

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2014-404-690
[2014] NZHC 1336**

UNDER the Unit Titles Act 2010, section 74
IN THE MATTER of The Ridge
BETWEEN BODY CORPORATE 361945
Applicant
AND WESTPAC NEW ZEALAND LIMITED
First Respondent

Continued page 2

Hearing: 28 May 2014 (with amended scheme provided on 13 June)

Appearances: J P Wood for the Applicant
No appearance for the Respondents

Judgment: 13 June 2014

JUDGMENT OF ELLIS J

*This judgment was delivered by me on 13 June 2014 at 4.30 pm
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Counsel/Solicitors:
J P Wood, Rainey Law, Auckland
T J Rainey, Rainey Law, Auckland

ASB BANK LIMITED
Second Respondent

ANZ BANK NEW ZEALAND LIMITED
Third Respondent

BANK OF NEW ZEALAND
Fourth Respondent

PEPPER NEW ZEALAND (CUSTODIANS)
LIMITED
Fifth Respondent

KIWIBANK LIMITED
Sixth Respondent

MORTGAGE HOLDING TRUST COMPANY
LIMITED
Seventh Respondent

NEW ZEALAND HOME LENDING
LIMITED
Eighth Respondent

STEEL BUILDING PRODUCTS
(NORTHERN) LIMITED
Ninth Respondent

CRESSIDA CAPITAL ONE LIMITED
Tenth Respondent

RAYMOND CHARLES DAVEY, EDNA
JEAN DAVEY AND WAYNE ROSS
STOLLERY
Eleventh Respondents

JELlicoe HOLDINGS LIMITED
Twelfth Respondent

URIEL INVESTMENTS LIMITED
Thirteenth Respondent

ADAMS PROPERTIES LIMITED
Fourteenth Respondent

DAVID JOHN FISHER, SANDRA ANN
FISHER AND JAMES ALFRED HOGG AND
SANDRA ANN FISHER, DAVID JOHN
FISHER AND JAMES ALFRED HOGG

Fifteenth Respondents
WILHELMINA MARTHA MITCHELL AND
CAMPBELL JOHN MITCHELL
Sixteenth Respondents

MICHAEL THOMAS KINGSNORTH AND
SHARLEEN SIMONE KINGSNORTH
Seventeenth Respondents

JAMWILL PROPERTIES LIMITED
Eighteenth Respondent

CHRISTOPHER LONG
Nineteenth Respondent

BRANDT INVESTMENTS LIMITED
Twentieth Respondent

JOUNG HEE PARK
Twenty First Respondent

DAVID MURRAY HEMPLEMAN AND
CHRISTINE MARGARET HEMPLEMAN
Twenty Second Respondents

CLERKE INVESTMENTS LIMITED
Twenty Third Respondent

GEESON INVESTMENTS LIMITED
Twenty Fourth Respondent

MIJIN AHN
Twenty Fifth Respondent

MARK ROY COOPER, JILLIAN ADA
COOPER AND KERRY JAMES PALTRIDGE
Twenty Sixth Respondents

BAOSHAN CHIJIALIN SONG AND LINDA
CHI
Twenty Seventh Respondents

AK INVESTMENT PROPERTIES LIMITED
Twenty Eighth Respondent

YOUNG JAE LIM
Twenty Ninth Respondent

WEBELLE ARCENA TRUSTEE LIMITED
Thirtieth Respondent

KWASSIE INVESTMENTS LIMITED
Thirty First Respondent

PECUMA PROPERTIES LIMITED
Thirty Second Respondent

SMG PROPERTY INVESTMENTS LIMITED
Thirty Third Respondent

PLAIN JANE LIMITED
Thirty Fourth Respondent

RPR LIMITED
Thirty Fifth Respondent

FREDANN PROPERTIES LIMITED
Thirty Sixth Respondent

DEURMEKAAR LIMITED
Thirty Seventh Respondent

GUAN PING YEOH AND CHENG FOONG
LIM
Thirty Eighth Respondents

SOMPHOU DOUANGSAVAHN
Thirty Ninth Respondent

VAUXHALL PROPERTY HOLDINGS
LIMITED
Fortieth Respondent

VICKI ROZITA TUNUI
Forty First Respondent

PAUL WARWICK HARPER, NEROLIE ANN
HARPER AND WYNDHAM TRUSTEES
LIMITED
Forty Second Respondents

