IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-005756

UNDER	PART 18 OF THE HIGH COURT RULES
AND UNDER	THE DECLARATORY JUDGMENTS ACT 1908
AND UNDER	THE UNIT TITLES ACT 1972
BETWEEN	CHUAN WU Plaintiff
AND	BODY CORPORATE 366611 First Defendant
AND	THETA MANAGEMENT LIMITED Second Defendant

Hearing: 14 - 21 March 2011

Counsel: BP Rooney for Plaintiff
PD Sills for First Defendant
N Davidson QC, G Burgess and on 21 March DM Lester for Second Defendant

Judgment: 30 May 2011

JUDGMENT OF ASHER J

This judgment was delivered by me on Monday, 30 May 2011 at 5pm pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] This case concerns a dispute that has arisen between the plaintiff Chuan Wu and other unit owners in an apartment building and the first defendant Body Corporate 366611 ("the Body Corporate"). The plaintiff and those he represents do not accept that the Body Corporate and its agent the second defendant Theta Management Ltd ("Theta") have been acting in the best interests of the unit owners. They seek damages from the Body Corporate and Theta, arising from a refusal to allow them electronic keys to access the common areas and the units. They also seek declarations in relation to certain actions taken by the Body Corporate and Theta.

Background

[2] There has in the end been little contention about the important facts.

[3] In 2004 a developer referred to as Sanctuary Developments Empire Ltd ("Sanctuary Group") promoted a 313 unit title development at 21 Whitaker Place, Auckland. The units were to be known as the Empire Apartments and the building

as the Empire Building. The Body Corporate was formed. The Empire Apartments were erected close to the University of Auckland and were designed to provide student accommodation. The units were promoted extensively in New Zealand and overseas to investors who would acquire units with the goal of leasing them to students for the university year.

[4] The principal of Sanctuary Group was a Gary Groves. John Chung Ching Chen who is the principal of Theta did work for Sanctuary Group and assisted in promoting the sale of units in New Zealand and overseas.

[5] The building was completed in approximately March 2006. At this time Sanctuary Group, as developer and prior to any sales, was the owner of all the units. It therefore had control of the Body Corporate. Using its voting power as owner of all the units, it passed a unanimous resolution amending the default rules under sch 2 of the Unit Titles Act 1972 ("the Act") to a new set of rules that would be advantageous to the entrenched control of the administration of the apartments by a management company. A company controlled by Mr Groves was formed called Academic Accommodation Management (3) Ltd ("Academic"). Pursuant to the amended rules, it was appointed as the building manager to manage the rentals of the units. Before the units were sold to investors, Sanctuary Group leased each of the units to Academic. Academic was required by the leases to pay a fixed rent to the investors amounting to eight per cent of the purchase price of each unit for the first two years. Obviously, this was an attractive selling point to potential purchasers.

[6] Academic, having secured leases of all the units, then proceeded to licence them to student occupants and to derive the revenue from all the units. Units were sold to investor purchasers by Sanctuary Group, including Mr Wu and those he represents. Mr Wu acquired unit 810.

[7] Clause 9.3 of Mr Wu's agreement for sale and purchase in an apparently standard form clause provided that Sanctuary Group would procure the Body Corporate to enter into a management agreement and licence for the carrying out of any of the management or duties of the Body Corporate. Academic was that

manager. In the months that followed Academic did not regularly pay the agreed rent and ultimately was placed in liquidation on 12 September 2007.

[8] In the meantime, on 22 August 2007 Mr Groves had circulated a letter to unit owners advising them that a new company, Theta, had been appointed as building manager. Theta was incorporated in August 2007. Theta had sent out a standard form letter to unit owners dated 29 August 2007 telling them that for them to be paid rent on their units from student occupants they would need to sign the Theta management lease appointing Theta to manage the units.

[9] On 31 August 2007, shortly before its liquidation, Academic terminated all the occupation licences. Later on 28 November 2007 Academic's liquidators disclaimed the remaining leases with owners as onerous property. In the meantime, however, Academic pursued a vigorous campaign of obtaining new leases from the existing owners, it would seem on behalf of Theta. Theta was to be the lessee of the new leases and to take over from Academic as manager. The leases that Theta invited owners to sign were not on the same terms as the original Academic leases. They did not provide for certain fixed rental returns. They included a default proxy clause similar to that which had been in the Academic leases but which was for the full term of the lease. Between August and October 2007 Theta signed leases with the majority of the unit owners and proceeded to licence those units out to student occupants.

[10] Theta therefore effectively took over Academic's position when new leases were signed. By the end of 2007 Theta was acting as manager for the Body Corporate, and was lessee of a large number of the units. In turn it had licensed those units out to student tenants, was receiving the income, and then paying a return to the unit owners. It had taken over Academic's role, but there was one important difference. Not all the owners would sign leases with Theta. Unlike Academic, which was set up when Sanctuary Group controlled all the units, Theta could not force unwilling owners to enter into leases with it and did not have complete control.

[11] Importantly, at some stage in August, possibly on 31 August 2007 when all the licences were terminated by Academic, the electronic locks in the common areas

and to the units were changed so that the existing electronic key cards would no longer work. There was no evidence of who was directly responsible for this.

[12] By this time, or shortly thereafter, Theta was in control of the electronic locks and cards. In August 2007 it had acquired from Sanctuary Group in a sale and purchase agreement all the equipment for processing the electronic key cards. As building manager it had the ability to control the electronic locks on the outside of the building and in the lifts and on the units. It had cards which it could programme. What this meant was that Theta could control access to the common areas and the units.

[13] On 16 October 2010 Theta wrote to the remaining owners who had not signed leases with Theta stating that before Theta would grant any person security access to the Empire Building it required the occupier to sign a detailed security and access protocol agreement with Theta and pay a security deposit of $2,725 to Theta. Theta's position can be seen in an email to Academic's liquidators on 19 October 2007. It was:

> … Empire apartments use a programmable swipe card for security and access control. It is the same card that controls all of the entrances from the front and the rear of the building as well as the lift to the floors.
>
> Theta purchased and owns both the access cards and the software which programmes them. …

[14] The majority of owners had accepted Theta's terms and signed leases with Theta, but Mr Wu and about 50 other proprietors were not prepared to do so. Following the change of locks Theta would not provide them with functioning electronic key cards and they were effectively locked out of the building.

[15] Mr Wu and others responded by instructing solicitors and issuing proceedings in the District Court seeking an injunction requiring Theta to provide them with access. On 16 January 2008 Judge Hole in the District Court issued an injunction directing the Body Corporate to "take all practicable steps necessary to provide the

claimants with electronic key cards giving access to their respective units and the common property of Empire Apartment Buildings. ..."[1]

[16] Theta did not provide electronic key cards. Instead, it called an extraordinary general meeting on 8 February 2008 and passed a rule change. That rule change empowered the Body Corporate to require owners to enter into a security and access protocol agreement and to require them to pay a refundable deposit of $2,650.

[17] Shortly after this, on 14 February 2008, the matter again came before Judge Hole.[2] He noted that the resolution was "passed effectively in defiance of the Court order" and he ordered the Body Corporate to deliver the keys to provide the owners with access to their units by midday 25 February 2008.[3]

[18] This deadline came and went without the keys being made available. Theta had appealed the District Court judgments. The appeal was heard in the High Court on 6 March 2008 and dismissed.[4] Lang J stated that he expected that the Body Corporate would have required Theta to hand the keys over to the respondents by 12 March 2008.[5] Theta, however, refused to do so.

[19] On 25 March 2008 Theta offered to accept $1,000 instead of $2,650 providing the security and access protocol was signed and the proprietors undertook that any tenant would abide by the Empire rules and regulations.

[20] On 15 August 2008 the Body Corporate held an annual general meeting and passed a resolution that it would not sue Theta

[21] In August 2009 these new proceedings were issued in the High Court replacing the earlier District Court proceedings. In these new proceedings Mr Wu is the plaintiff. He brings the action as a representative action under r 4.24 of the High Court Rules on behalf of other owners of eight units whose interests are identical to his which I summarise as follows:

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1 *Mai v Body Corporate No 366611* DC Auckland CIV-2008-004-14, 16 January 2008 at [47].
2 *Mai v Body Corporate No 366611* DC Auckland CIV-2008-004-14, 14 February 2008.
3 At [9] and [11].
4 *Body Corporate No 366611 v Mai* HC Auckland CIV-2008-404-809, 6 March 2008.
5 At [59].

