IN THE SUPREME COURT OF NEW ZEALAND SC 59/2015

[2015] NZSC Trans 25

**BETWEEN** **JOHN GILBERT**

First Appellant

**QSM TRUSTEE LIMITED**

**(IN RECEIVERSHIP AND LIQUIDATION)**

Second Appellant

**AND** **BODY CORPORATE 162791**

Respondent

Hearing: 8 December 2015

Coram: Elias CJ
William Young J
Glazebrook J
O'Regan J

Appearances: D J Chisholm QC and S M Jass for the First Appellant
J Anderson and T J G Allen for the Respondent

---

**CIVIL APPEAL**

---

**MR CHISHOLM QC:**

Chisholm and Jass for the appellant.

**ELIAS CJ:**

Yes, thank you Mr Chisholm.

**MS ANDERSON:**

May it please Your Honours, Ms Anderson with Mr Allen for the respondent.

**ELIAS CJ:**

Thank you Ms Anderson. Yes, Mr Chisholm. Mr Chisholm, we're sitting four today because Justice Arnold is unwell so – suddenly – so we're able to do that.

**MR CHISHOLM QC:**

Thank you, Your Honour. Your Honours should have four volumes in the case on appeal and two volumes of the appellant's bundles of authorities and one volume of the respondent's bundle of authorities, so seven volumes in total.

**ELIAS CJ:**

Yes.

**MR CHISHOLM QC:**

Thank you, Your Honour. Your Honours will be aware that this case concerns receivers' liability under section 32 of the Receiverships Act 1993 for body corporate levies. In particular there are two broad issues under section 32(5). Firstly, whether an agreement subsists at the date of the appointment of the receiver and secondly the interpretation of the words "relating to use, possession or occupation by the grantor of property in receivership."

The statutory scheme in the Unit Titles Act is relevant to both of these issues. I propose to cover briefly five points and I'm sure it won't take long. Firstly, the no agreement point. Secondly, interpretation of those words relating to use, possession or occupation. Thirdly, the interpretation of rule 31(b) in the body corporate operational rules themselves which emphasis was placed on in the Court of Appeal and indeed by the body corporate. Fourthly, the relief provision, section 32(7) of the Act and finally very briefly, the cost issue.

If I could briefly take Your Honours to section 32. If Your Honours don't have separate copies it is set out at the beginning of volume 1 of the appellant's authority bundle starting at page 2 and I simply want to point out two limitations on a receiver's liability under section 32(5). 32(5) is obviously the central section but first of all there is 32(6) which has two limitations: the liability of a receiver under subsection (5) is limited to that portion of the rent or other payments which accrued for the period commencing 14 days after the date of appointment of the receiver and ending on (a) the date on which the receivership ends or, (b) the date on which the grantor ceases to use, possess or occupy the property and what we submit, Your Honours, is that (b)

reinforces that essentially the consideration, the payment consideration by the liability is in respect of use, possession or occupation. That, in our submission, is what section 6(b) reinforces. The other limitation on liability is subsection (8) and we have in (a) nothing in subsection (5) or subsection (6), firstly (a), is to be taken as giving rise to an adoption by receiver of an agreement, referred to in subsection (5) or (b), renders a receiver liable to perform any other obligation under the agreement. So just to interpolate there, we were talking about a straightforward lease situation. While there may be an obligation on the receiver to pay for the use or possession or occupation it wouldn't be an obligation on the receiver, for example, to pay for maintenance or repair for that period of time that the receiver is utilising the property in question. So again, the liability is essentially a subset of the –

**WILLIAM YOUNG J:**
So why, why wouldn't a requirement to pay for maintenance be one that relates to the use, possession or occupation of the property?

**MR CHISHOLM QC:**
Well, Your Honour, it's – that's the limitation and it's only on use renders a receiver liable to perform any other obligation. It's really the extent that you –

**WILLIAM YOUNG J:**
But if the agreement relates to the use of property and under that agreement there is a requirement to pay maintenance, why wouldn't that be caught by section 32(5)?

**MR CHISHOLM QC:**
Well, Your Honour, on that interpretation every obligation under the agreement would be caught. Subsection (8) –

**WILLIAM YOUNG J:**
Well only in relation to payments?

**MR CHISHOLM QC:**
Yes, only in relation to payment but the obligation –

**WILLIAM YOUNG J:**
Why shouldn't it?

**MR CHISHOLM QC:**

The obligation –

**WILLIAM YOUNG J:**

Sorry, but why shouldn't it?

