IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA71/2018
[2018] NZCA 612

BETWEEN	BODY CORPORATE S73368 Appellant
AND	ROSALIND KAY OTWAY (NOW ROSALIND KAY WRIGHT) AND OLPHERT SANDFORD TRUSTEE SERVICE COMPANY LIMITED First Respondents
	PHILIP HERBERT DORR, SHARON LESLEY DORR AND DONALD RAYMOND PILBROW Second Respondents

CA319/2018

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AND	ROSALIND KAY OTWAY (NOW ROSALIND KAY WRIGHT) AND OLPHERT SANDFORD TRUSTEE SERVICE COMPANY LIMITED First Respondents
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Hearing:	27 August 2018
Court:	Miller, Mallon and Gendall JJ
Counsel:	S C Price and I J Stephenson for Appellant G Brittain QC and J Delaney for Respondents
Judgment:	19 December 2018 at 2.00 pm

JUDGMENT OF THE COURT

A The appeals are dismissed.

B The appellant must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Gendall J)

Introduction

[1] Maintenance and repair issues in unit title developments and the question of who pays for required repairs have caused some difficulty recently, particularly in the context of leaky buildings.[1]

[2] This appeal concerns a dispute regarding the responsibility of the respondent apartment owners to pay for substantial repairs undertaken by the appellant Body Corporate on a leaking unit title apartment block at Mount Maunganui. The Body Corporate appeals the substantive decision on this dispute given by Woolford J in the High Court of 20 December 2017,[2] and his costs decision of 17 May 2018.[3]

Background

[3] The respondents own two apartments on the first floor of the 12 storey mixed residential and commercial unit title development known as Oceanside Tower Two, located across the road from the beach at Mount Maunganui. The first floor has large decks which sit above ground-floor shops and the public footpath. The decks are

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1 This has been recognised by a range of commentators in this area including Lisa Fry-Irvine and Tim Jones "Challenges for Bodies Corporate" (New Zealand Law Society webinar, 2015) at 1; and Elizabeth Toomey and others "Revised Legal Frameworks for Ownership and Use of Multi-dwelling Units" (BRANZ External Research Report, University of Canterbury, 2017) at 191–192 and 230–235.

2 *Body Corporate S73368 v Otway* [2017] NZHC 3265 [HC substantive judgment].

3 *Body Corporate S73368 v Otway* [2018] NZHC 1095 [HC costs judgment].

formed by a concrete slab sitting on structural steel beams. Previously, the concrete slab was covered by a butyl rubber membrane with ceramic tiles laid on top. These decks had been leaking since at least 2009, due in large measure to the premature failure of the waterproof membrane.

[4] The Body Corporate requested the respondents, as the owners of the decks, to repair them but they refused. This refusal continued for some years and the decks continued to leak into the ground-floor commercial shop units.

[5] In 2014, the Body Corporate began to carry out repairs to the decks and the building pursuant to the Unit Titles Act 2010 (the UTA 2010). The work was completed and a code compliance certificate issued on 17 November 2014. The repair costs totalled $841,838.56. This cost was met initially by levies imposed by the Body Corporate on all unit owners in the development. The Body Corporate broke these repair costs into three categories:

(a) balcony works (excluding joinery and drainage Works) — $591,459.64;

(b) joinery works — $183,739.46; and

(c) drainage works — $66,639.46.

[6] The Body Corporate elected to treat the drainage works as infrastructure for the building as a whole so it did not pursue that cost from the respondents. The Body Corporate, however, sought $290,830.43 from each of the respondents for the balcony works and the joinery works.[4]

[7] In 2015, the Body Corporate carried out other work relating to these repairs. This involved removing soffit linings, repairing structural steel under the decks, replacing the soffits and painting them (the podium and soffit works). This work was

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4 The third unit on the first floor contributed to the cost of these works and was not a defendant in this proceeding.

completed at a total cost of $115,129.09. The Body Corporate sought from each of the respondents $24,488.05 for this work.

[8] The basis on which the Body Corporate sought recovery of the repair costs under the UTA 2010 was:

(a) **The s 127 claim** — given that the Body Corporate said that the decks were the respondents' unit property, they were obliged (from at least 2009 to 2012) to repair and maintain their decks pursuant to r 1(e) of the then Body Corporate Rules.[5] The respondents did not do so in breach of that obligation which resulted in the Body Corporate having to undertake the work. This work was completed on the basis the Body Corporate was entitled to recover from the respondents the resulting repair costs pursuant to s 127 as a fault provision.

(b) **The s 138(4) claim** — again, on the basis that the decks were the respondents' unit property, the Body Corporate said it was entitled to recover from them the costs of repairing these decks (being building elements that served or related to more than one unit) pursuant to s 138(4) of the UTA 2010.

(c) **The s 126 claim** — this claim was advanced alternatively in the event that recovery under the fault section, ss 127 and/or 138(4), proved not to be available. If this was found to be the case, the Body Corporate sought part recovery of the repair costs under s 126 on the basis that the

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5 Since the passage of the Unit Titles Act 2010 [UTA 2010] this obligation has also been broadly outlined in s 80(1)(g), which provides:

> (1) An owner of a principal unit—
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> …
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> (g) must repair and maintain the unit and keep it in good order to ensure that no damage or harm, whether physical, economic, or otherwise, is, or has the potential to be, caused to the common property, any building element, any infrastructure, or any other unit in the building:
>
> …

repairs to the respondents' decks were said to benefit their first-floor units (and the ground-floor units) substantially more than the other units in the apartment block.