BAFAC INVESTMENTS LIMITED
Forty Third Respondent

STYX HOLDINGS LIMITED
Forty Fourth Respondent

NM KEARVELL LIMITED
Forty Fifth Respondent

ASHOK PUNA AND HANSA ASHOK PUNA
Forty Sixth Respondents

HENZAR PROPERTIES LIMITED AND
JANE MOLLY BEZAR
Forty Seventh Respondents

JITEN PRASAD AND ROZY RENUKA
PRASAD
Forty Eighth Respondents

IRONSIDE ENTERPRISES LIMITED
Forty Ninth Respondent

NICHOLAS JAMES REID
Fiftieth Respondent

HAO ZU
Fifty First Respondent

JOHN DAVID ASHTON AND MCDERMOTT
AND MCINTOSH TRUST MANAGEMENT
LIMITED
Fifty Second Respondents

TREVOR WILLIAM TOHILL AND SUSAN
MAY LIND
Fifty Third Respondents

A R ESTATES LIMITED
Fifty Fourth Respondent

JONATHAN ANDREW DAVISON
Fifty Fifth Respondent

ROBEL INVESTMENTS LIMITED
Fifty Sixth Respondent

YUN HEE JEONG AND IN HWA JEONG
Fifty Seventh Respondents

ALFREDO LOPEZ AND LIBIA LOPEZ
Fifth Eighth Respondents

VAUGHAN LEONARD ANDERSON AND
SOO YOUNG ANDERSON
Fifty Ninth Respondents

VICKS SEVEN LIMITED

Sixtieth Respondent
LOY PROPERTY LIMITED
Sixty First Respondent

ROUSLAN GERASEMOVICH KIM,
SVETLANA MIHALOVNA KIM AND Q.T.L.
TRUSTEES (NO.66) LIMITED
Sixty Second Respondents

GEARED FOR LIFE LIMITED
Sixty Third Respondent

SAMMY MACHOUCHE
Sixty Fourth Respondent

PINEHILL NO.2 PROPERTY LIMITED
Sixty Fifth Respondent

ALVIN YU CUBILLAN AND JOYCE GO
CUBILLAN
Sixty Sixth Respondents

PIA PASIA
Sixty Seventh Respondent

PETRUS JOHANNES RALL AND ALTA
RALL
Sixty Eighth Respondents

GLEN ALAN OLLERENSHAW AND
JOANNE MARGARET OLLERENSHAW
Sixty Ninth Respondents

MANAGH INVESTMENTS LIMITED
Seventieth Respondent

NAE SURA YI
Seventy First Respondent

SARAH HONGMING SHEN
Seventy Second Respondent

YVONNE ANN ROSS
Seventy Third Respondent

GABRIEL BERGA LIMITED
Seventy Fourth Respondent

IN SHIK KIM AND KYUNG EUN LEE
Seventy Fifth Respondents

FAY MARGARET NEWBY
Seventy Sixth Respondent

TREVOR JAMES STAFFORD AND
AUDREY ALICE STAFFORD
Seventy Seventh Respondents

HENAV INVESTMENTS LIMITED
Seventy Eighth Respondent

GEORGE MARTIN BRANNIGAN,
MAUREEN CARMEL BRANNIGAN AND
LARRY FITZPATRICK
Seventy Ninth Respondents

CREDIBLE INVESTMENTS LIMITED
Eightieth Respondent

PEA AND BEE LIMITED
Eighty First Respondent

ALLAN JAMES WOLLEY AND MAUREEN
FRANCES WOLLEY

Eighty Second Respondents

IAN MICHAEL BENSLEY, MICHELLE JO-
ANNE BENSLEY AND J.G. HARRIS
CORPORATE TRUSTEE LIMITED
Eighty Third Respondents

