2013 the solicitors for 239QSTL wrote to the body corporate inviting it to withdraw its application for liquidation. The basis of this invitation was that since 239QSTL had been removed as trustee of the beneficial owner of the units, secured creditors were likely to appoint a receiver to 239QSTL. The levies were not owed because they had been written off under the earlier agreement on which 239QSTL/the trust had relied in developing common areas for the benefit of all unit

holders (giving rise to an estoppel as well as providing a set-off against any sums still claimed). The solicitors claimed that the body corporate was not honouring the earlier agreement, and was preventing the owners (and developers) from selling the units.

[17] 239QSTL had not in fact been removed as trustee at the time of that letter, but it was formally removed shortly afterwards, and QSMTL was appointed as trustee in its place. The units were transferred to QSMTL two days before the hearing of the body corporates' application for liquidation of 239QSTL (at which time an order was made without opposition from 239QSTL).

[18] Over the next six months the body corporate and QSMTL were involved both in further liquidation proceedings, namely proceedings instigated by the body corporate in respect of QSMTL and second in civil proceedings commenced by QSMTL. In regards to the former, the body corporate issued a statutory demand for unpaid current levies which QSMTL applied to set aside on the basis that it had a counterclaim exceeding the amount of the demand. The application to set aside was ultimately determined in the body corporate's favour on 18 July 2013, by default, after QSMTL had failed to comply with various procedural orders. In regards to the latter, QSMTL issued a claim against the body corporate for a substantial amount of damages resulting in an order on 11 July 2013 that QSMTL provide security for the costs of the body corporate in that proceeding. QSMTL did not provide security, and the proceeding had not advanced before QSMTL was put into liquidation.

[19] In the meantime, the body corporate (perhaps as a result of the problems encountered in relation to the units) adopted new operational rules on 2 April 2013. The material parts provide:

> **1. Interpretation of terms and rules binding on owners, occupiers, employees, agents, invitees, licensees and tenants**
>
> ...
>
> c) "Owner" or "Owners" has the same meaning in these rules as it has in the Act, and for the purposes of these rules it also includes occupiers of a unit in the unit title development and the employees, agents, invitees, licensees and tenants of all

> owners and occupiers of units in the unit title development, unless the context otherwise requires.
>
> …
>
> **31. Rules**
>
> a) ...
>
> b) An Owner must comply with all Acts, (including the noise control provisions of the Resource Management Act 1991, bylaws and regulations) for the time being in force in the area in which its unit is situated, as they relate to the use, occupation or enjoyment of the unit, accessory unit or common property.

[20] On 25 July 2013, a company associated with the interests of Mr Finnigan, Gartmore Nominees Ltd, appointed the first defendant as receiver of QSMTL. The following day QSMTL was placed in liquidation (a Mr Young was appointed liquidator).

[21] On 19 September 2013, the body corporate, by resolution at its annual general meeting, resolved to levy unit owners for an operating budget of $1,148,200 (excluding GST) for the year from 1 July 2013 to 30 June 2014, with the first instalment due on 1 July 2013. The units' share of this levy is 35.65 per cent, which equates to a monthly figure of $39,205.77 (inclusive of GST of $5,113.79). Invoices for the levy instalments have been sent to the receiver. He has not paid them.

Dispute over redevelopment agreement

[22] Although it is not directly relevant to the present application I will refer briefly to the other main aspect of the present proceeding, as it puts the claim for unpaid levies in perspective.

[23] The body corporate accepts that there was an agreement between it and 239QSTL in November 2010 to vary the covenant for redevelopment of the units, dependent on 239QSTL meeting various obligations under the agreement, including replacement of the roof on the building.

[24] It is not disputed that replacement of the roof had not been completed by 27 April 2013. On that date, the body corporate wrote to all potentially affected parties

(including the defendants), making time of the essence under the agreement and giving all parties three months to perform 239QSTL's obligations.

[25] It is also not in dispute that the work was not done within the notice period. On 5 August 2013, the body corporate wrote again to all interested parties, cancelling the November 2010 agreement, revoking the licence given to 239QSTL, requiring removal of any structures erected on the common property on the three levels on the building and requiring the common property areas to be made good to building warrant of fitness standards.