**MR CHISHOLM QC:**

Well –

**WILLIAM YOUNG J:**

I mean the alternative is to resign as receiver or abandon the property? And the case you're –

**MR CHISHOLM QC:**

Well he can't abandon the property.

**WILLIAM YOUNG J:**

No, no but the case you're postulating which is a lease.

**MR CHISHOLM QC:**

He can't abandon the property.

**WILLIAM YOUNG J:**

You can abandon a lease, can't you?

**MR CHISHOLM QC:**

No he can't. Well no he – well in a normal lease situation yes he can. He can cease using the property.

**WILLIAM YOUNG J:**

Yes, you're talking about a lease –

**MR CHISHOLM QC:**

Correct.

**WILLIAM YOUNG J:**

– you're not talking about this case?

**MR CHISHOLM QC:**
Correct, correct, exactly right.

**WILLIAM YOUNG J:**
Okay, so I'm talking about the lease too.

**MR CHISHOLM QC:**
Yes, well remember in the lease situation the obligation will be an obligation to maintain which is not a money obligation by itself necessarily.

**WILLIAM YOUNG J:**
It might be.

**MR CHISHOLM QC:**
It may be but it's an obligation to perform something.

**WILLIAM YOUNG J:**
And if you don't there'll be an obligation to pay.

**MR CHISHOLM QC:**
The obligation to pay would only arise if the lessor stood in, or stood up and took on the liability himself and sought to recover.

**WILLIAM YOUNG J:**
But, I mean, would it really be right for a receiver to be able to carry on a lease of property but not meet the obligations associated with that lease?

**MR CHISHOLM QC:**
Well it's – there must be a limitation. Subsection (8) is putting some sort of limitation on that liability and it can only be a liability on the limitation for the period of the receivership or the period of –

**WILLIAM YOUNG J:**
Well maybe.

**MR CHISHOLM QC:**

Otherwise it adds nothing, in my submission.

**WILLIAM YOUNG J:**

Can I just ask you something because it's bugging me? In your –

**MR CHISHOLM QC:**

I'm sorry, Your Honour.

**WILLIAM YOUNG J:**

Can I just ask you something because it's really bugged me? The proposition in your submissions that the receiver hasn't received rent.

**MR CHISHOLM QC:**

Well as a matter of fact he hasn't received –

**WILLIAM YOUNG J:**

So it's a seriously incomplete proposition.

**MR CHISHOLM QC:**

Well, rent –

**WILLIAM YOUNG J:**

On the basis of the material that's been put up by the respondent.

**MR CHISHOLM QC:**

Well, as a matter –

**WILLIAM YOUNG J:**

Because effectively there's been an entity interposed in between that's got the rent.

**MR CHISHOLM QC:**

Well, that's not correct either, Your Honour.

**WILLIAM YOUNG J:**

Well what is being paid in relation to the units? The people who occupy them, what are they paying?

**MR CHISHOLM QC:**

Very – there is no one left, no one left occupying.

**WILLIAM YOUNG J:**

Where –

**MR CHISHOLM QC:**

The place is empty.

**WILLIAM YOUNG J:**

Were they not occupied?

**MR CHISHOLM QC:**

Shortly – there was for a very short period. Essentially this is one of the arguments that will be dealt with at trial. Essentially the appellants say that the signs were taken down, that there was interference with the use of the space. The licence to utilise the space was purportedly revoked. There has been no income received.

**WILLIAM YOUNG J:**

But is there not a tenant, is there not an interposed entity?

**MR CHISHOLM QC:**

There is.

**WILLIAM YOUNG J:**

And has that received any income?

**MR CHISHOLM QC:**

No, no, it received some income but very little, not to cover its own costs and it has since received none. There are no – and one of the, and it's pleaded in the counterclaim, there are no longer subtenants there.

**WILLIAM YOUNG J:**

When did that start? When did they stop?

**MR CHISHOLM QC:**

Your Honour, it's not in the evidence.

**WILLIAM YOUNG J:**

But your proposition anyway is that even if they are receiving rent it doesn't matter.

**MR CHISHOLM QC:**

Even if this?

**WILLIAM YOUNG J:**

So even if the receiver was getting rent they still wouldn't have to pay the outgoings?

**MR CHISHOLM QC:**

Well there is at least an argument in respect of mortgagees in possession that they may have an obligation to pay outgoings but not on the interpretation, no.