The Unit Titles Act 2010

[9] Provisions in the UTA 2010 of relevance here are:

> **126 Recovery of money expended for repairs and other work**
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> (1) This section applies where the body corporate does any repair, work, or act that it is required or authorised to do, by or under this Act, or by or under any other Act, but the repair, work, or act—
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> (a) is substantially for the benefit of 1 unit only; or
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> (b) is substantially for the benefit of some of the units only; or
>
> (c) benefits 1 or more of the units substantially more than it benefits the others or other of them.
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> (2) Any expense incurred by the body corporate in doing the repair, work, or act is recoverable by it as a debt in any court of competent jurisdiction (less any amount already paid) in accordance with the following:
>
> (a) so far as the repair, work, or act benefits any unit by a distinct and ascertainable amount, the owner at the time when the expense was incurred and the owner at the time when the action is instituted are jointly and severally liable for the debt; or
>
> (b) so far as the amount of the debt is not met in accordance with the provisions of paragraph (a), it must be apportioned among the units that derive a substantial benefit from the repair, work, or act rateably according to the utility interest of those units, and in the case of each of those units, the owner at the time when the expense was incurred and the owner at the time when the action is instituted are jointly and severally liable for the amount apportioned to that unit.
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> (3) Despite subsection (2)(b), if the court considers that it would be inequitable to apportion the amount of the debt in proportion to the utility interest of the unit owners referred to in that paragraph, it may apportion that amount in relation to those units in the shares as it thinks fit, having regard to the relative benefits to those units.
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> **127 Recovery of money expended where person at fault**
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> (1) This section applies if the body corporate does any repair, work, or act that it is required or authorised to do, by or under this Act, or by or under any other Act, and the repair, work, or act was rendered

necessary by reason of any wilful or negligent act or omission on the part of, or any breach of the Act, the body corporate operational rules, or any regulations by, any unit owner or his or her tenant, lessee, licensee, or invitee.

(2) Any expense incurred by the body corporate in doing the repair, work, or act, together with any reasonable costs incurred in collecting the expense, is recoverable as a debt due to the body corporate (less any amount already paid) by the person who was the unit owner at the time the expense became payable or by the person who is the unit owner at the time proceedings are instituted.

…

138 Body corporate duties of repair and maintenance

(1) The body corporate must repair and maintain—

(a) the common property; and

…

(d) any building elements and infrastructure that relate to or serve more than 1 unit.

…

(4) Any costs incurred by the body corporate that relate to repairs to or maintenance of building elements and infrastructure contained in a principal unit are recoverable by the body corporate from the owner of that unit as a debt due to the body corporate (less any amount already paid) by the person who was the unit owner at the time the expense was incurred or by the person who is the unit owner at the time the proceedings are instituted.

…

The High Court substantive decision

[10] We turn first to the Judge's substantive decision of 20 December 2017. Before the Body Corporate's claims under the UTA 2010 could be determined, the Judge had to resolve the preliminary issue as to where the floor boundaries of the respondents' units were located. Initially, the respondents had claimed their legal floor boundaries were some two to 15 centimetres above the concrete floor slabs in their apartments and decks. Thus, they denied they owned the decks and said that, given the decks were not their unit property, they were not responsible for the repairs required. The Body Corporate refuted this and argued that the concrete floor slabs of the decks in particular came within the respondents' units.

[11] The Judge rejected the respondents' denial and held the respondents' decks were their respective unit property. He found the location of the legal boundaries between unit floors in the tower block of the apartments was the top of the respective concrete floor slabs. This included the top of the concrete floor slab constituting the deck of each of the respondents' units. In other words, the decks were part of each respondent's own unit property and that included all material above the top of the concrete floor slab, being the waterproof membrane and the ceramic surface tiles.[6]

[12] The Judge's conclusion on this point is not the subject of this appeal. Our judgment proceeds on his unchallenged findings as to the boundaries of the units.

[13] We turn now to the Body Corporate's claims to recover the repair costs from the respondents under ss 126, 127 and 138(4) of the UTA 2010.

[14] Addressing first the s 127 claim, the Judge held that the Body Corporate could not recover any of the repair costs under this section. He found that the respondents had "not committed any wilful or negligent act in breach of the [UTA 2010] or the body corporate operational rules".[7] He was of the view that:[8]

> …the defects must have been caused during the construction process through incorrect product specification, poor or incorrect installation, or incomplete installation.

And:[9]

> …the damage caused by the defective membrane was not the result of a failure on the part of the first-floor apartment owners to keep their units in sufficiently good order, repair and condition, but a failure during the construction process.

In determining that the membrane failed prematurely due to errors in the design and construction process, he found too that the overall storm water system for the building no longer met the requirements of the current Building Code.[10]

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6 HC substantive judgment, above n 2, at [13]–[14].
7 At [36].
8 At [21].
9 At [23].
10 At [29].

[15] Next, addressing s 126, the Judge noted that this provision enables the Body Corporate to recover repair costs from a unit owner if the repair work has benefitted that unit "by a distinct and ascertainable amount".[11] Otherwise, the costs must be apportioned among the units that derive a substantial benefit from the repair work according to the utility interest of those units.

[16] The Judge accepted that the membrane on the decks was an important part of the storm water system for the entire apartment building. The replacement of this membrane necessitated the balcony works, the joinery works and the drainage works to ensure the requirements of the current Building Code were met.[12]

[17] He found that the repair works did not benefit the first-floor units more than other units by a distinct and ascertainable amount because:[13]

(a) the weathertightness of the entire building is interlinked and indivisible so the repairs affected all units;

(b) although the first-floor units own from the top of the concrete slab, the membrane and the tiles, the concrete floor slab itself is owned by the ground-floor units or by the Body Corporate as common property;

(c) the allocation by the Body Corporate of repair costs has been somewhat arbitrary;

(d) each of the unit owners bought into the building as a whole, not just their individual units;

(e) the sharing of common property repair costs on a unit entitlement basis necessarily contemplates there may be an element of disproportionality;

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11 At [26].
12 At [29].
13 At [30].

(f) if any part of a building is not weathertight, then that adversely affects the saleability and value of all units, regardless of whether they themselves are in fact leaky; and

(g) the first-floor units, in any event, will pay proportionally more than almost all other unit owners based on their unit entitlements which take into account the floor area of their extensive decks.

[18] The Judge made one exception. This was with regard to the new joinery installed in the first-floor apartments. He found these repairs were for the distinct and ascertainable benefit of those units.[14] He ordered payment of $44,344.75 from each respondent under s 126(2)(a) or s 126(3). This was lower than the sum sought by the Body Corporate ($68,993.29) because the Judge considered some costs for this work, such as scaffolding, could not be directly connected with the installation of the joinery.[15]

[19] Finally, turning to consider s 138(4), the Judge was of the view that this was not limited to circumstances where s 126 does not apply. Rather, he said they are alternative modes of recovery. He found that there was some limited jurisdiction also under s 138(4) here, but only to order the respondents to pay for the specific new window joinery installed in their units.[16]

Appeal against the substantive decision

[20] The Body Corporate raises two main questions on its appeal against the Judge's substantive decision. The High Court having found that the respondents own their decks, the issues are:

(a) Was the Body Corporate entitled to recover the costs of repairing the decks under s 127 of the UTA 2010 on the basis that the Body Corporate's carrying out of the deck repairs resulted from

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14 At [31]–[32].