[26] Two days later the receiver responded, rejecting the body corporate's right to cancel the licence, asserting that he had the right to undertake a redevelopment of the common property on levels 3 – 5, and contending that the body corporate had no right to remove any structures in that area. He sought an undertaking that any structures erected on the common area would not be removed.

[27] Shortly after the receiver wrote to all owners advising:

> (a) "...prior to my appointment ... lodged a caveat against all titles in the Development to protect its interest ..."
>
> (b) "As part of its Redevelopment of the common property on levels 3 – 5 QSM intends to make changes to the Building to divert foot traffic from level 1 through to level 2 which it believes is necessary or desirable..." and "...as part of its initial Redevelopment, QSM has constructed a further unit on Common Property on level 2 which it will now seek to occupy or lease."
>
> (c) "QSM also intends to reinstate signage on the Building (which will be on Common Property) which it believes it is entitled to do under its Land Covenant."

[28] The body corporate did not accept the receiver's position. It told him that he was unlawfully trespassing on the common property on levels 3 – 5, he was not entitled to construct a structure on common property on level 2, he was not entitled to alter access of other owners (or their tenants) to their units or access of the public to those units, and was not entitled to erect signage as it said it intended to do.

[29] The receiver maintains his position that he was entitled to erect structures in accordance with rights under the land covenant, and the plaintiff would have to issue proceedings if it wished to dispute his right.

[30] The body corporate responded immediately, obtaining an interim injunction restraining the receiver from erecting a fence across common property on level 1 of Mid City or otherwise impeding access across any part of common property. That order remains in force.

The contentions as to the receiver's liability

[31] The body corporate seeks summary judgment against the receiver for levies due from the time it says the obligation became due (14 days after his appointment) in reliance on s 32(5) of the Receiverships Act 1993. The receiver says that that section does not apply in the circumstances of this case, but if it does, in any event he should be excused from liability under s 32(7)(b) (or his liability should be limited to a greater extent than that provided for in subs (6) under s 32(7)(a)). Those subsections read:

> (5) Subject to subsection (7) of this section, a receiver is personally liable, to the extent specified in subsection (6) of this section, for rent and any other payments becoming due under an agreement subsisting at the date of the appointment of the receiver relating to the use, possession, or occupation by the grantor of property in receivership.
>
> (6) The liability of a receiver under subsection (5) of this section is limited to that portion of the rent or other payments which accrue in the period commencing 14 days after the date of the appointment of the receiver and ending on—
>
> (a) The date on which the receivership ends; or
>
> (b) The date on which the grantor ceases to use, possess, or occupy the property,—
>
> whichever is the earlier.
>
> (7) The Court may, on the application of a receiver,—
>
> (a) Limit the liability of the receiver to a greater extent than that specified in subsection (6) of this section:
>
> (b) Excuse the receiver from liability under subsection (5) of this section.

The principles for summary judgment

[32] The principles that the Court applies when determining an application for summary judgment are not in contest. They can be found in the decision of the Court of Appeal in *Pemberton v Chappell*,[3] and have been re-stated recently in the following succinct statement of the Court of Appeal in *Krukziener v Hanover Finance Ltd*:[4]

> [26] The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried. The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated. The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable. In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it.

The body corporate's arguments

[33] The body corporate contends that on a proper construction of s 32(5) the receiver is indisputably liable for all levies falling due 14 days after the receiver's appointment until either the receiver's appointment ends or QSMTL ceases to have use, possession or occupation of the units. Counsel for the body corporate submitted that such liability rises because QSMTL is deemed by law to have agreed, at the time of acquiring the units, to comply with the Unit Titles Act 2010, and body corporate rules, including the requirement to meet levies on the property. In support of that submission he advanced the following propositions:

(a) The word "agreement" was used in s 32(5), as distinct from the more technical word "contract" used elsewhere in s 32.

(b) Where the word "agreement" is used elsewhere in the Act, it is in conjunction with the document giving rise to the receivership (the

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3 *Pemberton v Chappell* [1987] 1 NZLR 1, particularly at 3 – 4.