KYLIE LYN CHAPMAN
Eighty Fourth Respondent

BRONWEN ELIZABETH ELLIS
Eighty Fourth Respondent

DAVID FRANCES VOS AND SUSAN
LESLEY VOS
Eighty Sixth Respondents

INGWE INVESTMENTS LIMITED
Eighty Seventh Respondent

RUSSELL WARNER BOYES AND KAY
BOYES
Eighty Eighth Respondents

WILLIAM THOMAS LOWMAN AND
MAUREEN ANNE MCCRUDDEN
Eighty Ninth Respondents

PGK PROPERTIES LIMITED
Ninethieth Respondent

G.E.M GROUP LIMITED
Ninety First Respondent

KELVYN FRANCIS CHAPMAN AND
LESLEY ANN CHAPMAN
Ninety Second Respondents

TIMOTHY WAYNE DARBY AND
COLLEEN ANN DARBY
Ninety Third Respondents

W A WILSON HOLDINGS LIMITED
Ninety Fourth Respondent

YUN YAN
Ninety Fifth Respondent

SUSE JERONIMO DOS SANTOS AND
NORBERTO DOS SANTOS
Ninety Sixth Respondents

GERARDO CASAS AND MICHELLE
CASAS
Ninety Seventh Respondents

PAULINE WILLIAMS
Ninety Eighth Respondent

AIG INSURANCE NEW ZEALAND
LIMITED
Ninety Ninth Respondent

ZURICH AUSTRALIAN INSURANCE
LIMITED
One Hundredth Respondent

[1] The applicant is a Body Corporate formed pursuant to the Unit Titles Act 1972 (the UTA72) in relation to a unit titled development known as the Ridge. The 1972 Act has been repealed and replaced by the Unit Titles Act 2010 (the UTA10).

[2] The Ridge comprises 93 units arranged in five blocks. The complex is affected by weathertightness issues, particularly in relation to the decks. The complex will continue to deteriorate over time if those issues are not attended to.

[3] In this proceeding the Body Corporate applies for an order approving a scheme under s 74 of the UTA10 giving it the power to repair the defects and to make incidental repairs to the interior of units.

Approach to s 74

[4] In general terms, the approval of a scheme under s 74 is premised on the Court being satisfied that:

- (a) a building comprised in any unit has been damaged or destroyed;
- (b) the scheme is necessary and should be granted in order to effect the repair;
- (c) the terms of the scheme are such that the Court can impose and that they fairly balance the interests of the unit owners.

[5] Section 74 is materially identical to s 48 of the UTA72 and the Court's approach to applications made under the newer section is necessarily informed by decisions made under its predecessor. The relevant principles were summarised by the Court of Appeal in *Tisch v Body Corporate 318596* as follows:¹

First, a scheme with broad support is to be preferred. The greater the level of support from owners for the proposed scheme, the more likely it is that the scheme does justice between owners. This will not invariably be so, because a majority of owners may support a scheme that is unfair to a minority...

¹ *Tisch v Body Corporate No 318596* [2011] NZCA 420, 3 NZLR 679 at [45] – [49].

Secondly, the scheme should be appropriately detailed. The more detailed a scheme, the less scope for later misunderstanding and argument about it.

Thirdly, providing that what has been done by the body corporate before the s 48 scheme is actually approved is in accordance with the scheme, the order has retrospective effect...

Fourthly, work should normally be done to the same standard and at the same time ...

Fifthly ... the terms of the s 48 scheme should depart from the scheme of the Act and from the body corporate rules no more than is reasonably necessary to achieve what is fair as between unit owners in the circumstances. Thus the Act and the body corporate rules remain relevant considerations. An exception to this fifth guiding principle is a scheme unanimously agreed to by all unit owners.

[6] In the present case, Mr Gerard Ball of Maynard Marks Limited has surveyed the cause and extent of the defects in the buildings on the instructions of the Body Corporate. Mr Ball has summarised the main building defects in his affidavit as follows:

- (a) The failure of the deck waterproofing membrane;
- (b) Poorly designed and/or constructed concrete wall to deck abutment details;
- (c) Failure of the paint finish to the external concrete walls;
- (d) Corrosion of metal balustrades in block A and B;
- (e) Inadequate waterproofing to the external wall of block D;
- (f) Poorly installed balustrade cap flashings in Block E;
- (g) Inadequately flashed vertical junctions between weatherboards and wall panels.

[7] The estimated cost of repair was \$3,513,240. The results of a tender process subsequently conducted by the Body Corporate suggest, however, that the remediation work will cost \$4,425,368.50.

[8] In any event, the buildings are indisputably damaged and the Court's jurisdiction under s 74 is therefore engaged.

Why is a scheme required?

[9] Under the UTA10, the repair and maintenance obligations imposed on bodies corporate are contained in s 138, which relevantly provides:

- (1) The body corporate must repair and maintain—
 - (a) the common property; and
 - (b) any assets designed for use in connection with the common property; and
 - (c) any other assets owned by the body corporate; and
 - (d) any building elements and infrastructure that relate to or serve more than 1 unit.