Unit:	Owner:
912	Lien Son Sun
1210	Wai Jing Lai
1410	Wu Qing Zhang / Zheng Min Zhang
1517	Wai Jing Lai
624	Jian Hui Liang / Xiao Feng Chen
729	Chi Ming Sung
1516	Wai Shan Wong / Yuk Choi Cheung
722	Le Yan

For convenience I will call these owners "the claimants".

[22] On 30 November 2009 Lang J delivered a judgment on a preliminary question in these proceedings declaring the amendments that had been made on 8 February 2008 to r 3.10(a) of the Body Corporate Rules to be *ultra vires*. He stated:[6]

> There can be no justification for the body corporate and Theta denying proprietors' access to their units in the future. Counsel for the body corporate responsibly accepted during the hearing that this was the case. I would therefore expect the body corporate and Theta to co-operate immediately in providing Mr Wu and others in his position with keys to their units.

[23] Following that decision, in December 2009 electronic key cards were given to the claimants and others. They only worked in the common areas and did not open the doors to the individual units. Individual owners then engaged locksmiths to open their individual doors and provide working cards and locks. They were at that point able to access their units.

[24] Mr Wu puts forward four causes of action. The first is a claim based on trespass and nuisance (effectively two causes of action) in which damages are sought for what is alleged to be the unlawful acts of the defendants in changing the electronic configuration of the locks and refusing to make working key cards

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6 *Wu v Body Corporate 366611* (2010) 10 NZCPR 917 (HC) at [53].

available. The second cause of action is for orders that certain of the Body Corporate rules are *ultra vires* and invalid. The third cause of action is that certain resolutions relating to levies that proprietors must pay are *ultra vires* and invalid. The fourth cause of action relates to the proxies that have been used by Theta arising from the proxy clauses in the leases. Declarations under the Declaratory Judgments Act 1908 are sought that the use of the proxies must be only "pursuant to and for the purposes of leases of units to the second defendant only, and not otherwise" and for a declaration that resolutions passed for purposes "other than the leases of units to the second defendant" were invalid and void.

First cause of action – nuisance

Private nuisance

[25] The second amended statement of claim pleaded certain actions as constituting a nuisance. It is stated that the claimants were denied access to or use of their units because the Body Corporate and Theta refused to provide to the claimants:

> 7.1 Electronic key cards to the stairwells and lifts; and
>
> 7.2 Electronic key cards to the doors of the plaintiffs' units; or
>
> 7.3 Physical master keys to the doors of the plaintiffs' units; or
>
> 7.4 Access to the doors of the plaintiffs' units so that physical locks could be installed.

[26] The second amended statement of claim went on to recite the failure of the Body Corporate and Theta to observe the terms of the various Court orders requiring the provision of working electronic key cards. It was alleged that the defendants had no statutory or other right to deny access to or use of the claimants' units.

[27] It is necessary initially to address the question of whether these actions can constitute a private nuisance. There is no precise evidence of how and when and by whom the change to the electronic locks was effected. I infer that in August 2007 those who controlled Academic decided to change the electronic locks to the common areas and to the units so that the existing electronic key cards would no

longer work. This had been done by 31 August 2007. If the Body Corporate was not aware of this at the time it actually happened, it certainly would have become aware of it shortly thereafter. It accepted that this had been done and did not direct the manager to return the electronic locking equipment to its former settings, or direct the manager to provide new electronic key cards to all tenants.

[28] Theta, when it took over as manager through August 2007, continued Academic's policy and did not change back the electronic locks. As a matter of deliberate policy it refused to make electronic key cards available to those unit owners who had not signed leases with it unless they signed the security and access protocol ("the protocol") and paid $2,725. This situation continued through to December 2009. The unit owners were the joint owners of the common property as tenants in common under s 9 of the Act. The effect of the policy was to prevent these owners accessing the common areas and therefore accessing their units. While they could have got in locksmiths to change the locks on the doors to their own units, they could not get to those doors except through the common areas. The effect of the inability to access the common areas was that they could not lease the units out to tenants and thereby gain income from them.

Could the Body Corporate or Theta's actions amount to nuisance?

[29] It has been said that "the essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land".[7] The focus is on the particular interest of the plaintiff which the Court protects, rather than the defendant's conduct, which is the focus of negligence.[8] In *Bank of New Zealand v Greenwood* Hardie Boys J observed that it gave the owner a remedy for "certain interferences with the occupier's use or enjoyment of his land".[9]

[30] There is a lack of formalism about the law of nuisance, which has allowed it to adapt to the changing circumstances of property ownership and developing community standards. There is no need for the defendant to have any particular

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7 *Khorasandjian v Bush* [1993] QB 727 (CA) at 734 per Dillon LJ citing RWM Dias (ed) *Clerk and Lindsell on Torts* (16th ed, Sweet & Maxwell, London, 1989) at [24-01]. See also Michael A Jones (ed) *Clerk and Lindsell on Torts* (20th ed, Sweet & Maxwell, London, 2010) at [20-01].

8 *Watt v Jamieson* (1954) SC 56 (OH) at 57–58 per Lord Cooper.

9 *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525 (HC) at 530.

status and in particular no need for the defendant to be an adjoining owner or adjoining occupier.[10] Providing the plaintiff does not have exclusive control over the area from which the nuisance emanates, there appears to be no restriction on the place from which a nuisance must emanate. Thus, co-owners may sue each other in nuisance since they cannot exclude each other from the land in question or control each other's activities.[11] In *Clearlite Holdings Ltd v Auckland City Corporation* the injury to the plaintiff's land resulted from an act on the plaintiff's own land, the nuisance being a shaft dug by the defendant under the plaintiff's land. It was held that it was not a prerequisite to a cause of action in nuisance that the nuisance emanate from neighbouring land.[12]

[31] Here, the original act of nuisance as I perceive it was the original reprogramming of the electronic locks so that the claimants' cards were no longer useable. Then it was maintaining electronic locks on the common areas that the proprietors could not use. The effect was to lock the proprietors out. These are not the exact words used to describe the nuisance in the amended statement of claim, but I consider that the words used were sufficiently broad to incorporate this description.

[32] It is common ground that Academic was the Body Corporate's agent. It changed the locks. The Body Corporate was legally responsible for its action. Then there was Theta's ongoing refusal to provide cards which worked on the changed locks. Theta was also acting as the Body Corporate's agent.

[33] As was observed by Lord Evershed MR in *Thompson-Schwab v Costaki* the "forms which activities constituting actionable nuisance may take are exceedingly varied".[13] In that case the Court of Appeal of England and Wales held the use of residential premises for the purposes of prostitution and the perambulations of the prostitutes and of their customers could amount to a private nuisance as constituting a sensible interference with the comfortable and convenient enjoyment of neighbouring residential premises.[14] In *J Lyons & Sons v Wilkins* that same Court

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10 *Roswell v Prior* (1706) 12 Mod 635 (KB) cited in RA Buckley *The Law of Nuisance* (2nd ed, Butterworths, London, 1996) at 4.
11 *Hooper v Rogers* [1975] 1 Ch 43 (CA) at 50.
12 *Clearlite Holdings Ltd v Auckland City Corporation* [1976] 2 NZLR 729 (SC).
13 *Thompson-Schwab v Costaki* [1956] 1 WLR 335 (CA) at 338.
14 At 339.

held the picketing of a leather bag and portmanteau manufacturer over some months to persuade or otherwise prevent workpeople from working for it, even though peaceable, would support an action on the case for a nuisance at common law, as a serious interference with the ordinary comfort of human existence and ordinary enjoyment of the premises beset.[15] *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* was another picketing case.[16] The picketing in that case was not peaceful but rather obstructive and violent. The Supreme Court of Victoria held it amounted clearly to an interference with the rights of persons wishing to enter or at least to proceed and make deliveries to or take supplies to or from the plaintiff's premises, and amounted to a nuisance.[17]

[34] The Body Corporate and Theta, through their actions in altering the electronic configuration of the locks so that the claimants' electronic key cards would not work, and by thereafter refusing to provide working cards, prevented the claimants from using their land. The fact that the nuisance, i.e. the locked doors and lifts, was on land owned by the plaintiff unit owners with others, does not preclude these actions being a nuisance. The fact that the actions were carried out by persons who had a right to occupation of common areas (Academic and Theta) does not preclude them being a nuisance to other affected proprietors. Their actions cannot be materially distinguished from those of an adjoining owner or third party who through its physical activities prevents access. Although I have not been referred to any authority which has held that the locking out of an owner from that owner's property is a nuisance, I have no doubt that such an action is capable of being a nuisance.