4 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26] per Miller J (citations omitted).

constituting document),[5] indicating that Parliament intended the phrase "any agreement", when used in s 32(5), to have a wider meaning than merely a bilateral agreement (such as a lease) thus negating any narrow meaning that might otherwise be suggested by the word "rent" and any implicit limitation to real property.

(c) The Court of Appeal has ruled[6] that by buying into a unit title development, an owner in effect agrees with other owners and the body corporate to abide by the Unit Titles Act 2010 and the body corporate rules.

(d) The body corporate rules provide a separate source of "agreement" in relation to the use, occupation, and enjoyment of a unit. They apply to all owners, and additionally are expressly made binding on the mortgagee in possession.[7] Under the rules, owners agree to abide by the scheme of the Unit Titles Act which includes paying levies.

[34] Counsel submitted that this construction of s 32(5) is also consistent with the legislative policy underlying s 32(5), namely that it is unjust for the receiver to remain in possession of property and obtain the benefits of possession or occupation (for the security holder) without meeting outgoings on the property relating to its use. In this case the receiver or security holder are in possession of the units for the purposes of attempting to sell them, and are gaining a benefit from that possession by permitting between 25 – 30 tenants or licensees to occupy and operate businesses in the units so as to be able to present the property as a potential going concern, and at the same time by receiving income from those tenants or licensees.

[35] Counsel submitted that the receiver's contention that he had an arguable defence, on the basis that any liability should be excused[8] in the circumstances of the case, was disingenuous and unmeritorious because:

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5 He referred, by way of example, to "security agreement" in ss 2(1) and 30 of the Act, and to "deed or agreement" in ss 2(1), 2(2), 6, 7, 10, 14, 15, 18, 20, 25, 33 and 36 of the Act.

6 *Tisch v Body Corporate* No 318596 [2011] NZCA 420, 3 NZLR 679 at [31]; *St Johns College Trust Board v Body Corporate 197230* [2013] NZCA 35, (2013) 14 NZCPR 56 at [19].

7 Unit Titles Act 2010, s 105(3)(d).

8 Under s 32(7).

(a) There is no dispute over the fact that the levies are due.

(b) On the facts (including the close relationship between the trust, the trustee and the security holder, all of whom were represented by the same solicitors), his appointment was merely a device to avoid paying the levies:[9]

(i) there is no connection between the levies and the dispute over the redevelopment covenant;

(ii) the receiver could have continued the claim commenced by QSMTL (in which the existing disputes had been put before the Court) but elected not to do so, so that the body corporate has had to "make the running" by bringing this proceeding;

(iii) the receiver has instead chosen to take unilateral action in respect of redevelopment by seeking to place structures in the common area (leading to the interim injunction still in force): and

(iv) the receiver has continued to receive the services provided by the body corporate (for which the levies are imposed), notwithstanding that it is open to him to discontinue the supply of those services.

(c) The receiver's failure to pay levies casts a burden on other owners, yet he has failed to provide any explanation as to where the income from the tenancies and licensees operating in the units is going.

(d) It cannot be unfair to require the receiver to meet the levies; he is entitled to an indemnity out of QSMTL's property, and no doubt has obtained an indemnity from the security holder (the body corporate and other owners do not have any such protection).

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[9] Referring to QSMTL's solicitor's letter to the plaintiff's solicitors dated 17 January 2013 – see [15] above.

(e) It remains open to the receiver to retire if he is uncomfortable about his personal liability: the position of the secured parties will not be affected (they retain their rights as mortgagees).

(f) The receiver's claim that he is being prevented from selling the units because of this on-going dispute is not sustainable given that he was aware of this dispute when he accepted appointment.

(g) Contrary to the receiver's opinion that the body corporate is not disadvantaged because the levies will be payable by an incoming purchaser, the levies have remained unpaid notwithstanding there have been intervening purchasers.