...

(3) The body corporate may access at all reasonable hours any unit to enable it to carry out repairs and maintenance under this section.

(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.

[10] The concept of “building elements” (which formed no part of the UTA72) is defined as including:²

... the external and internal components of any part of a building or land on a unit plan that are necessary to the structural integrity of the building, the exterior aesthetics of the building, or the health and safety of persons who occupy or use the building and including, without limitation, the roof, balconies, decks, cladding systems, foundations systems (including all horizontal slab structures between adjoining units or underneath the lowest level of the building), retaining walls, and any other walls or other features for the support of the building.

[11] As s 138 makes clear, although a building element may well relate to or serve more than one unit, it is not necessarily common property. And, as subs (4) confirms, where repairs are required to building elements that are contained in a principal unit it will be the owner of the unit who is responsible for meeting the cost, *after* the repairs have been effected.

² Unit titles Act 2010, s 5.

[12] In the case of the Ridge, the principal weathertightness defects relate to the decks, which are clearly within the statutory definition of building elements. The Chairman of the Ridge Body Corporate, Mr Boyes, has explained that on the second and third storey blocks the decks effectively form part of the floor of each upper unit and the ceiling of the units below. And although the principal defect relates to the waterproofing and construction of the decks themselves there is consequential damage to the units adjoining the decks including (but not limited to) other “building elements”. The Body Corporate has been advised that the nature of the defects mean:

- (a) that the integrity of the whole building cannot be maintained without a full and comprehensive repair;
- (b) it is likely that further areas of failure may be identified once the work begins.

[13] In these circumstances the means of apportionment contemplated by s 138 are not regarded as appropriate. It is in the interests of all owners to have the remediation work completed. Moreover, it is more economically efficient for any incidental repairs to individual units (such as to interior linings and carpets) to be done at the same time. And because of the magnitude of the overall repairs required, it is not feasible for the Body Corporate to meet the cost of repairs out of the existing levy accounts and to recover those costs later. There is a need to be able to levy all owners on the basis of the tender price in advance of the remediation work.

[14] It is for all these reasons that a scheme has been approved by the owners and that approval by the Court is now sought.

The terms of the proposed scheme

[15] The proposed scheme is annexed to this judgment. I nonetheless summarise the salient features below.

[16] The Preamble sets out the history to the scheme and attaches Maynard Marks Limited’s detailed remediation plans.

[17] Clauses 1 and 2 provide the broad and central power to carry out the repairs.

[18] Clause 3 specifies that this power is a general power to do all necessary to undertake the repairs and obtain a code compliance certificate. It provides that the Body Corporate should have any power incidental to the power to repair in order to carry out its duties.

[19] Clauses 4 and 7 provide for the scheme to apply retrospectively to the work already carried out and provides a schedule detailing those costs that were known at the time the scheme was filed.

[20] Clause 5 particularises aspects of the general power. Primarily the sub-clauses iterate that it has the power to engage the persons necessary to design and effect the repairs. Sub-clause (i) responds to a concern by the body corporate about continuity of funding. It provides that, where there is a shortfall due to the default of an owner, the Ridge may borrow those funds and, when it does so, cl 6 makes clear that the cost of doing so is not carried by the other owners but by the defaulting owner. The defaulting owner's obligation to pay for its share is not extinguished.

[21] Clauses 8 and 9 preserve the general scheme of governance under the UTA10 Act, although it also carves out a subset of powers that may not be delegated to the Committee of the Body Corporate.

[22] Clauses 10 to 14 detail the decision to engage the contractor and the implications that this has for raising levies and the timing of those levies. It left the decision to proceed with the contract in the hands of the Committee given the knowledge it would have of the amount of levies raised.

[23] Clauses 15 to 19 deal with levies raised pursuant to this scheme:

- (a) clause 15 provides that levies struck under the scheme are deemed to be levies raised pursuant to the ordinary levying powers contained in s 121 of the UTA10. In other words, once struck, they become a debt due by the owners to the Body Corporate;

- (b) clause 17 provides that ss 126, 127 and 138(4) of the UTA10 (which all require repair costs to be met by the directly affected individual unit owners) do not apply in relation to the subject matter of the scheme (ie the costs of the remediation work);
- (c) clause 18 allows for the Body Corporate to raise further levies to make up for any shortfall. While these levies will be levied in the same manner as before, there is a recognition that if there is a shortfall because of a default, the fresh levies need to cater for the likelihood of further default by those owners when setting the level of those levies;
- (d) clause 19 provides that where repairs have been effected and paid for but subsequently the Body Corporate receives a refund (such as a GST refund) that is referable to that payment, the unit owners who contributed to it are entitled to their share of the refund regardless of whether they are still an owner at the time the refund is made.