15 At [33] and [41]. Any issues of possible betterment related to the new joinery in the respondents' apartments it seems were not raised, as Woolford J made no mention of this in his judgment.

16 At [40].

the respondents' sustained breach of r 1(e) of the Body Corporate Rules? Linked to this question is the issue as to whether the membrane was the major contributor to the water leaks and consequential damage to the ground floors, thus necessitating the remedial work.

(b) Was the Body Corporate entitled to recover the costs of repairing the decks under s 138(4) of the UTA 2010 on the basis the repairs were to the respondents' unit property? This question also involves a consideration of whether or not s 138(4) of the UTA 2010 is limited to circumstances where s 126 of the UTA 2010 does not apply.

[21] The Body Corporate also addresses some argument to the issue of its entitlement under s 126 with regard to the podium and soffit works.

Recovery under s 127

[22] At trial, the Body Corporate submitted that the respondents owned their decks and refused to repair the defects in them. This caused water damage to continue in the downstairs units for many years, until, in 2012, it became clear that the Body Corporate, in light of the provisions in the new UTA 2010, was authorised to fix the failing waterproof membrane which it said was causing the problems. The Judge did not allow recovery under s 127 because he found the defects were caused during the construction process.[17] Therefore, it was not a result of the respondents' failure to keep their units in sufficiently good order, repair and condition.[18]

[23] The Body Corporate now maintains now that the Judge erred in determining recovery under s 127 on this basis. It argues that the respondents were required to repair the decks in terms of r 1(e) of the operative Body Corporate Rules but refused to. At the material time r 1(e) required that a unit proprietor shall:

> Repair and maintain his Unit and keep it in sufficiently good order, repair and condition to ensure that no damage or harm shall ensue to the common property or any other Unit in the building to which the Unit forms part.

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17 At [21] and [36].
18 At [23] and [36].

The Body Corporate submits that, as the Judge determined that the respondents did own their decks, repairs were required to stop the leaking which was causing damage to the downstairs units and other common property, so the grounds for recovery under s 127 were met. It was the respondents' failure to carry out the repairs that resulted in the Body Corporate having to incur the costs of completing them.

[24] The wording of s 127 indicates that liability arises when the repair is made necessary because the unit owner has either: committed any wilful or negligent act or omission; or breached the UTA 2010, body corporate rules or any regulations.

[25] The Body Corporate's case is that the respondents breached r 1(e) of its operative rules by failing to repair and keep in good order their unit property, being the decks. This failure made it necessary for the Body Corporate to undertake the repairs. Thus, under s 127(2), it is entitled to recover from the respondents the amount spent on the repairs.

[26] In response, the respondents submit that the Body Corporate's claim under s 127 fails on the facts as the evidence confirms that the repairs were necessary because of widespread defects in the original design and construction of the building. They argue that the repair work substantially benefitted all of the units by making the development as a whole, including the roof of the ground-floor units, watertight and ensuring that the storm water drainage system for the entire apartment tower complied with the Building Code.

[27] On these aspects, we accept that the repairs carried out in 2014 and 2015, which included work to the respondents' decks, were part of an indivisible remediation project to fix what were design and construction defects in the storm water disposal system for the building as a whole. The evidence here confirmed that this storm water drainage system, which included the necessary run-off from the tower block to the respondents' decks, was both under-designed and defective in its original construction. In reality, the repairs and remediation work undertaken effectively provided an entirely new storm water disposal system as for the building, such that it could now meet the requirements of the current Building Code. Much was made here of the defects in the waterproof membrane and the contribution of this to deck leaks

to the ground-floor shops. We accept that the membrane was an important part of the overall drainage plane and integral to the storm water disposal system, but it was through its premature failure that these issues were caused. As the Judge noted, there is also no evidence of any post-installation damage to the membrane.[19] We find, too, that the evidence indicates the membrane problems were only one of a number of defects in the original design and construction of the building's storm water disposal system which necessitated the work undertaken by the Body Corporate.

[28] For completeness, we note that the Judge concluded:[20]

> In the present case, I am of the view that the first-floor apartment owners have not committed any wilful or negligent act in breach of the Act or the body corporate operational rules. The waterproof membrane on the decks failed prematurely and therefore did not meet the requirements of the Building Code. …

[29] With respect, we record that the Judge has confused the requirements of s 127(1) of the UTA 2010 here. As we noted at [24] above, the Body Corporate's repair or work must be rendered necessary by reason of either "any wilful or negligent act or omission on the part of…any unit owner" or "any breach of the UTA 2010, the Body Corporate Operational Rules, or any regulations by any unit owner". Notwithstanding this, we accept the confusion here is only minor and has little real impact on the Judge's overall conclusion that the respondents were not at fault in terms of s 127 of the UTA 2010. We agree with this conclusion. The Body Corporate therefore cannot recover repair costs under this fault provision from the respondents.

[30] We agree with the Judge therefore that the Body Corporate is unable to recover from the respondents any of the repair costs under s 127 of the UTA 2010.

Recovery under s 138(4)

[31] Section 138(1) of the UTA 2010 obliges the Body Corporate to repair and maintain "the common property",[21] and also "any building elements and infrastructure that relate to or serve more than 1 unit".[22] The deck areas in question here meet the

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19 At [21].
20 At [36].
21 UTA 2010, s 138(1)(a).
22 Section 138(1)(d).

definition of a "building element" and it is common ground that the deck areas serve more than one unit.[23] Therefore, it is clear that, absent some obligation on unit owners to do so, the Body Corporate in this case was under an obligation to repair and maintain the decks as "building elements".

[32] Section 138(4) of the UTA 2010, however, is problematical. An immediate difficulty arising is whether the Body Corporate can require one or more individual unit owners to pay for these "building elements" repair costs, or whether the Body Corporate as a whole should meet these costs. This argument also involves the question whether, absent substantial benefit to a particular unit owner or fault on the part of that unit owner, the Body Corporate has to meet those costs itself.

[33] This brings into play s 126 of the UTA 2010. This section provides for the sharing of repair costs disproportionately on the basis that the repairs benefitted certain units substantially more than other units.