The receiver's arguments

[36] Counsel for the receiver argued that the receiver has no liability under s 32(5) because:

(a) Levies are not payments due under an agreement, but payments made pursuant to the statutory obligation imposed on a unit owner under s 80(1)(f) of the Unit Titles Act 2010, after the body corporate has exercised the statutory power to levy owners granted to it under s 121 of that Act.

(b) The obligation to pay levies is an incident of ownership, and is not related to the use, possession or occupation of property under an agreement subsisting at time of receivership.

[37] Counsel submitted that the body corporate's arguments do not affect this obvious construction of s 32(5):

(a) This is an agreement relating to ownership: if no one is using, occupying or possessing the units the company is still be liable to pay levies and so the levy payment obligation to do so does not flow from use, possession or occupation of the property in receivership.

(b) The receiver's interpretation does not offend the policy underlying s 32(5) that it would be unfair for the receiver to allow the company to continue to obtain the benefit of property without making payments to the person who has given the company the use of the property. This is so because the phrase "other payment" contemplates a payment arising from an agreement with a third party in respect of property belonging to the third party, as distinct from a payment relating to the company's use, possession and occupation of units that it owns.

(c) The authorities on which the body corporate relies for construing "agreement" widely do not guide the interpretation of s 32(5); the Court's comments were made in an entirely different context. In any event, the mere fact that the scheme of the Act imports some contractual elements does not make those elements an "agreement" for the purposes of s 32(5).

(d) The body corporate's interpretation s 32(5) (that "agreement" includes an agreement implied by law to meet obligations under the Act and body corporate rules) is unrealistic, in that it would render the receiver personally liable for levies in almost all cases where the company in receivership owns a unit-titled property; a receiver is free to cease to use, occupy or possess the property that is being leased or hired whereas it would be virtually impossible to dispose of a unit owned by the company within the 14 days before the liability arose. The body corporate's interpretation would require the receiver to abandon property that comes within the receivership or become personally liable, and could result in personal liability even though the receiver has no ability to avoid the obligation (because a receiver cannot cause a company to cease to own property, save by effecting a sale).

(e) The Unit Titles Act 2010 extends liability for obligations beyond owners in some circumstances[10] but under s 80 only the owner is

[10] See, for example, s 105(3).

made liable: if Parliament wanted the receiver to be liable it could have extended liability beyond the owner in this section.

(f) The body corporate's reliance on a separate source of agreement arising out of the body corporate rules is also misplaced not only because that obligation is an incident of ownership but also because the rules relate to operational matters rather than the imposition of levies.

[38] Counsel relied on the plain wording of "agreement" construed in the context of s 32(5). He argued that "agreement" should be given its usual meaning of a consensual arrangement. He submitted that this interpretation was supported by the general principle against personal liability[11] and by the report of the Law Commission[12] (released prior to the introduction of the Act) that mentioned only two categories of pre-existing contracts, both with third parties. He submitted that liability was intended only if the receiver "permitted" a state of affairs to continue, importing a choice rather than liability imposed by statute. He argued that if Parliament had intended the receiver's personal liability to be extended to payments due as an incident of ownership (rather than bilateral or multilateral agreement) it would have said so explicitly. He submitted that a strained interpretation of s 32(5) was not required because the body corporate (and other unit owners) did not require protection in this way. It remained open to the body corporate to pursue subsequent owners.[13]

Discussion of the competing arguments

[39] The starting point for any inquiry into statutory interpretation is s 5(1) of the Interpretation Act 1999:

(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

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11 Paul Heath and Michael Whale (eds) *Heath and Whale: Insolvency Law in New Zealand* (looseleaf ed, LexisNexis) at 14.71.

12 Law Commission *Company Law Reform and Restatement* (NZLCR 9, 1989) at 386.

13 Unit Titles Act 2010, s 124(2).

[40] Although the Court will start with the plain meaning of the words used, there is still a relationship between the text and the statutory purpose even in relation to apparently plain meaning:[14]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[41] In my view, s 32(5) does not make the receiver personally liable for levies imposed under the Unit Titles Act 2010 for two reasons:

(a) first, levies are not payments due under an agreement, as that word is used in s 32(5); and

(b) second, even if "agreement" can be construed as including an "agreement" between an owner and the body corporate arising as a matter of law when a unit is purchased,[15] such "agreement" arises as an incident of ownership, and is not an agreement "relating to the use, possession or occupation by the grantor of property" for which the receiver is personally liable under s 32(5).