Was the action an unreasonable interference?

[35] Mr Davidson QC for Theta submitted that there had been no absolute denial of access but rather conditional access, the conditions being accession to the protocol and payment of the security deposit (the "access conditions"). Those conditions, he submitted, were reasonable. It was his central answer to the nuisance allegation that the reasonable offer of Theta, refused by Mr Wu and the other owners who did not

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15 *J Lyons & Sons v Wilkins* [1899] Ch 255(CA) at 267 per Lindley MR and 271–272 per Chitty LJ.

16 *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* [1986] VR 383 (SC).

17 At 388.

want to have Theta as lessee, meant that there had been no unreasonable interference with the claimants' right to the enjoyment of their interest in their units and the common areas.

[36] There is no doubt that an unreasonable interference lies at the heart of nuisance. In *Cambridge Water Co v Eastern Counties Leather plc* Lord Goff said:[18]

> [I]f the user is reasonable, the defendant will not be liable for consequent harm to his neighbour's enjoyment of his land; but if the user is not reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it.

[37] In terms of the test as to what is reasonable, it was observed by Lord Wright in *Sedleigh-Denfield v O'Callaghan*:[19]

> A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society.

[38] The concept of unreasonableness is not approached only from the perspective of the defendant. As Hardie Boys J put it in *Bank of New Zealand v Greenwood* the test is "simply whether a reasonable person, living or working in the particular area, would regard the interference as unacceptable".[20] He quoted *Salmond on the Law of Torts:*[21]

> He who causes a nuisance cannot avail himself of the defence that he is merely making a reasonable use of his own property. No use of property is reasonable which causes substantial discomfort to other persons, or is a source of damage to their property.

[39] I have no doubt that Theta's actions seemed commercially justified to Mr Chen. From his perspective the claimants were behaving irrationally. In order to run such a large block of apartments occupied by many hundreds of students it was desirable to have strict rules and security arrangements in place, so that tenants could

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18 *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 (HL) at 299.
19 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 (HL) at 903.
20 At 531.
21 At 531. RFV Heuston (ed) *Salmond on the Law of Torts* (17th ed, Sweet & Maxwell, London, 1977) at 61.

be controlled. It was desirable that such rules and arrangements be uniform, otherwise they would not work. Uniform security procedures could only be implemented and enforced if all tenants were party to them. To him Mr Wu and those in his position in not committing to his lease arrangement were being stupid, and spoiling a good arrangement.

[40] In determining whether the access conditions were unreasonable the principal criterion will be whether Theta (specifically its principal the Body Corporate) had the power to impose them. A body corporate has no powers except those that are reasonably necessary to enable it to carry out the duties imposed on it by the Act and by its rules.[22] If the refusal to provide the cards unless the conditions were accepted was unlawful, it would ordinarily follow that the action was unreasonable. While it has been observed that the body corporate model is essentially democratic, it would be wrong to regard the body corporate as the equivalent to the authorised Parliament of the proprietors. It does not have unbridled power. It has no general right to take such actions as it considers reasonable for the benefit of the proprietors as a whole. Its powers are limited by the Act and its lawful rules.

[41] Section 15 of the Act sets out the duties of a body corporate:

> **15 Duties of body corporate**
>
> (1) *The body corporate shall—*
>
> (a) Subject to the provisions of this Act, *carry out any duties imposed on it by the rules:*
>
> ...
>
> (h) *Subject to this Act, control, manage, and administer the common property* and do all things reasonably necessary for the enforcement of the rules:
>
> (Emphasis added.)

[42] Section 16 of the Act sets out the powers of a body corporate:

> **16 Powers of body corporate**

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[22] Unit Titles Act 1972, s 16.

> Subject to the provisions of this Act, *the body corporate shall have all such powers as are reasonably necessary to enable it to carry out the duties imposed on it by this Act and by its rules*:
>
> Provided that the body corporate shall not have power to carry on any trading activities.
>
> (Emphasis added.)

[43] I begin with the rules. There is no default rule in the Act that can be read as empowering the Body Corporate to make access conditional on the access conditions.

[44] There was in the Body Corporate rules as first amended r 3.10 which envisaged restricting access other than by use of security keys. The security keys had certain conditions attached including a prohibition on their duplication, a requirement that reasonable steps be taken to ensure against their loss and that their loss or destruction be notified. In his judgment of 30 November 2009 Lang J held this amendment invalid as the rule should have appeared in sch 2 and its amendment required a unanimous resolution.[23] He observed, however, that the power related to the control, management, and administration of both the units and the common property in terms of s 37(5), and was also arguably incidental or ancillary to the duty of the body corporate under s 15(1)(h) to "control, manage or administer the common property". For that reason, he continued, it was unlikely that it would have offended the proviso to s 37(5) if it had been added to the rules contained in sch 2 by unanimous resolution.[24]

[45] Rule 3.10 was later amended making access conditional on the access conditions. Lang J held the amended rule also invalid as also requiring a unanimous resolution.[25] He may be seen, however, as casting doubt on whether the amended rule, even if passed by a unanimous resolution, would be *intra vires*:[26]

> The amendments to r 3.10 in 2008 and 2009 were wide ranging in scope. They purported to provide the body corporate and its agents with the power to require unit owners to pay substantial sums of money and to require them to enter into onerous contracts. Those are clearly the types of powers that the

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23 *Wu v Body Corporate 366611* (2010) 10 NZCPR 917 (HC).
24 At [39].
25 At [46]–[47].
26 At [47].

> body corporate could only ever acquire by way of a rule under Schedule 2 rather than Schedule 3. Even putting aside the issue of the width of the powers, the absence of unanimity when the body corporate passed the resolutions means that they are ultra vires and invalid.

[46] Lang J did not determine the point, and there is no need to expressly do so here.

[47] The short point is that neither the Body Corporate nor Theta had the power under the rules to make access conditional on such a set of access conditions.

[48] I turn to the Act. Was the power to make access conditional on the access conditions a power reasonably necessary to enable the Body Corporate to carry out the duties conferred on it by the Act, relevantly the duty to control, manage and administer the common property?

[49] Dealings affecting the common property (transfer lease or easement) must be approved by unanimous resolution.[27] No express power is given to the Body Corporate to restrict the access of proprietors to the common areas. I would accept that making access to common property conditional on certain conditions might be regarded as necessary for the control, management and administration of the common property. Requiring that proprietors access the common property by way of security keys would likely fall into this category, as would attendant conditions governing precautions against their loss (i.e. the situation Lang J first dealt with).

[50] I would not, however, regard it as so necessary to make access conditional on accession to the protocol and payment of the security deposit. The protocol was detailed and imposed a series of ongoing obligations. It forced the proprietor into a long-term commercial relationship with Theta. It required payment for keys, accepting deductions from the security deposit of up to $2,000 for fire alarm calls and repair costs and insurance excesses. Tenants were required to pay fees chargeable at Theta's discretion and comply with Theta's occupant's handbook. Proprietors accepted responsibility for all of the acts of their tenants. The security deposit was a considerable amount of money (initially $2,720, later reduced to $1,000).

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[27] Unit Titles Act. s 17.