[24] Clauses 20 to 22 provide for accounts to be kept. I was advised that cl 22 involves a minor departure from other schemes that have been previously approved. Although the default position is that the accounts pertaining to the scheme will be audited annually, it provides that the owners may dispense with the audit by special resolution. The clause mirrors the ordinary power of a body corporate to dispense with audited accounts on its yearly budget in s 132(8) of the UTA10.

[25] Clauses 23 to 25 provide for regular reporting. Such information would not ordinarily be information an owner would be entitled to receive as of right under s 206 of the UTA10.

[26] Clause 26 allows for the possibility that this scheme may need to be varied or extended and may return to this Court for further orders.

[27] Clause 27 provides for an indemnity to those in the Body Corporate who need to take active roles in ensuring the scheme is carried out.

Application of the *Tisch* factors

Support for the scheme

[28] The evidence before me was to the effect that the proposed scheme has broad support. Turn-out for the EGM that approved the scheme was relatively high. Apart from one owner who voted irregularly, the Body Corporate members who attended (in person or by proxy) were unanimous in their approval of a scheme.

[29] There was, however, a division on the means of cost apportionment under the scheme. Ultimately, two-thirds of the owners wanted levies to be struck on the basis of utility interest³ whereas the remainder wanted them to be struck on the basis of an equal division between all units.

[30] Mr Wood submitted, however, that this split is not symptomatic of a deeply divided body corporate where each side is committed passionately to its respective position. I accept that submission, for the reasons that follow.

[31] First, and as I have said, the owners broadly accept that they are all affected by the defects and all should contribute to their remediation.

[32] Secondly, the practical difference between the two positions is not great. Prior to the February 2014 EGM a breakdown of the differences between the two calculations for each unit holder was prepared and distributed. The breakdown shows that there is an almost 50/50 split between those owners who will do (slightly) better under one method of apportionment than the other; those better off under a utility interest split are in a small majority (48:45). Moreover, for all but three owners the difference shown on the breakdown was less than \$2,000 and for 54 owners the difference will be smaller still, less than \$1,000.⁴

[33] Thirdly, there are separate proceedings in this Court (CIV-2013-404-1223) brought on behalf of the owners against the Auckland Council for its part in causing

³ In this unit title development, utility interest and ownership interest are identical.

⁴ It should, however, be noted that the schedule was based on the estimated cost of repair, whereas the tendered costs of repair are higher. The differences between the two means of apportionment are therefore likely to be somewhat greater.

the owners' losses. Whichever apportionment is selected will be reflected in the basis upon which each owner will calculate their loss in that proceeding and apportionment of any money received in judgment and/or following a settlement. For the very great majority of owners who are parties to that litigation, the mode of apportionment is ultimately likely to be immaterial.

[34] Lastly, none of the owners took steps in the present proceeding to oppose the application for approval of the scheme. That reflects what I accept is the fact of the matter, namely that there is little practical incentive for any particular owner to take a stand one way or another and that as a group, they are content to have resolved the matter through voting at the EGM.

[35] In my view, therefore, it can safely be concluded that the scheme has broad support.

Appropriate detail

[36] I consider that the proposed scheme is appropriately detailed. Notwithstanding the absence of opposition to it, Mr Wood went through the clauses carefully with me and the clauses were also compared with the terms of other schemes that have been approved. Some minor changes have been made as a result of the hearing.

Retrospective effect

[37] The scheme expressly applies retrospectively and thus will have the effect of approving steps that have necessarily already been taken by the Body Corporate in relation to the remediation process.

Work done to same standard and at same time

[38] This is one of the principal aims of the scheme.

Extent of departure from the scheme of the UTA10

[39] Mr Wood submitted that the scheme departs no more than necessary from the UTA10 Act. It deals fairly with the members as it retains them in the decision making process, provides for them to be informed and allows them the power to return to this Court. I agree.