The nature of levies

[42] The obligation to pay levies is imposed on owners of units by s 80(1)(f) of the Unit Titles Act 2010:

> 80 Responsibilities of owners of principal units
>
> (1) An owner of a principal unit—
>
> …

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[14] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]. See also *Transpower New Zealand Ltd v Commerce Commission* HC Wellington CIV-2011-485-1032, 4 November 2011 at [17].

[15] *Tisch v Body Corporate No 318596*, above n 4 at [31].

> (f) must pay all rates, taxes, charges, body corporate levies, and other outgoings that are from time to time payable in respect of the unit

[43] Section 121 gives the body corporate a statutory power to determine levies and impose them on owners. That power is exercised unilaterally (by the body corporate's governing committee) rather than by specific agreement with the affected owners.

[44] Turning then to the first critical aspect of the wording of s 32(5), the meaning of the word agreement, I consider that the plain meaning of the word imports an element of consent or mutual understanding. It is defined in the Concise Oxford English Dictionary as:[16]

[45] a negotiated and typically legally binding arrangement. This meaning can be cross-checked against the purpose of s 32 (which is, broadly put, to define the liabilities of a receiver) and s 32(5) in particular. The following matters are relevant to analysis of the statutory purpose of s 32(5):

(a) As a matter of general principle, a receiver does not assume personal liability for contracts existing at the time of appointment: in general the company remains liable for these contracts, although this general position is subject to the statutory exceptions set out in s 32 and where the receiver personally adopts a contract.[17]

(b) The argument for the body corporate that meaning should be given to the use of "agreement" as distinct from "contract" does not advance matters. A similar argument could be put to the contrary that parliament could have used "obligations" if it wished to widen liability to include levies, as that expression would encompass a payments that is imposed.

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16 *The Concise Oxford English Dictionary* (12 ed, Oxford University Press, New York, 2011).

17 *Heath and Whale: Insolvency Law in New Zealand*, above n 9 at 14.71; *Laws of New Zealand*, Receivers, at [43]. See also *Re Sew Hoy & Sons Ltd (in rec)* (1991) 5 NZCLC 67,009; [1991] MCLR 234.

[46] An obligation to pay arising out of an agreement as interpreted in its usual sense is consistent with the general purpose of s 32(5) as viewed by the leading texts,[18] namely that it would be unfair for the company to continue to get the benefit of a contract negotiated with a third party, without making payment to that third party for the use of the property. Counsel for the body corporate argued that the policy was not limited to third party property. I do not accept that view, but even if that is the case, the underlying policy consideration (the need for mutuality of benefits and obligations) does not exist when the obligation to pay is imposed, nor when the property belongs to the company.

[47] I also find support for confining the interpretation of agreement to the conventional meaning in s 32(8):

> (8) Nothing in subsection (5) or subsection (6) of this section –
>
> (a) Is to be taken as giving rise to an adoption by the receiver of an agreement referred to in subsection (5) of this section; or

[48] (b) Renders a receiver liable to perform any other obligation under the agreement. The body corporate's interpretation does not sit easily with this provision, which reads more logically in relation to an agreement over third party property.

[49] The body corporate's argument that the levies are also caught as a payment under an agreement between owners in respect of body corporate rules is defeated by the same points as arise in respect of its argument that there is liability under an "agreement" imposed by law as a consequence of purchase of a unit title property – it is still an obligation derived from statute rather than from a conventional agreement to which 32(5) does not apply.

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[18] *Heath and Whale: Insolvency Law in New Zealand*, above n 9 at 12.23; Blanchard and Gedye, *The Law of Private Receivers of Companies in New Zealand* (LexisNexis, Wellington, 2008) at 11.08; *Laws of New Zealand*, above n 13, at [42]- [43]. This view has been in place for many years.

