

TENANCY TRIBUNAL AT Auckland

APPLICANT: Body Corporate 346799
Body corporate

RESPONDENT: Hyung Been Kang
Unit owner

UNIT ADDRESS: Unit/Flat 6L, 135 Victoria Street West, Auckland Central,
Auckland 1010, Victopia Apartments

ORDER

1. The application is dismissed.
2. Costs for this proceeding is reserved.

Reasons:

1. Counsel Clinton Baker represented the body corporate whereas counsel Katerina Wendt represented the unit owner.
2. The body corporate has applied for recovery of unpaid levies raised at the body corporate committee meeting held on 5 June 2020, together with interest, costs and the filing fee from the unit owner.
3. The body corporate claims that levies totalling \$17,267.57 for balcony repairs are due and payable by the unit owner on 20 August 2020.

Background

4. The levies charged against the unit owner are pursuant to a High Court settled scheme under section 74 Unit Titles Act 2010 ('UTA').
5. On 12 December 2013 the High Court at Auckland granted the body corporate's application under section 74 UTA for a scheme governing proposed repairs to the "Victopia" building comprised within the unit title development ('the Scheme').

6. The Scheme authorised the body corporate to raise funds to pay for weathertightness repairs. It provides:
 5. The Body Corporate shall levy and collect from the Owners such money as it considers necessary in order to undertake and complete the Repairs and fulfil its obligations under this Scheme, on the following basis:
 - (a) The Owners shall pay for repairs to the exterior cladding in accordance with their ownership interests;
 - (b) The Owners shall pay for cost of repairing leaks to the basement car park in accordance with their ownership interests;
 - (c) The Owners of units on level 13 and level 14 shall pay for the cost of repairing their balconies;
 - (d) The Body Corporate shall determine how any remaining costs are to be levied and paid.
 - ...
 8. The Body Corporate is authorised to demand payment of the levies issued under this Scheme to pay for the Repairs from each Owner in amounts and at times that the Body Corporate may from time to time determine.
 9. The levies raised by the Body Corporate under this Scheme shall be deemed to be as effective and binding in law as if a contribution raised under section 121 of the Unit Titles Act 2010. The Body Corporate shall have the right to sue or take other steps to recover the levies as if they had been raised under that Act.
 10. In the event an Owner defaults in making payment of any levies raised under this Scheme by the due date(s):
 - ...
 - b)The Body Corporate shall be entitled to recover all legal and administrative costs incurred in relation to the recovery of the levies from the Owner in default, including full solicitor/client costs.
7. The body corporate resolved in resolution 6 (item 12) of the 2019 AGM to delegate all of the duties and powers of the body corporate (except those excluded by section 108(2) UTA) to the new committee appointed in resolution 5 of that meeting: Dariusz Koper, Jacquie Turner, Yana Hay, Catherine Morgan, Vellingi Young, Ina Lawrence Curtis and Graeme McDonald (collectively 'the committee').
8. It is not disputed that the committee was authorised to raise levies settled under the Scheme on behalf of the body corporate.
9. The primary issue before the Tribunal is whether the body corporate, acting through the committee, has fixed the due date for the levies for balcony repairs to be paid.

Was a date fixed for the subject levies to be paid?

10. According to paragraph 9 of the Scheme, the levies raised are deemed to be as effective and binding in law, as if a contribution were being raised under section 121 UTA.

11. Consequently the requirements that apply to a body corporate under section 121 UTA are equally applicable to this body corporate when determining and demanding payment of balcony repair levies from unit owners under the Scheme.

12. Pursuant to section 121 UTA:

121 Contributions to be levied on unit owners

(1) A body corporate *may determine from time to time* the amounts to be raised for each fund and impose levies on the owners of principal units to establish and maintain each fund.

13. Indeed, the material wording “a body corporate may determine from time to time” is similar to the wording used at paragraphs 5(d) and 8 of the Scheme.

14. This implies, in my view, that when raising levies authorised by the Scheme, the committee must comply with the requirements of the Scheme and of the UTA, at least as far as those requirements relate to the raising of levies.

15. The committee cannot just disregard the requirements of the UTA when raising levies authorised by the Scheme.

16. With respect to those requirements, section 124(1) UTA states:

124 Recovery of levy

(1) A **body corporate must fix the date** on or before which payments of levies are due.

17. Apart from the obvious expectation that a unit owner should be informed of the date on which levies are due, section 124(1) UTA specifically provides that the body corporate (in this case via the committee) must fix the due date.