[34] In his substantive decision, the Judge found:

(a) with respect to the s 138(4) claim, the respondents were to pay only an amount in respect of window joinery replacement specific to their units, representing a small part of the total costs of the deck and storm water system repairs;[24] and

(b) with respect to the s 126 claim, no order for recovery of repairs was made, other than for the window joinery works noted above, on the basis that the Judge did not consider the respondents to have received "distinct and ascertainable benefit" from the deck repairs.[25]

[35] It is apparent that the relationship between s 138(4) and s 126 of the UTA 2010 created some potential difficulty here. This difficulty was the focus of a large part of the argument before us on this appeal. It is a significant issue in this and other cases,[26]

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23 Section 5(1), definition of "building elements".
24 HC substantive judgment, above n 2, at [40].
25 At [32].
26 In *Body Corporate 324525 v Stent* [2017] NZHC 2857, which involved a not dissimilar leaky building unit title development at Paihia, Associate Judge Bell at [211] noted:

and has also been recognised by commentators in this area.[27] We now turn to address the relationship between these provisions.

The relationship between ss 138(4) and s 126

[36] The legislative history of s 138(4) of the UTA 2010 is well set out in the recent High Court judgment of van Bohemen J in *Body Corporate 199380 v Cook*.[28] We adopt that account. Relevantly the Unit Titles Act 1972 (the UTA 1972) did not expressly provide that a body corporate might repair individually-owned unit property when the repairs related to the integrity of or damage to common property. This issue arose fairly often as a consequence of the leaky building crisis.

[37] In *Berachan Investments Ltd v Body Corporate 164205* this Court held that a body corporate could, under the UTA 1972, undertake obligations to repair unit property if those obligations were incidental to its duties to maintain and repair common property.[29] However, a body corporate could only undertake responsibilities to repair unit property under the UTA 1972 in two ways: pursuant to a rule under s 37 of that Act (and only if the "incidental" test from *Berachan* was satisfied), or under a scheme for repairs to the building approved by the Court pursuant to s 48 of that Act.[30] The approval of schemes that allowed for the body corporate to undertake repairs to common property was discussed by this Court in *Tisch v Body Corporate No 318596*.[31] Notably, the Court there emphasised that, though it was possible to depart from the scheme of the UTA 1972 and the body corporate rules (and so potentially allow for repairs to unit property), any departure should be no more than

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"To carry out works [the Body Corporate is required to do] the body corporate will use its funds derived from levies paid by all owners. It may then look to owners under ss 126, 127 and 138(4). Whether it does so is for it to decide. It may, but cannot be required to, make claims under these sections. *Such claims are not straightforward*." (Emphasis added.)

27 See for example Thomas Gibbons "Maintenance" (paper presented to New Zealand Law Society Unit Titles Intensive Conference, April 2013) at 68:
"Ultimately, there is potential for a conflict between s 138(4) and s 126(2). Should costs recovery depend on whose property the building element rests within, or on who will benefit from the repair. Perhaps in this instance, the specific should prevail over the general, though a general reliance on s 126 seems more appropriate in many cases."

28 *Body Corporate 199380 v Cook* [2018] NZHC 1244.

29 *Berachan Investments Ltd v Body Corporate* 164205 [2012] NZCA 256, [2012] 3 NZLR 72 at [46].

30 We need not express a view as to whether s 33 of the Unit Titles Act 1972 [UTA 1972] permitted body corporates to recover costs for repairs done to unit property. Compare *Cook*, above n 28, at [58]–[59].

31 *Tisch v Body Corporate No 318596* [2011] NZCA 420, [2011] 3 NZLR 679.

was reasonably necessary to achieve fairness between unit holders in the circumstances.[32] It also emphasised that relative benefits between owners was not a reason to depart from the scheme of the UTA 1972, and that ordinarily owners should be taken to have purchased their units knowing their individual obligations for their unit property.[33]

[38] Against this backdrop Parliament enacted the UTA 2010, which changed the obligations on a body corporate with regard to unit property. Whereas under the UTA 1972 the body corporate was obliged to "keep the common property in a state of good repair",[34] the UTA 2010 requires a body corporate to repair and maintain "the common property" and any "building elements" and "infrastructure" that relate to or serve more than one unit.[35] As this Court explained in *Wheeldon v Body Corporate 342525*, the UTA 2010 introduced the concept of building elements — those components necessary to the building's structural integrity or exterior aesthetics or to the health and safety of its occupants or users[36] — to address the dilemma created by defects within a unit that might affect another unit or the development as a whole.[37] To that end, the UTA 2010 circumscribed the property rights of unit owners by requiring that they permit the body corporate access to repair building elements affecting another unit or the common property,[38] and by limiting their right to alter their own units without the body corporate's consent.[39] The UTA 2010's processes are intended to prevent holdout problems that arose under the former legislation when unit owners refused to repair their units or permit repairs.[40] To the same end, as the Court went on to explain, the UTA 2010 limited the unit-owner's obligation to repair and maintain their own unit;[41] it is an obligation to repair and maintain the unit to avoid damage to building elements rather than to repair and maintain the building elements themselves.[42]

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32 At [49].
33 At [64].
34 UTA 1972, s 15(1)(f).
35 UTA 2010, s 138(1).
36 Section 5(1), definition of "building elements".
37 *Wheeldon v Body Corporate 342525* [2016] NZCA 247, (2016) 17 NZCPR 353 at [35].
38 UTA 2010, s 80(1)(a).
39 Sections 80(1)(i) and s 79(e). See also *Wheeldon*, above n 37, at [37].
40 (30 March 2010) 661 NZPD 10217 and 10219.
41 UTA 2010, s 80(1)(g).
42 *Wheeldon*, above n 37, at [38].

[39] The deck and the balcony and podium and soffit works in this case are building elements. The Body Corporate was obliged to repair them under s 138(1)(d) and entitled to access the units for that purpose under s 80(1)(a). The argument in the present case centres on whether the Body Corporate is entitled to recover the repair costs from the owners under s 138(4).

[40] We have quoted s 138(4) at [9] above. It provides that the costs incurred by the Body Corporate that relate to repairs or maintenance of building elements and infrastructure "contained in a principal unit" are recoverable from the owner of that unit.

[41] Subsection 138(4) is the product of a departmental report prepared by the then Department of Building and Housing for the relevant select committee during the legislative process. Submitters to the Committee were concerned as to who would pay for repair costs, and specifically as to how the relationship between what is now ss 126, 127 and 138(4) of the UTA 2010 would operate in practice. The Department responded to those concerns:[43]

> Some submitters were confused over the link between a unit owner's responsibility to repair and maintain their unit and the body corporate responsibility to repair and maintain all building elements and infrastructure that affect more than one unit… All building elements and infrastructure that relate to or serve more than one unit ought to be maintained by the body corporate, but *costs should be recoverable from the unit owners in instances where those unit owners substantially benefit from the repair or are at fault under clauses 111 and 112*.
>
> **Recommendation**
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> Add sub-clause to clause 122 to indicate that costs may be recovered from the owner of the principal unit if the body corporate does any repair work to the building elements or infrastructure that are contained within a unit owner's principal unit.