[40] I am therefore satisfied that the draft scheme is appropriate and I order that the scheme should be settled under s 74 of the UTA10 accordingly.

Rebecca Ellis J

SCHEDULE

SCHEME UNDER SECTION 74 OF UNIT TITLES ACT 2010

I. Preamble

- A) This is a Scheme governing remedial works to the buildings that have been built on the base land for Body Corporate 361945 ("the Body Corporate") and known as The Ridge ("the Buildings").
- B) By a written report dated August 2012 prepared by Maynard Marks Limited ("the Maynard Marks Report") the Body Corporate has confirmed that the Buildings have been damaged as a result of moisture ingress. Extensive repairs are required to the units and common property that comprise the Buildings. The remedial works recommended in the Maynard Marks Report are based on the knowledge of the physical damage present in the Buildings as at the date of that report.
- C) The scope of works ultimately required to repair the Buildings will only become fully apparent when remedial works are actually commenced and the extent of damage to the Buildings which is currently hidden becomes apparent ("the Latent Damage").
- D) Subsequent to the Maynard Marks Report, Maynard Marks Limited have prepared plans for the proposed remedial works ("the Plans and Specifications"), a copy of which is annexed hereto marked "A". Those repairs, together with any works required to repair any Latent Damage so that a Code Compliance Certificate is obtained for the Buildings ("the Repairs"), are intended to be governed by this Scheme.
- E) The Repairs will require work to be done to common property and all of the units (including principal and accessory units) in the Buildings.
- F) In order for the Repairs to be conducted in the most efficient and cost effective manner they must be undertaken as a single project and, as such, require the sanction of the Court pursuant to this Scheme.
- G) The cost of the Repairs, subject to the determination of the cost of the Latent Damage, was determined by a tender process and it will be necessary to raise funds to pay for the Repairs from each of the registered proprietors of the units in the Body Corporate ("the Owners").
- H) Once this Scheme is sanctioned by the Court and the Body Corporate has entered into a contract for the completion of the Repairs in accordance with the provisions of this Scheme, it will be impractical to stop the process as the Owners will be committed to having the Repairs completed.

- I) This Scheme is intended to ensure the Repairs proceed in a co-ordinated manner, irrespective of whether such Repairs are to common property or to unit property, and that the Owners shall pay their proportion of the cost of such Repairs as set out herein.
- J) The Body Corporate has resolved that the fairest way of allocating the costs of the repairs authorised by the Scheme is for owners to pay for the repairs in proportion to their utility interests, notwithstanding that there might, in fact, be more or less work required to particular individual units within the Body Corporate.

II. The Body Corporate to re-instate the whole of the building

- 1. The Body Corporate is, subject to the provisions of this Scheme, to carry out the Repairs irrespective of whether the Repairs are to Common Property or to the Principal Units or Accessory Units as designated in Deposited Plan 361945, a copy of which is annexed hereto marked "B".
- 2. The Repairs are to be completed in accordance with the Plans and Specifications for the Repairs or any amendment thereto that the Body Corporate may approve as provided for below.

III. Powers

- 3. The Body Corporate, is hereby granted the general power to do all things necessary to obtain a Building Consent for the Repairs (acknowledging that the Repairs currently identified are set out in the Plans and Specifications) or such further defects and damage to the Buildings as may be identified during the course of the Repairs, and to complete the Repairs in accordance with the terms of any such Building Consent so as to obtain a Code Compliance Certificate for the Repairs, and the Body Corporate is further granted such other power and authority as may be necessary to enable the Body Corporate to fully and properly carry out the Repairs and its obligations under this Scheme.
- 4. In recognition that some work has already been undertaken to identify the Repairs, the costs of that work as set out in the Schedule attached hereto marked "C" are costs that may be levied and collected from the Owners in accordance with the provisions of this Scheme.
- 5. While not limiting the generality of the foregoing the Body Corporate shall have the power to:
 - (a) Engage suitably qualified persons to identify and quantify the extent of the Repairs both now and from time to time in the future until such time as the Repairs are complete.
 - (b) Instruct suitably qualified advisors to develop plans and specifications for the work required to be carried out to effect such Repairs,

together with such variations or additions as from time to time may be required.