[51] Conditions of this nature plainly go far beyond what might be considered necessary for the control, management or administration of the common property. This is aptly illustrated by the apartment building having functioned, it seems, in a satisfactory way since the claimants attained access in December 2009.

[52] This conclusion is consistent with the decision of the Supreme Court of New South Wales in *Lin v Owners – Strata Plan No 50276*.[28] The plaintiff proprietor in that case sought to connect to the building's exhaust ventilation system, which was common property. The owners corporation denied access on the ground the system was overloaded and allowing the plaintiff access would adversely affect the system and the use and enjoyment of it by other proprietors. Under the relevant legislation the owners corporation held the common property as agent for the proprietors as tenants in common. The Court concluded the owner's corporation's power of management and control of the use of the common property did not extend to overriding the proprietary right a proprietor had therein.[29]

[53] It is correct, as Mr Davidson submitted, that it was contemplated that the owner's corporation might make access conditional on the observation of certain conditions. But the conditions contemplated in *Lin* were eminently reasonable: that the plaintiff bear the cost of access, that the contractor be approved, that it dictate when the work should be carried out. They bore no relation to the significant prescriptive conditions with which we are concerned in the present case.

[54] The Body Corporate and its agent had no power to make access conditional on such access conditions. The interference with the claimants' use and enjoyment of their units and the common property that resulted when these conditions were not met was therefore *ultra vires* the powers of the Body Corporate. I think it is beyond doubt it was also unreasonable for the purposes of establishing nuisance. It is conceivable that denial of access *ultra vires* the powers of a body corporate might be nonetheless reasonable in, say, an emergency. But it was not here. Denying the claimants access unless they acceded to the protocol and paid the security deposit

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28 *Lin v Owners – Strata Plan No 50276* [2004] NSWSC 88.
29 At [27].

was an unreasonable interference with their use and enjoyment of their units and the common property and constituted a nuisance.

Causation

[55] The defendants argued that their actions were not causative of loss, and that it was rather the unreasonable refusal on the part of the claimants to accept Theta's demands that caused their loss. The claimants should have paid the money and argued later. I have no doubt that the actions of the defendants did prevent the claimants from leasing out their properties. Since usable electronic key cards have been made available in December 2009, by and large the units have indeed been leased indicating the causative nature of the defendants' actions. It was a natural and logical consequence of denying the claimants access to the common areas, that they would be unable to access and lease their units.

Failure to mitigate

[56] It is argued that Mr Wu failed to mitigate his alleged losses by failing to enter into the security protocols. It is submitted that he should have done so "under protest" which would have left only a small contest as to the fees paid.

[57] As a general rule the victim of an unlawful act must take all reasonable steps to mitigate the loss to it resulting from that act. It cannot recover damages for any such loss which it could thus have avoided but has failed, through unreasonable action or inaction, to avoid.[30] The question of mitigation of damages is a question of fact in the circumstances of each particular case.[31] The onus of proof on the issue of mitigation is on the defendant.[32] The "ordinary course of business" sets the standard of reasonableness in commercial cases, requiring the plaintiff to do no more than reasonable and prudent people would do ordinarily in the course of their business.[33] The standard of reasonableness is not high in view of the fact that the defendant is an

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30 Harvey McGregor *McGregor on Damages* (18th ed, Sweet & Maxwell, London, 2009) at [7-004].
31 Ibid, at [7-016].
32 Ibid, at [7-019].
33 *Laws of New Zealand* Damages: Factors Limiting Compensatory Damages (online ed) at [112].

admitted wrongdoer.[34] The measures which a claimant may be driven to adopt in order to extricate his or herself ought not to be weighed in nice scales at the instance of the party whose breach has occasioned the difficulty.[35]

[58] It cannot be said that it is a required reasonable step to mitigate that a victim accede to a demand from the wrongdoer that it enter into a long-term contract with the wrongdoer on the wrongdoer's unwelcome terms and pay the wrongdoer money. The claimants did not need to do any more than a reasonable person would do ordinarily in the course of that person's business, and reasonable persons do not give way to such unlawful and unfair ultimatums. They are entitled to seek redress through the courts rather than surrender.

[59] Mr Davidson relied on the cases of *Payzu Ltd v Saunders*[36] and *Australian Medic-Care Co Ltd v Hamilton Pharmaceutical Pty Ltd*[37] for the proposition, as stated in the former case, that:[38]

> ... in commercial contracts it is generally reasonable to accept an offer from the party in default. However, it is always a question of fact.

[60] In *Payzu* the plaintiff had been the victim of a wrongful repudiation of a contract for the sale of goods by the defendant. The defendant was therefore liable to the plaintiff in damages. But it was also held that the plaintiff buyer should have mitigated its loss by accepting the seller's offer to continue deliveries at the contract price, rather than sue for the price of the goods which had risen since the offer. It was held that the plaintiff should have accepted the defendant's offer. *Payzu* was applied in *Uzinterimpex JSC v Standard Bank plc*.[39] The dispute in that case centred around the sale of cotton. The victim refused an offer by the defendant to sell the cotton and pay the proceeds into a joint account to abide the resolution of the dispute. The defendant was later found to have converted the cotton. The Court upheld a finding that the victim had failed to act reasonably and in accordance with

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34 *McGregor on Damages* at [7-070].
35 *Banco de Portugal v Waterlow* [1932] AC 452 (HL) at 506.
36 *Payzu Ltd v Saunders* [1919] 2 KB 581 (CA) at 589.
37 *Australian Medic-Care Co Ltd v Hamilton Pharmaceutical Pty Ltd* [2009] FCA 1220, 261 ALR 501.
38 At 589 per Scrutton LJ.
39 *Uzinterimpex JSC v Standard Bank plc* [2008] EWCA Civ 819, [2008] 2 CLC 80.

its duty to mitigate in so refusing. Relevantly to the issue of the reasonableness of the mitigation offer the Court observed:[40]

> Equally, I do not think that there is much force in the argument that it was unreasonable to expect Uzinterimpex to enter into negotiations with a thief ... However badly the Bank may be thought to have behaved, it was asserting an interest in the goods, had not permanently deprived Uzinterimpex of them and was not seeking to extort money from it as the price of their release.

[61] Mr Davidson submitted that an acceptance of the Theta offer would not preclude an action for damages by the claimants for the actual loss sustained. The cases he relied on arose in a commercial situation where an offer to take or accept a remedial measure from the party in breach that was a commercial way to reduce loss had been refused. There is a difference between a *Uzinterimpex* type of proposal for a one-off commercially sensible step to minimise loss, and the Theta proposal. There is a distinction between accepting a reasonable offer to, say, supply goods that the buyers want and will ultimately sue for, or in preserving the value of goods of which ownership is contested, and a refusal to engage in a new long-term contract with the wrongdoer, because of pressure from that wrongdoer.

[62] For the reasons discussed in relation to nuisance,[41] Theta could not come along and seek to impose its will and require the proprietors to accept its demands and pay it money and enter into a long-term relational contract with it on pain of being held to be unreasonable in not mitigating their loss. One commercial party should not be obliged to surrender to such unlawful action by a third party and pay it money and bind itself to a contract with the party acting unlawfully as the price of stopping the unlawful action simply because there may be some commercial justification for the demanded arrangement. That would be an unreasonable outcome, and in broad terms not a commercial outcome. There was therefore no failure to mitigate.

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[40] At [52].
[41] See [50]–[54].

Are both the Body Corporate and Theta liable?

[63] It was accepted by both the Body Corporate and Theta in the trial that Academic and Theta acted throughout as the agent of the Body Corporate. This concession was correctly made. At all times Academic and Theta were acting expressly as agents for the Body Corporate on the basis of written management agreements.

[64] This means that in accordance with the general rule[42] the Body Corporate as principal is responsible for the nuisance of both of its agents Academic and Theta. Also Theta is liable for its own tortious acts, notwithstanding that it has acted in a representative capacity.[43] I conclude that both the Body Corporate and Theta are liable in nuisance.