Your Honour, moving to the first point, and that's really coming back to the relating to use possession, occupation point which I will come to. The first issue, well, Your Honour, I've taken you to those if I could perhaps take Your Honours to the relevant provisions in the Unit Titles Act which is a few pages on starting at page 10 of the first bundle and we have expressly defined rights and responsibilities and obligations throughout the Unit Titles Act for present purposes it's the rights and obligations of the owners and body corporate. Section 79(b) we –

**ELIAS CJ:**

Sorry, I haven't found it. It's in the white volume, is it?

**GLAZEBROOK J:**

So the first appellant's bundle of authorities.

**ELIAS CJ:**

Yes.

**GLAZEBROOK J:**

Which isn't that one, I don't think.

**ELIAS CJ:**

No that one?

**GLAZEBROOK J:**

Volume 1.

**ELIAS CJ:**

Yes, thank you. At 10, was it?

**MR CHISHOLM QC:**

Correct, Your Honour, section 79, and 79(b) simply reinforces the point that the owners hold a share of the common property in accordance with section 54(2). Now I only make reference to that because there is a suggestion in the respondent's submissions that while the common property is held separately but in fact the common property is held separately beneficially for the owners pursuant to section 54 but importantly for the present argument section 79(f) and (g).

First of all section 79(f) gives the expressed right to owners to have any dispute resolved in the manner set out in subpart 1 of Part 4. Now that subpart I don't need to go to but is simply section 171 to 176 which gives jurisdiction to the Tenancy Tribunal, District Court and High Court to deal with disputes under the Unit Titles Act. But (g), importantly, the expressed right to enforce the body corporate operation rules. So we say there is no need to import a contract fiction there simply because there's the expressed statutory right to enforce.

In respect of the –

**GLAZEBROOK J:**

You're not taking any – point us to the, where this has been taken, are you? I don't know why you referred to (f) is what I'm – it was just to say there is an ability to enforce, there wasn't any other?

**MR CHISHOLM QC:**

That's correct, Your Honour, and simply to show that as part of the statutory scheme the Act contemplates the enforcement of rights and a procedure for the enforcement of rights as well, that's all. There's no –

**ELIAS CJ:**

It sets up a procedure.

**MR CHISHOLM QC:**

I beg your pardon?

**ELIAS CJ:**

It sets up a procedure.

**MR CHISHOLM QC:**

Yes, Your Honour, that's all, nothing more than that. But there's the express right of enforcement. Responsibilities in section 80. 81(d), "Must comply with all laws and legal requirements relating to use occupation or enjoyment of the unit." I refer to that simply because that's a largely a reinstatement of what rule 20, rule 29(b) of the operational rules is. There's the express obligation, statutory obligation in (f) over the page, "Must pay all rates, taxes, charges, body corporate levies and other outgoings that are from time to time payable in respect to the unit." So again its statutory obligation. A little down the page at (j), "Must comply with the body corporate operational rules." So again a statutory obligation on the owners to comply with the rules.

Corresponding rules –

**O'REGAN J:**

Why did the company not comply with these obligations?

**MR CHISHOLM QC:**

The company had spent literally millions of dollars in developing this site and these are some of the issues that will come out in trial, and disputes effectively arose with the body corporate again as to what could or couldn't be done. The licence, the bare licence was being negotiated, that couldn't be finalised and relationships fell down.

**O'REGAN J:**

So it could have paid but it refused, is that what you're saying?

**MR CHISHOLM QC:**

Well, no, it's insolvent. The company itself, the owner is insolvent and in liquidation.

**O'REGAN J:**

Well it's a trust, isn't it?

**MR CHISHOLM QC:**

Well the – it is a trust but the underlying trust is insolvent.

**O'REGAN J:**

Well what's the receiver appointed in respect of, the company trustee or the trust?

**MR CHISHOLM QC:**

The trust assets.

**O'REGAN J:**

So who appointed it?

**MR CHISHOLM QC:**

The second mortgagee. There are –

**O'REGAN J:**

So the second mortgagee holds a mortgage from the trust not from the company?

**MR CHISHOLM QC:**

I'd have to check that Your Honour but it's the trust assets. I think it's common ground that it's the trust assets that are mortgaged and it's the trust that owes the obligation, it's the trust round of the security. So it's a trust liability. The only part –

**O'REGAN J:**

So what happens if there is another removal and replacement of the trustee?

**MR CHISHOLM QC:**

Well there's not going to be. Ultimately there are only two parties that can potentially be interested in these assets now other than the body corporate, well three including the body corporate: the first mortgagee, the second mortgagee and the body corporate and if things are successful there may be some money that comes through to the second mortgagee, if there are not it will only be the first mortgagee that takes the benefit but as one can see from what occurs on the sale once a sale ultimately occurs body corporate levies and the like will have to be paid in any event but that's down the track once these issues as to development, covenants and the like are resolved.