18. The requirements of section 124(1) UTA were discussed in *Body Corporate S90876 v Montessori Foundation Ltd* [2019] NZDC 23477. At [15] it was noted that the Minutes of the AGM of the Body Corporate held on 23 April 2018 recorded Resolution 11 as follows:

“It was resolved by the Body Corporate by ordinary resolution that the levies to be imposed on each unit title owner until the next general meeting will be as per the 2018/2019 budget.”

19. The budget contained a footnote that the levies should be paid “by the date stipulated”.

20. At [22] District Court Judge P W Cooper considered section 124 UTA and held:

The process adopted by the Body Corporate did not “fix the date” on or before which payments of the levies are due. In my view, the wording of the section requires the Body Corporate to fix a specific calendar date. Until this is done, the levy does not become payable. The process adopted by the Body Corporate did not fix a specific calendar date, rather the resolution simply refers to the budget and the budget has the footnote, “The levy for the forthcoming year should be paid by the date stipulated”. The correct process was for the Body Corporate by resolution to fix the date, being a specific calendar date, on or before which the payment of levies are due and the invoice should reflect that date.

21. In this case before me, at the body corporate committee meeting held on Friday 5 June 2020, the body corporate resolved thus:

RESOLUTION 1

With respect to clause 5 of the Scheme and the requirement that the Body Corporate levy such money as it considers necessary to undertake and complete the repairs:

(a) The Owners shall be levied for the cost of the Repairs to their balconies in accordance with the attached schedule.

22. The minutes of the committee meeting recorded that Resolution 1 was moved by Dariusz Koper and seconded by Jacquie Turner before the resolution was recorded as ‘Carried’.

23. However, neither the resolution nor the attached schedule fixed a specific calendar date on or before which the payment of the balcony repair levies is due. The fixing of the due date was notably absent with respect to the levies being sought to be recovered in this proceeding.

24. Only the invoice dated 1 August 2020 subsequently issued to the unit owner bore a due date of 20 August 2020. But liability for the unit owner to pay the balcony repair levy comes not from the issuance of the invoice that admittedly contains a specific calendar due date. The wording of section 124(1) UTA requires the body corporate to have earlier *fixed* a specific calendar date on or before which payments of the levies are due.

25. Counsel for the body corporate Mr Baker submitted that the due date of 20 August 2020 was resolved at the committee meeting of 5 June 2020 as evidenced in the affidavits of Ms Beaton and the relevant committee members.

Did the body corporate fix the due date of 20 August 2020 at the committee meeting of 5 June 2020?

26. Paula Kelly Beaton, general manager of the company who provided body corporate secretarial and managerial services, who attended the committee meeting on 5 June 2020 swore an affidavit on 18 May 2021 as follows:

9. During the Committee Meeting, I made contemporaneous notes as possible due dates for the Balcony Levies were discussed and the Committee settled

on 20 August 2020. Annexed hereto is a copy of my hand-written notes, marked “**PKB5**”. I correctly recorded that resolution in my notes as it was made.

10. The due date was left out of the typed up version of the minutes of the Committee Meeting. This oversight became apparent during the preparation for enforcement and debt collection through these proceedings.

11. Subsequently, a further typed up record of the decision that 20 August 2020 was agreed and resolved at the Committee Meeting as the due date for the Balcony Levies was drafted and circulated to the Body Corporate Committee members who had attended the Committee Meeting.

12. That record of decision at the Committee Meeting recognised that the balcony repairs had already commenced and, bearing in mind that large amounts that would need to be levied, it was agreed that the Balcony levies be struck for the units from the ground up to level 10, with a due date of 20 August, allowing owners as much times as possible to pay the Balcony levies.

27. Ms Beaton’s handwritten notes marked PKB5 referred to three possible due dates for the balcony repair levies: 20th July, 31st July and 20th August 2020. However only the 20th July date was crossed out leaving behind 31st July and 20th August 2020 as possible due dates.

28. Therefore, a question remains as to the due date that was supposedly left out of the typed up version of the minutes of the committee meeting: was the due date 31st July or 20th August 2020?

29. Ms Beaton’s hand-written notes have not satisfied me that the Committee actually resolved 20th August 2020 as the due date for payment of the balcony repair levies.

30. Section 97 UTA provides:

Counting of votes for ordinary resolution subject to request for poll

(1) This section applies if a motion is to be decided by ordinary resolution, subject to a request for a poll, at a general meeting of a body corporate.