Damages

[65] For a plaintiff to succeed for damages in nuisance, it must have a right to the land. Mere presence on the land will not do.[44] The claimants had a right to the common area as co-owners. The interest in the land that is relevant is not only the interest in the common area, but also the interest of the individual claimants in their units accessed through the common area. The use and enjoyment of their units was affected by the unreasonable actions of the Body Corporate and Theta.

[66] It is clear that damages may be obtained not only for the diminution in the amenity value of property, but the consequential losses including losses arising from an inability to use property for the purposes of the plaintiff's business.[45] The purpose is to compensate the plaintiff for the diminution in the value of the interest in the land.[46]

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42 See *Laws of New Zealand:* Agency (online ed) at [105] and *Halsbury's Laws of England*, (5th ed, 2008) vol 1 Agency at [121].

43 *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA) at 526 and see *Laws of New Zealand*, ibid, at [146].

44 *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL) at 725.

45 *Hunter v Canary Wharf Ltd* at 706.

46 Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed Brookers, Wellington, 2009) at [10.2.09].

[67] There is good evidence of the loss arising from the inability to access the common area. I accept the evidence that the claimants were unable to let their units following the change of locks. After useable key cards were provided in December 2009, a number of the units in question were let. Evidence has been adduced of the actual rentals achieved on those units since then. The claimants have by this means provided evidence of a monthly average of rental that could have been achieved for three-bedroom units. It is fair to assume that the rentals achieved in 2010 could have also been achieved in 2008 and 2009. This average rental can be adjusted in relation to the claimants' two-bedroom units during the relevant period.

[68] Here the relevant period is from 1 September 2007, after the cards had been deactivated on 31 August 2007, to 30 November 2009, shortly before working cards were provided and the units were available for letting.

[69] Having heard the evidence I am satisfied that the three-bedroom units could have achieved $1309.22 net per month as rental through the relevant period, and the two-bedroom units $872.80 net per month. If the figures are extrapolated over the entire period of 26 months the total amount of damages that can be claimed by the claimants is $283,663.64. Ultimately the defendants did not contest the arithmetical correctness of this figure. I am satisfied that this is the claimants' collective loss of rental arising from the inability to profit from their units during the period of the nuisance. The parties advised during the hearing that a general damages award of a round figure rather than a breakdown on a per unit basis was sufficient, and I will not divide the figure further at this stage.

[70] There is also a claim for the cost of the electronic access cards. A charge of $150 has been made and it is alleged by the claimants that this is excessive. I have been asked to make a declaration as to a fair charge. I am satisfied on the evidence that a fair charge would have been $25 per card.

[71] A claim is also made in relation to the costs of the security firm Chubb for installing internal room locks. Over the nine units the claim is for $3,121.56. This is a component of a larger bill of $5,592.44. I am satisfied that this was a cost incurred as a result of the actions constituting the nuisance being the changing of the

electronic configuration of the locks and I am prepared to order damages in that amount.

[72] There is also a claim for $3,200 to repair damage to the units caused by a pipe between the floors. It does not arise from any issue raised in the statement of claim and I am not prepared to make any award under that head.

Trespass

[73] Mr Rooney for Mr Wu also presented this first cause of action on the alternative basis of trespass. Indeed the first cause of action in the initial pleading referred only to trespass, and nuisance was only added by a late amendment.

[74] Trespass involves an unjustified direct interference with land that is in the possession of another.[47] As a tort it has not been proven to be as responsive to the realities of modern existence as nuisance. If there is no act of direct intrusion on another's property there is no liability in trespass.[48]

[75] It is questionable whether there was any sufficient act of direct intrusion by either the Body Corporate or Theta so as to constitute trespass. The refusal to provide working key cards was not an intrusion of any type. The action of initiating the change to the electronic configuration of the keys probably took place within premises of Theta in the building to which it would have had an exclusive licence. There is a question whether the electronic impulse that changed the configuration of the locks (including the locks in the proprietors' units) could have been a trespass. There was no evidence about the electronic process involved and no submissions on this issue. If I had not found nuisance proven I would have sought further submissions on the topic of whether an unreasonable electronic intrusion into an owner's property causing a change to an electronic device on a claimants land could constitute a trespass (and whether the issue could be fairly determined on the evidence and pleadings). But given the nuisance finding there is no need to determine the issue. I do not find trespass proven on the evidence before me.

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47 See *Laws of New Zealand* Tort (online ed) at [194] and *The Law of Torts in New Zealand* at [9.2.01].

48 *Halsbury's Laws of England* (5th ed, 2010) vol 97 Tort at [563].

Second cause of action – *ultra vires* rules

[76] There are four rules challenged as *ultra vires* and invalid. These are rr 2.1(g), 2.5, 2.39(b) and 2.42. In order to apply the arguments it is necessary to say something about the framework of the Act. There is no power to amend the Body Corporate rules save for that invoked by the Act.

[77] Section 37(1) of the Unit Titles Act 1972 ("the Act") provides as follows:

> **37 Rules**
>
> (1) Except as otherwise provided by this Act, the control, management, administration, use, and enjoyment of the units and the common property shown on a unit plan, and the activities of the body corporate that comprises the proprietors of those units, shall, while there are more proprietors than one, be regulated by the rules for the time being applicable to that body corporate.

Section 37(2) provides that subject to any amendment or repeal, the rules applicable to each body corporate shall be those set out in schs 2 and 3 to the Act.

[78] Section 37(3) provides that the rules in sch 2 may only be added to, amended or repealed by unanimous resolution, while under s 37(4) the rules in sch 3 may be added to, amended or repealed by resolution of the body corporate at a general meeting. The power to amend or repeal is proscribed.

[79] Section 37(5) and (6) relate specifically to amendments and additions to rules and provide:

> **37 Rules**
>
> (5) Any amendment of or addition to any rule shall relate to the *control, management, administration, use, or enjoyment* of the units or the common property, or to the regulation of the body corporate, or to the powers and duties of the body corporate (other than those conferred or imposed by this Act):
>
> Provided that *no powers or duties* may be conferred or imposed by the rules on the body corporate *which are not incidental to the performance of the duties or powers imposed on it by this Act* or which would enable the body corporate to acquire or hold any interest in land or any chattel real or to carry on business for profit.

(6) No rule or addition to or amendment or repeal of any rule *shall prohibit or restrict the devolution of units, or any transfer, lease*, mortgage, or other dealing therewith, or destroy or modify any right implied or created by this Act.

(Emphasis added.)

[80] Section 37(2) of the Act provides that subject to any amendment or repeal the rules applicable to each body corporate shall be those set out in schs 2 and 3 to the Act. I will call these rules the default rules.

[81] Section 15(1)(a) provides that a body corporate shall carry out any duties imposed by the rules. Section 16 of the Act provides that subject to the provisions of this Act, the body corporate shall have all such powers as are reasonably necessary to enable it to carry out the duties imposed on it by the Act and by its rules. Thus, insofar as the default rules give the body corporate powers, those powers fall within s 16 and are legal powers of the body corporate, as are incidental powers reasonably necessary to enable the body corporate to carry out its duties.

[82] The rules in question result from amendments passed unanimously when Sanctuary Group owned all the units prior to settling any sales to individual proprietors. So there is no jurisdictional issue as to the nature of their passing. But Mr Rooney argues that these amended rules do not fall within any of the permitted categories of departure from the standard rules permitted by s 37(5) and (6) and are therefore *ultra vires*.

[83] The defendants have not presented any submissions in opposition to the claimants' request that rr 2.1(g), 2.5 and 2.39(b) be declared invalid or *ultra vires*.

Rule 2.1(g)

[84] Rule 2.1(g) provides:

2.1 Duties of Proprietor

A Proprietor shall:

(g) either prior to settlement or contemporaneous with settlement of the purchase of a Unit either enter into a lease in substantial uniformity with the lease annexed as schedule 2 ("the Lease") or the Proprietor

> shall by accepting these Rules be deemed to irrevocably agree and covenant with the Body Corporate that for as long as the proprietor does not want the unit to be leased as contemplated by the lease that the proprietor will abide by those terms of the lease, as if it were a lessor, which enables the lessee to administer the common property and other property as an apartment complex.