**O'REGAN J:**
So we are clear that the mortgage security was granted by the test and the receiver has been appointed in relation to the assets of the trust, is that correct?

**MR CHISHOLM QC:**
Well, yes it is Your Honour. I have the receiver at the back of the room but, yes, that's my understanding. Your Honour, it will be apparent that there is going to be a shortfall, a significant shortfall for all parties involved.

I've dealt with the rights of the, or the responsibilities of owners under 80. I was coming onto section 84 which simply summarises the powers and duty to the body corporate. For present purposes, we have at section 105(3) which reinforces that the body corporate is obliged to comply with the body corporate rules. Again these are summary provisions in section 84. The sections themselves deal with the liability. Sections 115 to 117 to 120, the established of the – and maintenance of the funds. Now the funds are the funds that levies are paid for. 116 is a long-term maintenance plan. 121 is the central provision in respect of the imposition of levies. It's essentially these are unilaterally imposed by the body corporate and 138 which has some relevance in these underlying proceedings, the ability of the body corporate to undertake repair and maintenance. If owners don't undertake the repair and then claim the funds back.

Section 105 deals with the body corporate rules. It was referred to in section 84. Section 105(1) reinforces that the body corporate operational rules are the rules prescribed by regulations and apply to every body corporate. I will refer to those rules shortly because those prescribed rules applied in the case of this body corporate for about a nine month period between 2012 and 2013 when the rules were amended.

Subsection (2) deals with the amendment of –

**ELIAS CJ:**
Sorry, who do you say – I understand this submission relating to the scheme of the Unit Titles Act so who do you say that the body corporate was entitled to look to in this case?

**MR CHISHOLM QC:**

It's entitled to look to the – it's only entitled to levy the owners.

**ELIAS CJ:**

Yes.

**MR CHISHOLM QC:**

And in this case that's, for these that's QSM Trustee Limited as the owner. And indeed –

**O'REGAN J:**

Does the body corporate have any power to sell the unit to defray unpaid levies?

**MR CHISHOLM QC:**

Well the – a body corporate would have the power of anyone, one would imagine, to obtain judgment and then exercise judgment, get an order of sale and so on, any party can do that, any litigant can do that.

**O'REGAN J:**

No, no, what I'm asking is, is there something in the Unit Titles Act that deals with the body corporate's rights if an owner doesn't pay?

**MR CHISHOLM QC:**

I will check on that point but what the – in practical terms what the body corporate can do in a case like this, ultimately this is a situation where the mortgagees will control the sale process. Under section 124, which I will come to, not only is the body – not only the owner that was liable at the time but essentially future owners will be liable for body corporate levies as well and also under section 147 – I will take you to 124 now just so that Your Honours have the wording. Section 124(2) which is on page 21 of the bundle, well just to put it in context. You have 121(1) on page 19 which reinforces the body corporate may determine from time to time the amount to be raised for each fund and imposed levies and then 124(2) after fixing the date, the amount of any unpaid levies, levy together with any reasonable costs incurred in collecting the levy –

**GLAZEBROOK J:**

Sorry, where are you?

**MR CHISHOLM QC:**

I'm sorry Your Honour, section 124(2) on page 21 of the bundle.

**O'REGAN J:**

So that's all it is, it's just a debt? You've got to enforce it like any other debt?

**MR CHISHOLM QC:**

Yes Your Honour. I will check Your Honour's point though as to whether there is an independent sale but one can get a – this is a deemed statutory debt under 124 but it's not only the present owner under 124(2) who was the unit owner at the time or by the person who is the unit owner at the time the proceedings are instituted. So essentially if the unit is sold the liability runs with the land effectively.

And just to create, complete the picture in respect of rights. At section 147, which is on page 24 of the bundle, makes reference to pre-settlement disclosure statements and one says, "This section applies if a buyer and a seller have entered into an agreement for sale and purchase." So utilising the words "buyer" and "seller" are not just limited to owner but it also applies to mortgagees selling. "No later than the fifth working day before the settlement date the seller must provide a disclosure statement to the buyer." Subsection (3) deals with what the statement needs to say. Subsection (4) reinforces that, "A body corporate may withhold a certificate referred to in subsection (3)(b) if any debt that is due to the body corporate by the unit holder – unit owner is unpaid."