...

(4) For a body corporate meeting to pass an ordinary resolution, a majority in number of the eligible voters who vote on the resolution must vote in favour of the resolution.

31. Section 101(4) UTA provides:

How matters at general meeting of body corporate decided

(4) Every resolution must be recorded in writing.

32. Section 109 UTA provides:

Delegated duties and powers of body corporate committee

(1) A body corporate committee to which any duties or powers are delegated under section 108(1) may, unless the delegation provides otherwise, perform the duties and

exercise the powers in the same manner, subject to the same restrictions, and with the same effect as if it were the body corporate.

33. Section 113 UTA provides:

Decision-making of body corporate committee

Any matters at a meeting of a body corporate committee must be decided by a simple majority of votes.

34. It is not sufficient for the committee to merely *settle* in their minds on a due date for payment. As held by the District Court in *Montessori*: the correct process was for the body corporate to fix the due date *by resolution*.

35. Given the ambiguity of Ms Beaton's handwritten notes, I remain unsatisfied that the body corporate committee has formally fixed a due date of payment by resolution (by a simple majority of votes of the committee members) during the committee meeting held on 5 June 2020.

36. I now consider a document tendered at the hearing labelled "BC 346799 – RECORD OF DECISION" where committee members who attended the committee meeting on 5 June 2020 sought to clarify the decision made at the meeting and said they had "agreed that that [sic] the balcony levy be struck for the units from the ground level up to level 10, with a due date of 20th August 2020, thus allowing owners as much time as possible to pay the balcony levies."

37. That record of decision is not a contemporaneous document; it was only signed sometime in March 2021 after the body corporate started preparing debt collection proceedings on account of non-payment of levies by some unit owners.

38. By this late stage, invoices with the due date of 20 August 2020 for payment of the balcony repair levy had already been sent to the unit owners and defaulted upon by some unit owners, including unit 6L, being the unit owner in this proceeding.

39. A record of an agreement created in March 2021, cannot retrospectively validate invoices sent out in 2020 that did not record a due date properly fixed by the body corporate.

40. A unit owner, relying on the 5 June 2020 minutes of the committee meeting as a record of resolutions made, would have noted that there had been no fixing of the due date for payment of the balcony repair levies. Therefore, the unit owner would have been justified to consider that the levy was not due nor payable on 20 August 2020 at the material time the unit owner was sent the invoice in August 2020.

41. Sections 97, 101(4), 109, 113 and 124(1) UTA require the committee to formally vote on a resolution to fix the due date which resolution must be recorded in writing. That has not occurred prior to invoices being sent to the unit owners.

42. Jacqueline Anne Turner, company director, the body corporate chairperson who attended the committee meeting of 5 June 2020 swore an affidavit on 13 May 2021 to say that she seconded the resolution moved by Dariusz Koper at the committee meeting that “the owners shall be levied for the cost of the repairs to their balconies in accordance with the attached schedule. The resolution was passed. We had a discussion about the best due date for these levies, but unfortunately the decision of 20 August 2020 was left off the typed up minutes, we noticed later”.
43. Catherine Anne Morgan, IT consultant, who attended the committee meeting of 5 June 2020 swore an affidavit on 13 May 2021 recalling that “we discussed a few due dates for payment of the balcony levies before agreeing on 20 August 2020”.
44. Dariusz Koper, manager, who attended the committee meeting of 5 June 2020 swore an affidavit on 13 May 2021 stating as follows:
2. I moved the resolution at the Committee Meeting that the owners shall be levied for the cost of the repairs to their balconies in accordance with the attached schedule. This resolution was passed....
 3. During the Committee meeting, we discussed possible due dates in July for the balcony levies, and settled instead on 20 August 2020....
 4. The due date that we agreed on was overlooked in preparation of the typed up version of the Committee Meeting minutes, but was noted on the invoices sent out to the relevant owners. The oversight in the typed version of the minutes was brought to our attention in preparation for these proceedings.
 5. I recalled that we had in fact resolved the due date of 20 August 2020, hence the enquiry which led back to the original hand-written notes.
45. Yana Hay, commercial manager, who attended the committee meeting of 5 June 2020 swore an affidavit to say that “I...remember we talked about a few possible due dates before deciding on the latest in August”.
46. From those affidavits tendered by the committee members, it is only apparent that the committee may have “discussed”, “agreed” or “settled” on 20 August 2020 being a due date for payment of the balcony repair levy. The committee did not hold a vote and never resolved nor recorded in writing a resolution that 20 August 2020 was to be the due date for payment of the levy.
47. The relevant provisions of the UTA require the fixing of the due date by resolution; UTA requires the body corporate/committee to vote and record the resolution in writing. This has not been done, despite the current attempts by the committee to now recollect what transpired at the meeting on 5 June 2020.