The defendants do not contest the invalidity of this rule.

[85] The rather clumsily worded clause appears to be intended to place owners in the situation where a proprietor either must enter into a lease in the form annexed, which is the standard form lease with Academic as lessee, or abide by the terms of the lease as if the proprietor was a lessor of the lease to Academic, to enable Academic to administer the common property as an apartment complex.

[86] Any lease entered into if it was not with Academic would have to be on terms consistent with the Academic lease. If the proprietor did not do so, it would still have to observe the terms of the lease. In these circumstances it would not be able to lease to anyone else. Therefore, r 2.1(g) plainly restricts the owners' ability to lease their units in breach of s 37(6) which prohibits such a restriction. It is *ultra vires.*

Rule 2.5

[87] Rule 2.5 provides:

> Until the first annual general meeting of the Body Corporate, the Proprietors of all the units shall constitute the Committee. Thereafter the Committee (if there is one) shall consist of the secretary, a representative of the lessee under "the lease", and such number of Proprietors, not being fewer than, as is fixed from time to time by the Body Corporate at an annual general meeting.

The defendants do not contest the invalidity of this rule.

[88] Under this rule a non-proprietor may be a member of a committee of a body corporate. By contrast the default rule, cl 5 of sch 2, envisages only proprietors constituting a committee.

[89] On its face the amended r 2.5 does relate to the administration of the Body Corporate in terms of s 37(5). However, the proviso requires that no powers or

duties may be conferred or imposed by the rules which "are not incidental to the performance of the duties or power imposed on it by this Act". Can it be said that the appointment of non-proprietors to the committee is incidental to the performance of the duties or powers imposed by the Act?

[90] The ambit of amendments to the rules which are "incidental" was considered by the Court of Appeal in *Velich v Body Corporate No.164980.*[49] The only duty imposed by the Act which could be invoked to justify r 2.5 is s 15(1)(a) providing that the body corporate shall "carry out any duties imposed on it by the rules". It was stated in *Velich*:[50]

> As a matter of common sense, it is only powers and duties which are extant at the time of the rule change which are relevant. So the only new powers or duties which may be conferred by rule change on a body corporate are those which are "incidental" to existing powers and duties.

[91] At the time that r 2.5 was adopted there was no rule in place which referred to a secretary and a representative of the lessee under "the lease" being on the committee. Only proprietors could be members of the committee. That is a sensible rule. The proprietors are, after all, the constituents. It is they that have the vital financial interest in the good management of the Body Corporate. It is not contemplated that any person other than a proprietor will be a member of the committee.

[92] Plainly the amendment is part of the scheme of the new rules intended to ensure a regime where the Academic lease is signed or abided by, and the manager who is also the lessee can, with the use of proxies, dominate the actions of the committee. The provision for any representative of the lessee to be a member of the committee goes far beyond anything contemplated in the Act itself, or the rules in schs 2 and 3. They only contemplated proprietors being members. The rule cannot be regarded as "incidental". It is *ultra vires*.

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49 *Velich v Body Corporate 164980* (2005) 6 NZCPR 143.

50 At [30].

Rules 2.39(b)

[93] Rule 2.39(b) provides:

> Upon settlement of the purchase of any unit, each Proprietor shall execute in favour of the Body Corporate an irrevocable limited power of attorney (and in the absence of such power of attorney shall be deemed to have given such power of attorney to the Secretary) which shall empower the Secretary to:
>
> …
>
> (b) act as a proxy (hereinafter called the "deemed proxy") for that Proprietor at any annual general meeting or extraordinary general meeting or any adjournment thereof, only if the Proprietor or his or her duly authorised agent (other than the Body Corporate Secretary) is not present in person at that meeting and only for the purposes of getting a quorum for the meeting provided however that for the first three (3) years after the creation of the Body Corporate any proxy given as a result of a term in the Lease shall have priority to this "deemed proxy" held by the Secretary and that thereafter the "deemed proxy" of the Secretary shall have priority over any proxy given in any term in any Lease.

The defendants do not contest the invalidity of this rule.

[94] This rule gives the secretary the power to exercise a non-attending owner's vote as it chooses, when that owner has not been consulted. There is nothing in the Act about default proxies of this type and the default rules contain no such provision. I do not consider that r 2.39(b) can be regarded as incidental to the performance of the duties or powers imposed on the Body Corporate by the Act. Such a rule was held to be *ultra vires* in *Body Corporate 318566 v Strata Title Administration Ltd.*[51] I conclude that this rule is *ultra vires*.

Rule 2.42

[95] Rule 2.42 provides:

> Subject to rule 2.3(f), the Body Corporate shall employ a Building Manager in general conformity with the provisions of the form of contract annexed as Schedule 1.

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[51] *Body Corporate 318566 v Strata Title Administration Ltd* (2009) 10 NZCPR 221 (HC) at [41].

[96] The first defendant contests this aspect of the claimants' second cause of action, and contends that r 2.42 is a valid rule. The effect of r 2.42 is to require the Body Corporate to appoint a building manager. The terms of the appointment must be in conformity with the provisions of a very detailed draft agreement that is set out in Schedule 1. The agreement is with Academic and the effect is that the rules require an agreement, not necessarily with Academic but in accord with the provisions of that detailed contract.

[97] The draft agreement contains some unusual clauses. These include cl 1.2, which gives the building manager the power to assign any interest in the agreement without the prior approval of the Body Corporate and thereafter be absolved from further liability. The appointment is for a term of 10 years with a further term of 10 years at the option of the building manager (cl 2.1) and for remuneration which each year will be the higher of current market remuneration or an inflation adjusted amount (cl 3). It includes a provision for the manager to keep all keys. Under cl 11.1 the manager can only be removed by special resolution and such a resolution will not be valid for the first three years of the contract.

[98] This is an agreement that is on terms most favourable to the manager and has been drafted and passed by resolution when Sanctuary Group and Academic were in charge. It is designed to ensure that Academic's position is both protected and favourably remunerated. I accept Mr Sills' argument that there is no ratchet clause as such, so there could be a reduction in payments in the unlikely event of a period of deflation.

[99] The default rules in sch 2 include cl 11(b) which permits a committee of a body corporate to engage various agents, including a building manager. For the reasons given that power in the default rule can be seen as a power that is "reasonably necessary" to enable the Body Corporate to carry out its duties.

[100] Rule 2.42 goes much further than cover the engagements referred to in cl 11(b). It imposes the Academic form of management agreement on the Body Corporate. As such it inhibits the ability of the committee to negotiate and enter into the management contracts. It binds the Body Corporate to a certain form of

agreement and precludes it from entering into any other form of agreement, even if commercially that might be better for the Body Corporate. The management contract can only be changed by a resolution of at least 75 per cent of members. Such a restrictive provision cannot be regarded as "incidental" to the performance of the duties or powers imposed on the Body Corporate by the Act.

[101] Mr Sills relied on the decision of *Low v Body Corporate 384911*.[52] There a building management agreement had been entered into for a period of 10 years with the right to renew for a further 10 years. It was held to be open to the Body Corporate to enter into the management agreement. In *Low* there was no Body Corporate rule which set out the full management contract. Rather r 2.3(k) of the relevant rules gave the Body Corporate the power to enter into a management agreement on such terms as might be agreed. Heath J concluded that there was no material difference between the default rules in sch 2 to the Act and the actual rules.[53] The relevant rule was therefore different from the rule in this case.

[102] Whereas the power to enter into a management agreement can be seen as incidental to the powers of a Body Corporate, the sort of intensely prescriptive requirements relating to the terms of such an agreement as required by r 2.42, and in particular the giving of tenure but for a special resolution, go much further than the default rules. The imposition of such a rule cannot be regarded as incidental to the power to enter into a management contract. It goes further and creates a detailed entrenched management regime.