[42] It will be seen that the Department wanted to assign liability for building element repairs to unit owners only where they were at fault or benefited substantially from the repair. This is merely declaratory of what became sections 126 and 127. The Select Committee report explained that what became s 138 set out

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[43] Department of Building and Housing *Departmental Report to the Social Services Select Committee on the Unit Titles Bill 2008* (July 2009) at 20–21 (emphasis added).

the body corporate's duties of repair and maintenance for "common property, building elements and infrastructure" but had been silent on who must pay for work done "on elements forming part of an individual unit".[44] As we see it, the Committee envisaged the new provision s 138(4) as being subsidiary to ss 126 and 127, which were to prevail where they applied. Section 138(4) would only apply to repair work done by the body corporate either on elements within a unit that were *not* building elements or infrastructure or on building elements themselves where ss 126 or 127 did not apply. As to this latter situation, the Committee recognised the possibility that repairs to a building element as defined either may have been caused by fault on the part of the unit owner or were such that the repairs did not benefit any other unit owner, and therefore the cost should be met by the unit owner alone. We expand on this below.

[43] The Body Corporate here endeavoured to maintain that s 138(4) sets up a parallel recovery mechanism for building elements or infrastructure within a unit boundary and says it can employ s 138(4) at its discretion. But this was the same argument that failed in *Cook*, where van Bohemen J summarised it as a claim that, despite its many differences from the predecessor legislation, the UTA 2010 deliberately assigns responsibility for remedial work to unit owners regardless of benefit.[45]

[44] In the judgment under appeal, the Judge suggested that ss 126 and 138(4) are indeed alternative modes of recovery.[46] As van Bohemen J noted in *Cook*, however, the Judge's conclusion, which was confined to the joinery works and made no difference in the result, was somewhat at odds with his findings about the decks.[47]

[45] In our view, the legislative policy is clear and s 138(4) can be interpreted in a manner consistent with it. We reach this conclusion for reasons relating directly to the legislative purpose of Parliament in passing the UTA 2010. In addressing the mischief to which this enactment was directed, the legislature sought to address difficulties that had arisen when defects within a unit affected other units or the common property.

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44 Unit Titles Bill 2008 (212–2) (select committee report) at 27–28.
45 *Cook*, above n 28, at [93].
46 HC substantive judgment, above n 2, at [40].
47 *Cook*, above n 28, at [86]–[89].

It did so by assigning to bodies corporate responsibility for building elements and infrastructure found within units and limiting owners' rights and obligations accordingly.[48] The legislation permits a body corporate to act to prevent harm that has the potential to harm the common property, or any building element or any other unit. In s 126 the legislature created the necessary corollary, a flexible mechanism to recover from owners the costs of remedial work done by the body corporate: an owner who benefits in a substantial way must pay, and in other cases those owners who derive a substantial benefit must pay rateably according to their utility interests. In s 127 it provided that an owner who is at fault may be required to pay. And in s 138(4) it provided for the case where work is done on elements "contained in" a unit that may prove to be building elements or infrastructure or in some cases may not. The legislation recognises that the bases on which costs may be assigned under these provisions may be unknown when the work is commissioned. For example, it may not be known whether an element within a unit is a building element as defined; that depends on whether any given damage or defect may affect structural integrity, external aesthetics or health and safety. Whether an element qualifies as such may depend at least in part on the potential for it to affect other units.

[46] As we noted above at [32], on its face, s 138(4) is somewhat problematical. A plain and literal reading of the words of this provision might be seen as allowing stand-alone recovery against only one unit owner in a case such as this which therefore cuts across s 126 and 127 and the overall scheme of the UTA 2010.

[47] The learned author of *Burrows and Carter: Statute Law in New Zealand* addresses inconsistency between legislative provisions and states:[49]

> Apparently inconsistent provisions may appear in the same Act for a number of reasons. Sometimes in a long Act the framers may fail adequately to spell out the relationship between various sections; sometimes amendment of a Bill in the course of the parliamentary process may add a section that does not square satisfactorily with provisions in other parts of the Act; sometimes a later amendment to the Act, perhaps years after its original passage, may add provisions that do not fit comfortably with the rest of it; sometimes consolidation of several Acts may draw together sections that are not in harmony with each other.

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48 Clearly this can be inferred from the unit owners' responsibilities in s 80(1) and the Body Corporate's duties of repairs and maintenance in s 138 of the UTA 2010.

49 Ross Carter *Burrows and Carter: Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 463–464 (footnotes omitted).

> Normally it will be found, on reading the Act as a whole, taking into account scheme and purpose, that the two provisions can in fact be read consistently, albeit by "reading down" one of them. …
>
> There are numerous cases when such reconciliation has been necessary. Sometimes the reconciliation requires a strained interpretation to be given to one section; the law has always recognised that the avoidance of an internal inconsistency can justify some liberality with words.

[48] With this in mind, a purposive construction of the UTA 2010 is required, construing the meaning of the words in s 138(4) against the legislative purpose of the Act to ensure the overall scheme and functionality of the Act is respected.[50]

[49] A statement of purpose may be set out in the text of an Act. In the case of the UTA 2010 this occurs in s 3 which relevantly states:

> **3 Purpose**
>
> The purpose of this Act is to provide a legal framework for the ownership and management of land and associated buildings and facilities on *a socially and economically sustainable basis by communities of individual owners* and, in particular,—
>
> (a) to allow for the subdivision of land and buildings into unit title developments…; and
>
> (b) to create bodies corporate, which comprise *all unit owners* in a development, to operate and manage unit title developments; and
>
> (c) to establish a flexible and responsive regime for the governance of unit title developments; and
>
> (d) to protect the integrity of the *development as a whole*.
>
> (Emphasis added.)

[50] The function of a purpose clause such as s 3 is to provide a guiding principle for interpreting the text of the Act. This statement of the main purpose of the UTA 2010 in s 3 emphasises that the position of the community of owners is important.