Conclusion

48. The body corporate (via its committee), when raising levies, was required to comply not just with the Scheme but also the requirements of the UTA.
49. The body corporate must fix the date on or before which payments of levies are due; the fixing of the due date must be by resolution.
50. An informal agreement not recorded in the minutes of the relevant committee meeting but contained in handwritten notes and also allegedly discussed at the meeting (as referred to in several affidavits exhibited), did not satisfy me that the committee actually resolved 20 August 2020 as being the due date for payment of the subject levies.
51. At most, it was only apparent that the committee may have “discussed”, “agreed” or “settled” on 20 August 2020 being a due date for payment of the balcony repair levy. The committee did not hold a vote and never resolved nor recorded in writing, a resolution that 20 August 2020 was to be the due date for payment of the levy.
52. Finally, a record of agreement, created in March 2021, cannot retrospectively validate invoices sent out in 2020 that did not record a due date fixed by the body corporate.
53. Proper process required the body corporate to fix the due date by voting and formally recording that resolution in the meeting minutes as being “carried”. That was not done on this occasion.
54. That proper process be followed is a prerequisite for the successful management and governance of unit title developments and is exemplified by sections 97, 101(4), 109, 113 and 124(1) UTA which refer to the necessity for matters to be decided by ordinary resolution and recorded in writing.
55. As proper process had not been followed, the unit owner is not liable to pay levies arising from Resolution 1 of the body corporate committee meeting held on 5 June 2020 now being claimed by the body corporate.
56. Along with the principal claim for unpaid levies, the body corporate’s claim for interest and costs must also fail.
57. Costs for the unit owner, being the successful party in the proceedings, are reserved pending a memorandum from counsel filed within 5 working days of the date of this order, followed by a memorandum in response filed within a further 5 working days.
58. It is my preliminary view that costs should be fixed on a DCR 2B basis. If the parties agree with that view, then they should be able to determine costs as between themselves and may be able to notify the Tribunal accordingly.

59. I will deal with the issue of costs on the papers.



J Tam
19 August 2021

Please read carefully:

SHOULD YOU REQUIRE ANY HELP OR INFORMATION REGARDING THIS MATTER PLEASE CONTACT **UNIT TITLE SERVICES 0800 864 884**.

MEHEMA HE PĀTAI TĀU E PĀ ANA KI TENEI TAKE, PĀTAI ATU KI TE TARI **UNIT TITLE SERVICES 0800 864 884**.

AFAI E TE MANA'OMIA SE FESOASOANI E UIGA I LENEI MATAUPU FA'AMOLEMOLE IA FA'AFESO'OTAI'I LOA LE OFISA O LE **UNIT TITLE SERVICES 0800 864 884**.

Rehearings:

You may make an application to the Tenancy Tribunal for a rehearing. Such an application must be made within five working days of the order and must be lodged at the Court where the dispute was heard.

The **only** ground for a rehearing of an application is that a substantial wrong or miscarriage of justice has or may have occurred or is likely to occur. Being unhappy or dissatisfied with the decision is not a ground for a rehearing. (See 'Right of Appeal' below).

Right of Appeal:

If you are dissatisfied with the decision of the Tenancy Tribunal, you may appeal to the District Court. You only have 10 working days after the date of the decision to lodge a notice of appeal.

However, you may **not** appeal to the District Court:

1. Against an interim order made by the Tribunal.
2. Against an order, or the failure to make an order, for the payment of money where the amount that would be in dispute on appeal is less than \$1,000.
3. Against a work order, or the failure to make a work order, where the value of the work that would be in dispute on appeal is less than \$1,000.

There is a \$200.00 filing fee payable at the time of filing the appeal.

Enforcement:

Where the Tribunal made an order that needs to be enforced then the party seeking enforcement should contact the Collections Office of the District Court on **0800 233 222** or go to www.justice.govt.nz/fines/civil-debt for forms and information.

Notice to a party ordered to pay money or vacate premises, etc:

Failure to comply with any order may result in substantial additional costs for enforcement. It may also involve being ordered to appear in the District Court for an examination of your means or seizure of your property.