[103] A more helpful decision is *Chambers v Strata Title Administration Ltd* in which Paterson J considered whether or not a power to appoint a management company or professional manager on terms said to require such appointment to be terminable only by unanimous resolution of the proprietors fell within the amending provisions of s 37(5).[54] He considered that "incidental" meant "naturally attached to, or arising from, or naturally appertaining to any of the duties and powers set out in the Act".[55] He did not see that the appointment of a professional manager which

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52 *Low v Body Corporate 384911* HC Auckland CIV-2010-404-5760, 21 February 2011.
53 At [65].
54 *Chambers v Strata Title Administration Ltd* (2004) 5 NZCPR 299 (HC).
55 At [44].

could only be terminated by unanimous resolution of the proprietors was incidental to the performance of any of the duties or powers imposed on the Body Corporate by the Act.[56]

[104] I also derived assistance from the decision in *Body Corporate 201036 v Broadway Developments Ltd* where various rules relating to, amongst other things, a management agreement were held to be *ultra vires* and a written management agreement entered into was held to be *void ab intio* it having been entered into by the Body Corporate *ultra vires* its powers.[57] There amended rules required the Body Corporate to enter into a management agreement in a form attached and for a prescribed management fee, intended to compensate the developer for having negotiated a rent-free period for 10 years upon its acquisition of a leasehold interest, was held not to be an administrative expense falling within the wording of s 15(2)(a) of the Act.[58] It was further held that the amended rules consequential on the management agreement were not incidental to a performance of any duty or power imposed on the Body Corporate by the Act in terms of s 37(5).[59]

[105] I conclude that it is not incidental to the performance of the duties or powers imposed on the Body Corporate by the Act to set out a detailed and prescriptive management contract that must be entered into, in particular, one that can only be terminated by a special resolution. The only person who gains from this is the prospective manager. There is no tangible benefit to the proprietors. I conclude that r 2.42 is *ultra vires.*

Third cause of action – wrongful levy

[106] Section 15(2) of the Act provides:

> **15 Duties of body corporate**
>
> …
>
> (2) The body corporate shall also—

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56 Ibid.
57 *Body Corporate 201036 v Broadway Developments Ltd* (2011) 11 NZCPR 627 (HC).
58 At [49].
59 At [52].

(a) Establish and maintain a fund for administrative expenses sufficient in the opinion of the body corporate for the control, management, and administration of the common property, and for the payment of any insurance premiums, rent, and repairs and the discharge of any other obligations of the body corporate:

(b) Determine from time to time the amounts to be raised for the purposes aforesaid:

(c) Raise amounts so determined by levying contributions on the proprietors *in proportion to the unit entitlement of their respective units.*

(Emphasis added.)

[107] The Body Corporate at general meetings on 8 February 2008 and 15 August 2008 passed resolutions recorded in the minutes of those meetings as items 6(3) and 6(5), and items 7(2) and 7(iv) respectively, imposing levies requiring the payment of fixed amounts on the proprietors. The charges were flat charges and not in proportion to the unit entitlement of the respective units. The levies were raised in order to defend these proceedings and the earlier proceedings.

[108] The Body Corporate acknowledges that the proprietors have levied fixed amounts and acknowledges the obligation to levy in proportion to the unit entitlement. It undertakes through Mr Sills to make an adjusted payout to reflect actual unit entitlements within the next 28 days. On the basis of that undertaking Mr Rooney does not seek any order directing the first defendant to repay to the claimants any levies collected from them. Nevertheless, he seeks a declaration.

[109] Under s 15(2) there is no power to raise amounts other than by levying contributions on unit owners on a proportionate basis, in accordance with their unit entitlement. The promise to make an adjusted payout at a later time cannot create the power, or alleviate the invalidity. It cannot be said that there is a reasonably incidental power to the power to raise amounts by levying proprietors proportionately under s 15(2)(c), to do a different thing entirely and levy them on a flat rate. By implication such a flat levy is not contemplated by the Act.

[110] Mr Sills submitted that there was no need to determine the issue given the acknowledgement that there will be an adjusted payout. That was a sensible

concession and may be relevant to costs, but does not mean the point is moot. At the present time the levy stands and it was a wrongful levy.

[111] I declare that the resolutions recorded as items 6(3) and 6(5) in the minutes of the meeting of Body Corporate 366611 held on 8 February 2008, and items 7(ii) and 7(iv) in the minutes of the meeting of Body Corporate 366611 held on 15 August 2008, and any other similar resolutions, were *ultra vires* and invalid.

Fourth cause of action – proxies

[112] The standard form of Theta lease includes an irrevocable proxy permitting Theta to cast votes at meetings for the proprietor. The proxy is expressed as follows:

> The lessor hereby irrevocably appoints the lessee to be the lessor's proxy pursuant to the rules of the body corporate with full power to exercise the lessor's voting and other rights and functions relating to the operation and control of the body corporate to the exclusion of the lessor provided that the lessee shall give the lessor prior notice whenever practical of any matter of substance which is to be decided by the body corporate.

[113] Mr Chen, in his evidence, accepted that the purpose of the proxies was to enable Theta to efficiently manage the building. These proxy clauses give Theta the ability to run the Body Corporate and ensure that all voting is in accordance with its wishes.

[114] Mr Rooney does not argue that the use of proxies is per se invalid. However, he contends that Theta has used the proxies for votes which are intended expressly to confer a benefit on Theta. In particular, he refers to the following resolutions:

> 30.1.1. A resolution that it not be sued by the first defendant following the judgments pleaded in paragraphs 8 and 9 hereof; and
>
> 30.1.2 Resolutions approving annual budgets which included provisions for the payment of building management fees to itself; and
>
> 30.1.3 A resolution requiring the body corporate to pay costs of $40,000.00 plus GST for legal proceedings brought by the second defendant against the first defendant and the plaintiffs amongst others under section 42 of the Unit Titles Act 1972, which proceedings were later discontinued after the $40,000.00 plus GST had been spent;

[115] He submits that these resolutions are invalid as they were for a purpose or with an intention which went beyond the scope of the leases which created the proxy power. Mr Rooney says that the use of proxies in such circumstances is undemocratic and contrary to the intention behind the Act. He asserts that the actions of the first and second defendants constituted a fraud on a power. He seeks declarations that:

> (i) Any exercise of votes at meetings of the first defendant pursuant to or in reliance on any grant to the second defendant by any proprietor of an irrevocable proxy through any clause in any lease of a unit from any proprietor comprising Body Corporate 366611 to the second defendant shall be exercised pursuant to and for the purposes of leases of units to the second defendant only, and not otherwise; and
>
> (ii) Any past or future resolution of the first defendant passed by the exercise of the said default proxies for any purposes other than the leases of units to the second defendant were invalid and void.

[116] Mr Rooney relies on s 3 of the Declaratory Judgments Act 1908. It provides:

> **3 Declaratory orders on originating summons**
>
> Where any person has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute, or any regulation made by the Governor-General in Council under statutory authority, or any bylaw made by a local authority, or any deed, will, or document of title, or any agreement made or evidenced by writing, or any memorandum or articles of association of any company or body corporate, or any instrument prescribing the powers of any company or body corporate; or
>
> Where any person claims to have acquired any right under any such statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument, or to be in any other manner interested in the construction or validity thereof,—
>
> such person may apply to the High Court by originating summons … for a declaratory order determining any question as to the construction or validity of such statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument, or of any part thereof.

[117] Section 3 provides, relevantly paraphrased, that where any person claims to be in any manner interested in the construction or validity of any deed, document of title, agreement or instrument such person may apply for a declaratory order.

[118] The general approach to applications under the Declaratory Judgments Act is long established. Cooper J said in *Young v New Zealand Insurance Co* referring to s 3:[60]

> The Act was intended, in my opinion, to give a speedy and inexpensive method of obtaining a judicial interpretation of a deed, agreement or instrument in cases where the matter in dispute could not be conveniently brought before a Court in its ordinary jurisdiction, and where a declaratory judgment would be the appropriate relief.

[119] It is apparent from the words of s 3 that there is a clear jurisdictional problem with this cause of action. These proceedings do not seek the determination of any question as to the construction or validity of the proxies or the leases under which they were created. The proxies are after all creatures of the lease contract, freely entered into between proprietors and Theta. The issue as pleaded in the statement of claim is not about the construction of the proxy but rather the allegedly undemocratic way in which it has been used.