Not an agreement relating to use, possession or occupation

[50] The second reason that I find that s 32(5) does not impose a personal liability on the receiver for levies is that a levy is not a payment:

> becoming due under an agreement…relating to the use, possession, or occupation by the grantor of property in receivership.

[51] I have already referred to ss 80(1)(f) and 121(1) of the Unit Titles Act 2010. It is clear that those sections impose obligations in terms of ownership. The Unit Titles Act 2010 does not purport to regulate relations between owners and mortgagees or between mortgagees and the body corporate.[19] Section 32(5) is equally clearly related to use, possession or occupation of property, as distinct from ownership. The construction for which the receiver contends, and which I consider to be the appropriate one, is that the payments must arise under an agreement with a third party relating to the use, possession or occupation by the grantor company of the third party's property.[20] This interpretation is consistent with:

(a) The fact that an owner is liable to pay levies regardless of whether it uses, possesses or occupies the unit.

(b) The common law principle that receivers generally are not liable for rates which, like levies, are an aspect of ownership (unless the receivers dispossess the mortgagor so as to acquire the status of occupier)[21].

(c) Parliament legislated expressly for parties other than owners, including a mortgagee in possession, to be bound by the body corporate operational rules (those rules governing the day to day running of the body corporate) but left the obligation to pay levies solely with owners: the Act would have made receivers liable for levies expressly if that was in fact intended.

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19 *Body Corporate 322588 v K Mitchell Investments Ltd* (2009) 10 NZCPR 611 (HC) at [47] (referring to the 1972 Act).

20 As mentioned above at [45], that is the view of the leading texts.

21 *Ratford v Northavon District Council* [1987] QB 357 (CA); see generally Hubert Picarda *The Law Relating to Receivers, Managers and Administrators* (4th ed, Tottel, West Sussex, 2006) at 459.

(d) The policy underlying s 32(5) that it would be unfair for a receiver not to pay for obligations arising under agreements with a third party while still taking the benefit of that agreement (use, possession or occupation).[22]

(e) The fact that the receiver can disclaim the third party's property but is not similarly able simply to disclaim ownership of the company's property.

[52] The decisions of the Court of Appeal on which the body corporate places great reliance (*Tisch* and *St John's College Trust Board*) address an owner's commitment to obligations under the Unit Titles Act 1972 and the body corporate rules, in the context of applications for approval of proposed schemes under s 48 of that Act. I do not regard it has necessary or appropriate to apply them as a basis for an interpretation of s 32(5) of the Receiverships Act.

[53] Given my finding on the proper interpretation of s 32(5), I do not need to address whether the receiver has an arguable defence for relief from any personal liability under s 32(7). I will comment though that I do not regard that question as appropriate for determination by summary judgment. There are a number of contentious matters to be addressed as part of the exercise of the court's discretion, including the body corporate's claim that the receivership was merely a device, and whether the levies are potentially recoverable from the current owner. These issues may well need to be determined in the wider context of the dispute over the redevelopment covenant. The matters seem plainly unsuitable for summary judgment.

Decision

[54] The body corporate has not persuaded me that the receiver does not have an arguable defence to its claim. The application for summary judgment is dismissed.

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[22] The receiver's interpretation that s 32(5) addresses agreements between the company and third parties over property of the third parties is also supported by an *ejusdem generis* interpretation of the phrase in s 32(5) "…rent and any other payments…": refer to *Lewis v Hunter Valley Coal Processing Ltd* (2003) 46 ACSR 477 at [97] (although care needs to be taken with other reasoning in that decision given that the comparable section includes express reference to an agreement in respect of property of a third party).

[55] Counsel for the receiver has asked for opportunity to address the court further on costs, contending that, if the case is determined on the legal issue over the interpretation of s 32(5), the receiver should not have to wait for a determination of costs. There seems to be merit in that submission. I direct counsel to confer and file a memorandum within five working days advising whether there is still any issue to be determined on the substantive application and, if so, what further directions are sought. Counsel are also to advise if they are unable to agree on how to approach cost on this application and, in that case, give a suggested timetable for memoranda.

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Associate Judge Abbott