- (c) To approve any amendments to the Plans and Specifications as may be necessary to complete the Repairs.
 - (d) Instruct suitably qualified advisors to view tenders and recommend the contractor to be involved in the Repairs.
 - (e) Contract such contractor(s) as the Body Corporate resolves to employ and to sign all necessary contracts and other documents to carry out the Repairs.
 - (f) To employ suitably qualified project manager/s to oversee the Repairs carried out by contractors, to certify progress payments and to attend payments of the costs of the Repairs as required.
 - (g) To apply for and obtain such consents and local body approvals and certificates of compliance as required.
 - (h) To carry out all ancillary matters and things necessary to enable the Body Corporate to progress and properly finalise the Repairs.
 - (i) To borrow funds on such terms as the Body Corporate considers appropriate to pay for the Repairs or any part thereof. This power specifically allows the Body Corporate to borrow to pay any costs incurred by it under this Scheme where it would otherwise be unable to pay those costs as they fall due because any individual unit owner has failed (for whatever reason) to pay levies raised under Section 121 of the Unit Titles Act 2010 ("the Act") to meet costs under this Scheme. For the avoidance of doubt the exercise of this power to fund the shortfall resulting from any non-payment of such levies shall in no way affect the defaulting unit Owners' obligation to pay those levies together with interest and penalties or any subsequent owner of the unit's obligation to pay those levies together with penalties and interest pursuant to Section 124 of the Act.
 - (j) To act as the agent of the Body Corporate's members to those things required to further of arrangement, co-ordination and completion of the Repairs.
6. Where the Body Corporate exercises the power under 5(i) to fund any shortfall in required funds arising from the non-payment of levies by the owner(s) of any unit, the Body Corporate shall be entitled to levy the owner of that unit for all costs and expenses associated with borrowing those funds (including any interest paid by the Body Corporate).
7. To the extent that the Body Corporate has already undertaken work in furtherance of the obligations imposed under this Scheme those actions are hereby ratified and confirmed as forming part of this Scheme.

IV. Governance – Decisions under the Scheme to be made in accordance with the Act

8. The Body Corporate will make all decisions in furtherance of the Scheme in accordance with the Act.
9. For the avoidance of doubt, all major decisions in connection with the Scheme will be made by the Body Corporate at a General Meeting called for that purpose and will not be made by the Committee of the Body Corporate. Major decisions shall include any decisions to engage contractors or consultants pursuant to the terms of the Scheme, any decision to engage a project manager, any decision to alter the design of the remedial works from the plans and specifications attached, and all decisions to raise and enforce payment of levies or to borrow funds to pay for the costs incurred pursuant to the Scheme.

V. Decision to enter into the construction contract for the Repairs

10. The Body Corporate has obtained two tendered prices for the remedial works and the Body Corporate has resolved to appoint RCS Construction Group Limited as the preferred contractor. The Body Corporate has also resolved to raise the levies necessary to meet its obligations under the proposed contract for the Repairs in accordance with Section VI below.
11. The dates for payment of the levies so raised have been set to meet the expected work schedule and the Body Corporate's obligations to pay the contractor(s) for the remedial works.
12. If an owner or owners fail to pay the special building repair levy the day it is due, they lose the prompt payment discount and if the levy remains unpaid 7 days after it falls due, that the full estimated repair levy shall become payable immediately and if not paid in full within a further 7 days it shall be recovered as a debt due by the owner(s) to the Body Corporate.
13. The Body Corporate has resolved to enter into a contract with RCS Construction Group Limited to undertake the Repairs ("the Remedial Works Contract"). The Remedial Works Contract is conditional on the Body Corporate being satisfied that it will be able to make payments under the Remedial Works Contract as they fall due from the levies raised under clause 20 above. Whether the condition is satisfied is delegated to the Body Corporate Committee under this Scheme as it is not a major decision under Part IV above.
14. In the event that the Body Corporate Committee does not resolve to proceed with the Repairs under the Remedial Works Contract, its obligations under this Scheme shall be suspended pending further Order of the Court in accordance with the leave reserved under Clause 26 below.