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50 It is useful to remember the "golden rule" that generally purpose is to prevail and Lord Wensleydale's classic statement of this rule in *Grey v Pearson* (1857) 6 HL Cas 61 where he said at 106: "the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, *or some repugnance or inconsistency with the rest of the instrument,* in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no further". (Emphasis added.)

Increasingly, as commentators in this area have emphasised, in unit title developments, the whole is to prevail over the one.[51]

[51] In the present case, an important question is how the building elements in question are to be defined. Are these building elements simply a repair to the owners' deck, or to the deck membrane, or is it a repair to the overall storm water disposal system for the building which necessarily goes to its weathertightness?

[52] In our view, it is the latter. A building element is something that is necessary to the structural integrity or exterior aesthetics of the building or the health and safety of occupiers and users of the building. The deck membrane here is only a part of the overall storm water and weathertightness system necessary for the structural integrity of the building and the health and safety of owners and users. The building element repaired by the Body Corporate here is the entire storm water system which had gone on to cause weathertightness issues. First, that system cannot be said to be "contained" only in the appellants' units here as we outline at [27] above. And secondly and importantly, the storm water system repairs, being crucial to the integrity and value of the entire development, benefit all owners. For these reasons s 138(4) does not apply here.

[53] And generally, on the view we take of the legislation, we find that any perceived conflict between s 138(4) and ss 126 and 127 can be resolved as the Select Committee envisaged, with the latter sections where they apply prevailing over s 138(4) which, if necessary, is to be read down. Hence there is no need for a specific mechanism to apply and guide a body corporate when choosing among them. This avoids the risk that a body corporate will abuse its powers by requiring one unit owner to bear the cost of remedial work that substantially benefits others, and it eliminates the need for a judicially-developed mechanism to guide decision-making, such as that adopted by van Bohemen J in *Cook*.[52]

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51 Thomas Gibbons "Foreword" (paper presented to New Zealand Law Society Unit Titles — Density and Intensity Intensive Conference, November 2015) at 6.

52 *Cook*, above n 28, at [97]–[100].

[54] It follows that there is no ability for the Body Corporate in the circumstances of the present case to recover costs from the respondents on the basis of s 138(4). We disagree therefore with the Judge's findings first, as we have noted, that ss 138(4) and 126 are alternative modes of recovery, and secondly, that:[53]

> There is therefore jurisdiction … under s 138(4) to order that the first-floor apartment owners pay for the new joinery installed in their apartments.

This error made no difference in the result, since the Judge awarded the Body Corporate the window joinery sum in reliance on s 126.

[55] The matters we have outlined above dispose of the s 138(4) aspects of this appeal.

Recovery under s 126

[56] We turn now to the Body Corporate's appeal arguments relating to s 126 of the UTA 2010.

[57] The Body Corporate's position on this appeal relating to recovery under s 126 was simply that, as liability should be found against the respondents under ss 127 or 138(4) for the majority of the repair costs here, s 126 is no longer relevant other than in relation to the podium and soffit works. The podium and soffit works involved the removal of soffit linings around the first-floor deck area, repairing and painting structural steel under the decks, replacing the soffits and painting them at a total cost of $115,129.09. The Body Corporate had sought from each of the respondents $24,488.05 for this work but this claim failed before the Judge.

[58] The Judge's focus was on the need for the repairs to benefit the respondents "by a distinct and ascertainable amount" before their costs could be recovered from a particular unit owner.[54] The Judge found this was not so in the present case, bar the joinery works as already noted.[55] We consider that the test he applied, that repair work had to benefit a unit "by a distinct and ascertainable amount", was incorrect.

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53 HC substantive judgment, above n 2, at [40].
54 At [26].
55 At [30].

The presence of "distinct and ascertainable benefit" does not trigger the application of s 126. Rather, s 126 provides for recovery where there is "substantial benefit" to or for one or more units. The term "distinct and ascertainable benefit" refers to one of two bases for apportioning costs recoverable under s 126, that in s 126(2)(a). The alternative basis is set out in s 126(2)(b) and apportions the costs rateably between those units that substantially benefit.

[59] In the case of the podium and soffit works, the Judge did not discuss whether these works substantially benefitted some units more than others. He noted only that they were not necessitated by the replacement of the deck membrane. What is clear from the evidence, however, is that some of the podium and soffit works did assist in the drainage and storm water disposal system. In its submissions on appeal, the Body Corporate suggested that the only owners affected by the podium and soffit works were the ground-floor and first-floor owners. It noted the evidence before the High Court that the podium and soffit works did not affect the structural integrity of the rest of the building. Therefore, the Body Corporate submitted these repairs were substantially for the benefit of the ground-floor and first-floor units only and not other owners in the building. Thus, the cost for these repairs meets the criteria in s 126(1) and is accordingly recoverable from those benefitted owners pursuant to s 126(2)(b).

[60] As part of their response, the respondents opposed the categorisation of the overall repairs to the building as a whole into balcony works and podium and soffit works. They argue that all the works were necessary to repair the damage to the balcony, the podium, and the drainage and storm water system, and they formed one indivisible set of works for the collective benefit of all owners. The respondents point to the evidence of Mr Earley, the Body Corporate's building consultant, who acknowledged that he was directed to segment these matters and to use the terms "Deck Weathertightness Works" and "Podium Soffit Works" in his reporting. He said that he would not otherwise have used the label "Podium Soffit Works".

[61] It is clear from the evidence that the podium and soffit works were required to replace decaying soffits and to construct new drains and repair and rectify an unpainted, and no doubt rusting, metal beam structure supporting the concrete floor for the decks. This also comprised the roof for the ground-floor units. The overall

aesthetics and functionality of this part of the building, which included common areas over the footpath, was clear. No doubt, completion of the podium and soffit works would have been needed to obtain Building Code consent for the new storm water drainage system required for the building.

[62] We accept that the podium and soffit works were truly part of one repair contract for all the required work to fix the major weathertightness issue in the building. As such, we are satisfied the podium and soffit works were of substantial benefit to all of the units in this development, including the tower block. Some of this also involved work carried out to the common property. The usual starting point for this is that common property repair costs should be met on an ownership interest basis. We repeat that this work was part of the necessary repairs and renewal of the storm water drainage system for the entire building, which had been under-designed and poorly constructed, and needed upgrading to comply with the Building Code.