[120] There can be no suggestion that a proxy entered into in this way is invalid in the sense of being *ultra vires* or prohibited. The default rules under the Act allow such proxies.[61] The Body Corporate rules, in the same terms, allow such proxies (at r 2.27).

[121] However, Mr Rooney argues that the issue he wishes to raise is indeed one of construction and that the claimants seek an interpretation on how the proxy should be construed. He submits that the proxies should not be used for the "operation and control" of the Body Corporate. He points to certain specific uses of the proxies which he says the use is for the benefit of Theta and beyond the scope permitted by the leases.

[122] The claimants are seeking to use the declaratory judgments procedure not for the purposes of obtaining a judicial interpretation of the proxies, but to obtain relief in respect of their specific use. To succeed the claimants would need to call evidence of the resolutions and the wrongful purpose. A plaintiff should be able to argue a declaratory judgment claim on the words of the relevant instrument and

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60 *Young v New Zealand Insurance Co* (1909) 29 NZLR 50 (SC) at 51–52.

61 Unit Titles Act 1972, sch 2, cl 26.

should not need to call evidence on matters extraneous to the interpretation issue. The need for evidence demonstrates the jurisdictional obstacle to involving the Declaratory Judgments Act.

[123] Moreover, the general relief sought at (i) in the prayer to the fourth cause of action, which is for an order that the proxies shall be exercised "pursuant to and for the purposes of leases of units to the second defendant only, and not otherwise" is not intelligible. The phrase used presupposes that there are ascertainable "purposes" of the leases. No attempt has been made to particularise what those purposes might be. Leases have a number of purposes and provide different benefits to different parties.

[124] The making of the orders sought would provide no enforceable relief, as no one would know what the correct purpose was. Thus, I do not consider that the fourth cause of action as pleaded raises an issue amenable to a declaration under the Declaratory Judgments Act.

[125] This highlights a further jurisdictional issue raised by the defendants. The proxies are entered into between non-plaintiff proprietors and Theta. Mr Wu is not a party to the lease contracts under which the proxies were created.

[126] Mr Davidson submitted that a party does not have the ability to obtain a declaration as to the existence or validity of an alleged contract to which that applicant is not a party. In this regard he relied on the statement of the Court of Appeal in *All-Weather Investments Ltd v Sealord Charters Ltd*:[62]

> The Court's jurisdiction to make a declaratory order is conferred by ss 2 and 3 of the Declaratory Judgments Act 1908. It is expressed in the widest terms. By s 10 the jurisdiction is a discretionary one. It has never been regarded, however, as enabling an applicant to obtain a declaration as to the existence or validity of an alleged contract to which the applicant is not a party.

[127] This Court adopted the above statement of principle, and others summarising the English position, in *Greymouth Petroleum Holdings v Todd Taranaki Ltd.*[63]

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62 *All-Weather Investments Ltd v Sealord Charters Ltd* (1997) 10 PRNZ 320 (CA) at 321.

63 *Greymouth Petroleum Holdings v Todd Taranaki Ltd* [2005] NZAR 747 (HC) at [27]–[30].

Among the adopted principles of the law in England was the principle that any declaration must relate to the rights and liabilities of the party seeking the declaration.

[128] A similar issue was addressed in the body corporate context in *Creak v Body Corporate No 180838* where the view was taken that unsuccessful opponents to a vote cannot assume a right to challenge on behalf of other persons who have validly granted agency powers under power of attorney which were exercised as a proxy.[64]

[129] Mr Rooney in answer relied on the broad ability of interested persons to bring a claim, and in particular the second paragraph of s 3 of the Declaratory Judgments Act which relevantly provides:

> Where any person claims to have acquired any right under any such statute, … or instrument, or to be in any other manner interested in the construction or validity thereof … .

He submitted that the plaintiff can be seen as interested in the construction of the proxy.

[130] A somewhat more liberal approach to who may apply for a declaratory order to that expressed in *All-Weather Investments* can be discerned in *Wybrow v Chief Electoral Officer* where the New Zealand Labour Party sought a declaratory order determining the meaning of certain provisions of the Electoral Act 1956 relating to the counting of votes. There the full Court of Appeal, in determining that the New Zealand Labour Party had a sufficient interest, expressed the provisional view that the words in the statute indicated an intention to confer a very broad right to seek the Court's assistance on construction, and that the phrase "in any other manner interested" was not to be treated as limited by the earlier words in the paragraph.[65] In *Turner v Pickering*, a case commented on with approval by the Court of Appeal in *Wybrow*, Casey J had noted that a plaintiff did not need to establish any claim of a private right or tangible interest in the instrument.[66] For instance, members of a society could apply under the provisions for interpretation of the society's rules,

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64 *Creak v Body Corporate No 180838* (2009) 9 NZCPR 378 (HC) at [38].
65 *Wybrow v Chief Electoral Officer* [1980] 1 NZLR 147 (CA) at 149–150.
66 *Turner v Pickering* [1976] 1 NZLR 129 (SC) at 135.

simply as members wanting to know the meaning of the rules of their own society. The claimants there were members of a society who sought orders as to the validity of resolutions and other activities. Questions that called for a study of the facts of the case were considered unsuitable for the declaratory judgment jurisdiction. A similar view was upheld more recently in *Re Andrews*.[67] The interest can be somewhat less than a legal right, but must be an interest greater than that of a member of the general public.

[131] Mr Wu while not a party to the lease or proxies has an interest in them that goes beyond the interest of an ordinary member of the public:

(a) He owns as tenant in common with the lessors the common property.

(b) He is a member with the lessors of the Body Corporate.

(c) The lessee is the agent of the Body Corporate of which he is a member.

(d) The default rules provide that any vote to be cast at a general meeting of a body corporate may be exercised by proxy.[68] A proxy is required to be appointed in writing.[69] It might be inferred that this requirement is protective not only of the interests of the giver of the proxy but also those of other proprietors that may be affected by the exercise of the former's votes by proxy. If, for example, a proxy clause was manifestly invalid but the appointor was disinterested in or oblivious to its exercise, another proprietor might well be able to apply for a declaratory order declaring it invalid.

[132] In the present case the majority of proprietors signed a standard form lease irrevocably appointing Theta proxy. That is, Theta now has effective control (save where a unanimous resolution is required) over the body corporate of which Mr Wu is a member. I consider that Mr Wu has a sufficient interest in the validity of the

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67 *Re Andrews* (2002) 16 PRNZ 608 (HC).
68 Unit Titles Act 1972, sch 2, cl 26.
69 Ibid.

proxy by which Theta was appointed to bring a claim under the Declaratory Judgments Act.

[133] However, Mr Wu does not purport to be interested in the construction or validity of the proxy clause. It is its use in meetings which he contests. For that primary ground his application must fail.

Conclusion

[134] The plaintiff and those whom he represents therefore succeed on the first cause of action in nuisance, succeed entirely on the second and third causes of action, and fail on the fourth cause of action.

Result

[135] The plaintiff and those whom he represents succeed on the first cause of action against the first and second defendants and are entitled to damages against them both in the sum of $283,663.64. They are also awarded damages of $3,121.56 for costs in working on the locks. I declare that a fair charge for each electronic key card was $25.

[136] The plaintiff and those whom he represents succeed on the second cause of action and it is declared that rr 2.1(g), 2.5, 2.39(b) and 2.42 of the Body Corporate 366611 are *ultra vires.*

[137] The plaintiff and those whom he represents succeed on the third cause of action and it is declared that resolutions recorded as items 6(3) and 6(5) in the Minutes of a meeting of Body Corporate 366611 held on 8 February 2008 and as items 7(ii) and 7(iv) in the Minutes of a meeting of Body Corporate 366611 held on 15 August 2008 and any other similar resolutions purporting to impose levies for fixed amounts of money are not in accordance with unit entitlements and *ultra vires.*

[138] The plaintiff and those whom he represents fail on the fourth cause of action.

[139] Costs are reserved, for submissions if not agreed, by the plaintiffs within 14 days and the defendants within a further 14 days.

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Asher J