VI. Levies

15. The Body Corporate is authorised to raise a levy to meet its obligations pursuant to this Scheme and such a levy shall take effect as if it was a levy raised pursuant to section 121 of the Act.
16. All such levies shall be calculated in proportion to the utility interest for each unit owner irrespective of whether the Repairs are to common property or otherwise.
17. With the exception of any additional levies raised to meet any shortfall caused by any one or more owners failing to pay levies pursuant to clause 18 below, Sections 126, 127 and 138(4) do not apply to any costs incurred by the Body Corporate in implementing the Repairs under this Scheme with the intent that all costs incurred by the Body Corporate under this Scheme will be paid for by owners in proportion to their utility interest.
18. If, for whatever reason, there are insufficient funds to meet the Body Corporate's obligations under this Scheme as they fall due, then the Body Corporate may raise additional levies pursuant to clause 15 above in order to meet those obligations. It is recognised that the most likely reason for such additional levies will be the failure of one or more Owners to pay the levies raised to meet the obligations of the Body Corporate under this Scheme and in raising such levies the Body Corporate shall:
 - (a) Consider exercising its power to borrow funds to make up the shortfall under clause 5(i) above and recovering the cost of such from the defaulting unit owner under Section 127 of the Act;
 - (b) If it considers it appropriate to raise a levy to make up the shortfall rather than borrowing the funds to do so, raise sufficient funds to ensure, as far as foreseeable at the time the levy is raised, that the monies actually collected from the levy will be sufficient to meet the obligations of the Body Corporate under the Scheme as they fall due.
19. The Body Corporate may refund any surplus monies in the separate account described in clause 20 below following the completion of the Repairs. If it refunds surplus monies, the Body Corporate must distribute any such surplus to those persons who paid levies raised pursuant to the Scheme, and each person's payment shall be in proportion to the amount contributed by that person against the total amount received in levies under this Scheme. Any such distribution shall first be applied to meet any outstanding levy obligations any unit owner may have to the Body Corporate (whether in respect of levies raised to pay for the obligations imposed under this Scheme or otherwise). For the avoidance of doubt, where a refund is due and the payer of money collected for the Repairs has subsequently transferred their unit, that former owner remains entitled to their proportionate share of the refund.

VII. Accounting

20. The Body Corporate shall keep all monies raised from the Owners to meet the obligations imposed under this scheme in a separate account from the general account operated for the Body Corporate and may invest any funds not immediately required to meet the obligations under the Scheme in a secure bank deposit with a recognised Trading Bank.
21. The Body Corporate shall keep a permanent record, current at all times, of payments received and payments made in accordance with this Scheme from that account and provide financial statements on a regular basis (not less than every three (3) months) detailing the monies received and expended from that account to the Owners.
22. The accounts prepared under this Scheme shall be audited annually by an independent auditor appointed by the Body Corporate for that purpose. Provided that the owners may by special resolution decide not to have an annual audit pursuant to the power in section 132(8) of the Act, and, for the removal of doubt, this power applies to the accounts prepared under this scheme and an owner's general right to minority relief under section 210 of the Act applies to a resolution passed pursuant to this clause.

VIII. Reporting

23. The Body Corporate will keep each Owner fully apprised of details of the Repairs and progress of same over the period of the scheme by reporting every three months.
24. Reports to the Owners shall include:
 - (a) A report on the overall position both terms of the progress of the Repairs and financial terms, including details of costs and apportionments;
 - (b) A statement of the position of each Owner detailing any arrears of levies raised to meet the obligations under this Scheme;
 - (c) A final report on the Repairs eventually undertaken as part of the Scheme and its final cost.
25. The Body Corporate shall, within 20 working days of issue of the Code Compliance Certificate for the Repairs, file a memorandum with the Court seeking to discharge the scheme. The sealed Orders shall be served on Registrar General of Land in order that notification of the scheme, under section 74(5) of the Act, shall be removed from the supplementary record sheet for the Unit Plan 361945.

IX. Leave reserved

26. Leave is reserved to any party affected by the Scheme to apply to the Court for further orders in respect of any disputes arising under this Scheme, or in the event that the Body Corporate does not proceed with the Repairs under

Clause 13, leave is to be granted to any party to bring the matter back before this Court for such further orders as may be appropriate. .

X. Indemnities

27. The Body Corporate members jointly indemnify and hold harmless the Body Corporate Chair and the members of the Body Corporate Committee for all acts and omissions done in furtherance of this scheme except in case wilful misconduct or gross negligence.

XI. Miscellaneous

28. For the avoidance of doubt the Body Corporate, and its contractors appointed pursuant to this Scheme who are carrying out obligations and work pursuant to this Scheme, are permitted to access at all reasonable hours any unit in the Buildings necessary in order to carry out such obligations or work.