[63] On this basis, we are of the view that the gateway provision in s 126(1)(c) is not satisfied so far as the respondents are concerned. Section 126(1)(c) (in using "substantially more" language) deals with disproportionality of benefit that one or several unit owners have over others for the repairs that are undertaken. The podium and soffit works did not benefit the respondents' units substantially more than it benefitted others, nor were they benefitted by a distinct and ascertainable amount. Nor does it seem there was any real quantification evidence or other evidential basis advanced by the Body Corporate before the High Court to assess any relativity here.

[64] For these reasons, the Body Corporate's appeal relating to s 126 and the podium and soffit works fails.

[65] For completeness, in considering the s 126 issues, although the Body Corporate is not appealing the Judge's decision not to make any award against the respondents for balcony works under s 126 (other than for the new window joinery installed in the first-floor apartments which we noted at [18] above), we consider it appropriate here to note our agreement with his decision on this aspect. We do so, given the extensive submissions we have received from the respondents on this aspect which were not entirely necessary.

[66] On this aspect, we are of the view that the Judge was correct to find that the balcony works were not substantially for the benefit of the respondents' first-floor units and did not benefit those units substantially more than the remaining units in the building.[56] We say this given that the repairs fixed an important part of the storm water system for the entire building. We have already noted that we see the weathertightness of the entire building, including the podium and soffit works, as being interlinked and indivisible.

The High Court costs decision

The parties' costs claims

[67] Before the High Court:

(a) The Body Corporate claimed partial success and sought costs of $31,220, comprising scale costs on a 2B basis with a 50 per cent reduction. It also sought disbursements of $65,264.39.[57]

(b) The respondents acknowledged the Body Corporate had achieved some success but claimed they were entitled to costs because the Body Corporate failed to accept Calderbank settlement offers they had made without reasonable justification. They sought increased scale costs of $83,863.38 (comprising 2B scale costs increased by 33 per cent), and $220 filing fees.

The Calderbank offers

[68] Turning to the Calderbank offers, on 18 December 2015, each of the respondents offered to pay $100,000 to settle the claim. However, the offer included various obligations on the Body Corporate. The Body Corporate rejected this offer on 21 December 2015. It countered with an offer that the respondents accept liability of $170,000 each. This was not accepted.

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56 At [30].

57 These were reduced to reflect the Body Corporate's partial success.

[69] The Judge held that this was not an offer under r 14.11(3) or (4) of the High Court Rules 2016 because a Calderbank offer requires an offer be made without significant conditional terms.[58]

[70] On 10 July 2017, the Body Corporate sent a letter stating it would accept $650,000 "in full and final settlement of it claim". No mention was made in that letter of whether the settlement would cover the disputed issue of where the floor boundary for the units actually lay. That offer was to lapse on 14 July 2017. Counsel for the Body Corporate asked for an update on 4 August 2017. Under a subject line "without prejudice save as to costs", counsel for the respondents replied by email on 7 August 2017 with a counter offer:

> …My clients are prepared to each pay $200,000 including GST in full and final settlement of all issues. They will not be bound until a written agreement is signed.

[71] On 9 August 2017, counsel for the Body Corporate responded with another counteroffer:

> 1. We refer to your clients' offer dated 7 August 2017 of $400,000 in full and final settlement.
>
> 2. Your clients' offer roughly matches the cost of the repairs as presently claimed. However, considerable interest and costs have accrued over the years. Regrettably, those costs place your clients' offer well below the Body Corporate's bottom line.
>
> 3. We are instructed the lowest figure that the Body Corporate will accept to avoid any further action being taken is $531,000 including GST in full and final settlement of the claim for recovery of repair costs, and on the basis that your clients will not oppose the orders sought in relation to unit boundaries. …

[72] The respondents' reply to this was given on 16 August 2017. It said they would settle on the basis of $450,000, together with their consent to the unit boundaries being fixed at the concrete slab. This was with the proviso, however, that future apportionment of costs for repairs to the new membrane were to be allocated in thirds to the "Tower", the first-floor units and the ground-floor units.

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58 HC costs judgment, above n 3, at [31]–[32].

[73] The Body Corporate replied on 21 August 2017 rejecting this offer. Essentially, the Body Corporate simply repeated its 9 August 2017 counter-offer.

The Judge's costs decision

[74] As to the Calderbank offer issues, the Judge found that the email from counsel for the respondents on 7 August 2017 did constitute a Calderbank offer as it was specific in amount and in "full and final settlement".[59] Although brief, he considered it was implicit that the offer would be on the same terms and conditions as the Body Corporate's previous offer, except for a different amount.[60] He also noted that the Body Corporate perceived it as an offer to settle.[61] The Judge considered therefore the respondents were entitled to scale costs on a 2B basis for steps taken after 7 August 2017.

[75] The Judge acknowledged that in the 7 August 2017 email the respondents said they "will not be bound until a written settlement agreement is signed". However, he found this to be akin to making an offer conditional on the agreement being finalised in writing. It was not a significant condition and did not indicate an intention to negotiate further terms.[62]

[76] The Judge found that the total 7 August 2017 offer of $400,000 exceeded the eventual judgment sum and was more beneficial to the Body Corporate than the judgment, even taking into account issues of non-monetary success. Therefore, he awarded the respondents 2B scale costs from 7 August 2017 and disbursements incurred after that date.[63]

[77] As to the increase on those scale costs sought by the respondents, the Judge considered that the Body Corporate's conduct in this case was not unreasonable. Thus, he did not award the increase of 33 per cent they sought.[64]

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59 At [34].
60 At [35].
61 At [36].
62 At [38].
63 At [40]–[41].
64 At [46]–[50].

[78] For costs up to 7 August 2017, in light of the Body Corporate's partial success, the Judge awarded it the 2B scale costs sought with a 50 per cent reduction and limited to steps taken in the proceeding until 7 August 2017. Adjusted disbursements were also awarded to the Body Corporate, also limited to amounts incurred before 7 August 2017.[65]

Appeal against the costs decision

[79] The Body Corporate appeals the costs decision on the basis that it says the respondents' email of 7 August 2017 was not a Calderbank offer and, therefore, should not have warranted costs being awarded to the respondents.

[80] To be effective for costs purposes pursuant to rule 14.10 of the High Court Rules, the emailed offer needs to be:

(a) clearly and unambiguously stated;[66]

(b) capable of contractual acceptance; and

(c) more beneficial (or close in benefit) to the other party than the judgment actually obtained.[67]

[81] Here, the Body Corporate submits that the requirement the offer be capable of acceptance and be more beneficial to the offeree than the outcome achieved at trial were not met.

[82] In response, the respondents argue the 7 August 2017 email was a Calderbank offer and the Judge correctly applied the principles in rr 14.10 and 14.11.

Was the offer capable of acceptance and clearly stated?

[83] The Body Corporate contends there was no certainty as to what the offer covered. It argues that a blanket statement that the offer settles "all issues" cannot

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65 At [58].
66 *Simpson v Walker* HC Auckland CIV-2008-404-7381, 10 February 2011 at [27(a)].
67 High Court Rules 2016, rr 14.11(3) and (4).

encompass the spectrum of issues in the seven pleaded causes of action, which included declaratory relief and questions of costs. The Body Corporate suggests it could not act on this offer without leaving most issues in the claim unresolved. Further, the respondents' "offer" specifically included what was said to be a caveat that the respondents would not be bound until a written agreement was signed.

[84] In his costs decision, the Judge found that while the email was brief, it was implicitly on the same terms and conditions as the Body Corporate's previous offer, except for a different amount. The Body Corporate submits this was in error as there is nothing in the email to imply reference back to its earlier settlement proposal. That offer had expired almost a month prior and it also referred specifically to the boundary dispute, which was not referenced in the email.

[85] The Judge said, too, that "[p]ractically, it will almost always be the case that parties subsequently enter into a formal written settlement agreement".[68] The Body Corporate went on to argue that the dispute here covered serious issues and the terms of any settlement were not just a formality.

[86] The Body Corporate contends that if a party wishes to avail itself of the rules relating to a Calderbank offer, it must take due care to put forward an offer capable of acceptance. Had it accepted the offer, the Body Corporate says there would have been no certainty as to what was accepted. This was particularly so with regard to the declaration as to location of the unit boundaries sought in the proceeding.

[87] In response, the respondents suggest that the ultimate issue is always whether the recipient of an offer can understand what is offered and what will be settled by the offer. They argue that the response from the Body Corporate's solicitors on 9 August 2017 demonstrates that the Body Corporate was not confused and felt able to make a counter offer in full and final settlement of "the claim for recovery of repair costs, and on the basis that your clients will not oppose the orders sought in relation to unit boundaries". They say this reply demonstrates that the Body Corporate appreciated that the respondent's offer was in respect of the monetary claim only, and

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68 HC costs judgment, above n 3, at [38].

the parties were agreed that the Body Corporate would continue with its first and second causes of action (regarding the unit boundaries).

[88] The respondents further submit that if the offer is not considered to be a Calderbank offer, it could still be taken into account under r 14.7(f)(v).

[89] On these aspects and regarding the need for an offer to be clearly stated, the authors of *McGechan on Procedure* confirm:[69]

> The aim is to remove any scope for disagreement as to the terms of the offer. … The offer should be clearly and unambiguously stated. If settlement options are offered, they should be unequivocally spelt out. The offer should state whether or not it includes costs. …

[90] Offers of this type must be considered too in the context of other communications at the time between the parties. The Calderbank offer cost rules are based on the concept that the offeree should have reasonably accepted the offer. Therefore, it is of relevance what the parties actually understood to be the case.

[91] It appears to us that it was understood between the parties here that the settlement offers related only to the Body Corporate's monetary claims. It is clear from the Body Corporate's communications at the time that the offers included costs. This is also evident from the higher sums offered than those that were discussed in December 2015.

[92] Therefore, we find that the respondents' 7 August 2017 offer was sufficiently clear and unambiguous to be taken into account by the Court under r 14.11. It was a firm offer to settle and we reject the Body Corporate's suggestion that it was merely "an invitation to treat".

[93] We also consider the offer was capable of being accepted by the Body Corporate. We agree with the Judge that the reference to a written agreement did not indicate an intention on the part of the respondents to negotiate further terms. It merely meant that the agreement would be recorded and finalised in writing. As in

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[69] Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR14.10.02(1)].

Bushline Trustees Ltd v ANZ Bank New Zealand Ltd, it is highly doubtful that the offer was rejected here because of this requirement.[70]

Was the offer more beneficial than the outcome?

[94] The Body Corporate contends that by proceeding to a hearing before the High Court, while it did not obtain the monetary awards it sought, it extinguished the respondents' persistent denial that they owned the decks, a significant issue.

[95] This Court made clear in *Weaver v Auckland Council*, however, that a broad approach to the concept of success is required when assessing where costs should fall, and it held that "success on more limited terms is still success".[71] The High Court has noted too that there is inherent difficulty in comparing declaratory relief with monetary outcomes.[72]

[96] The Body Corporate argues that in order for it to have accepted the offer at the time it would have needed to accept that the decks were not owned by the respondents. As it could not accept that conclusion, it says it pushed on and was successful in that respect. It says that it is not proper to award costs to the respondents given that the Body Corporate went on to win that fundamental point which it could not let sit. But we disagree.

[97] We are satisfied that the Body Corporate did appreciate that the respondents' counter offer of 7 August 2017 was in respect of the monetary claim only and the parties were agreed that the Body Corporate would continue with its first and second causes of action which required litigation to clarify the location of the unit boundaries. This was for the benefit of all owners in the development. It was the case irrespective of the dispute with the respondents over repair costs. We are satisfied that the costs of that exercise should be properly absorbed by the Body Corporate.

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70 *Bushline Trustees Ltd v ANZ Bank New Zealand Ltd* [2018] NZHC 454 at [28].
71 *Weaver v Auckland Council* [2017] NZCA 330 at [26].
72 *Body Corporate 396711 v Sentinel Management Ltd* [2012] NZHC 2556 at [20].

[98] We conclude, therefore, that the benefit the Body Corporate would have received here after accepting the 7 August 2017 offer from the respondents would have clearly been greater than that which they received from the Judge's judgment.

[99] It follows that the Judge did not err in determining the issue of costs between the parties. The Body Corporate's costs appeal therefore fails.

Conclusion

[100] While we have not agreed with the Judge on certain aspects of his reasoning, particularly the relationship between s 138(4) and 126 of the UTA 2010, we agree first, with his analysis of the expert evidence here and his end conclusion as to the amount the Body Corporate is entitled to recover in its substantive claim from the respondents, and secondly, as to his proper allocation of costs on this proceeding. It follows that we uphold the final decisions that the Judge reached on both the substantive and costs decisions.

Result

[101] The appeals are dismissed.

[102] The appellant must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
MinterEllisonRuddWatts, Auckland for Appellant
Lyon O'Neale Arnold, Tauranga for Respondents