So essentially the combination of sections 124 and 147 mean that ultimately a body corporate can procure payment but of course in a case like the present there is a stalemate between the mortgagees on the one hand and the body corporate on the other in respect of moving forward, in particular with the uncertainty of the development covenant that's in issue.

But moving back to the, to section 105 which is the section that enables the body corporate, well, prescribes operational rules and enables the body corporate to amend rules under (2), we have express recognition in (3), subsection (3), that the rules are binding on, firstly, the body corporate, secondly, the owners, thirdly, any person who occupies a principal unit and, fourthly, any mortgagee who is in possession. So again there is an express statutory confirmation of liability under the Act itself.

**O'REGAN J:**
But not a receiver?

**MR CHISHOLM QC:**
Beg your pardon?

**O'REGAN J:**
But not a receiver?

**MR CHISHOLM QC:**
Not a receiver, no. And it's only related to the body corporate rules themselves.

**GLAZEBROOK J:**
These rules aren't statutory rules in the sense that they are passed by general resolution, aren't they?

**MR CHISHOLM QC:**
Well the rules that –

**GLAZEBROOK J:**
I mean there are certain rules that you have to have but otherwise the body corporate is free to – within the constraints and the Act to have the rules it wishes.

**MR CHISHOLM QC:**
Well they are limited by section 106.

**GLAZEBROOK J:**
I understand that but the argument that they are a statutory, it's a statutory obligation it is effectively some kind of agreement between the unit holders for the time being what is going to be in those rules subject to the statutory limitations, isn't it?

**MR CHISHOLM QC:**
No more than you'd say a shareholder's resolution is an agreement. At the end of the day shareholder resolutions or, indeed, body corporate resolutions can be imposed on minorities. It is still the body corporate acting in general meeting or indeed in certain situations acting by committee that makes the rules and that's what section 105(2) says. The body corporate may amend, revoke or make. So in a

colloquial sense, yes, I accept that Your Honour but it is ultimately the body corporate that amends the rules and we say that that's not an agreement, no more than shareholders voting at a shareholder's meeting is an agreement.

**GLAZEBROOK J:**

Well it's always that the old style indication was that it was a contract in terms of the shareholder's resolutions and the constitution of a company, that's no longer the case but agreement is a wider term, isn't it? And certainly here there has been agreement, it can be imposed on the minority but there's nevertheless an agreement on those rules and one can understand why they imposed on the minority in circumstances of this nature.

**MR CHISHOLM QC:**

Well we submit that an agreement still needs consensus. This goes to the heart –

**GLAZEBROOK J:**

So it needs whole consensus, 100% consensus and you can't have an agreement where people agree that if they are outvoted – because by joining the, joining an organisation, for instance, you will agree that if you were outvoted you were outvoted.

**MR CHISHOLM QC:**

But Your Honour, this is not joining an agreement. One, there is no need to have an agreement to enforce the body corporate rules. There is no need –

**GLAZEBROOK J:**

But do you need an agreement to enforce or an agreement to the rules themselves and here you have an agreement –

**ELIAS CJ:**

Is it the origin or is it –

**MR CHISHOLM QC:**

Well the origin will generally be, other than the prescribed rules if they were kept, would simply be a vote of the body corporate in general meeting, that would be the origin. But in my submission that's no more agreement than anything else. There is no – at the end of the day a purchaser comes along and chooses whether or not he or she wishes to be an owner of the, of a unit in a body corporate development.

**GLAZEBROOK J:**

And so chooses to agree to the rules because they want to – and then has the ability to ask for those rules to be changed in general meeting but understands that if they are in the minority that those rules will remain as they are but it's – that's what their agreement is, isn't it?

**MR CHISHOLM QC:**

With respect, I submit not Your Honour. There is no agreement. One looks and sees there's a statutory scheme that if you want to buy into a body corporate development you are bound by statute to comply with the rules. That's exactly what section –

**GLAZEBROOK J:**

But you certainly choose whether you enter and you can have a say in changing those rules that you don't like.

**MR CHISHOLM QC:**

But you only –

**GLAZEBROOK J:**

Apart from the statutorily imposed ones, obviously.

**MR CHISHOLM QC:**

You're only, you have a say only to the extent of a vote just like a shareholder of a company but that's not an agreement in my submission. The ability to –

**GLAZEBROOK J:**

A shareholder who is actually voting in favour of a resolution might disagree, mightn't they?

**MR CHISHOLM QC:**

But it's still binding on the minority if in a shareholder situation. It's still not an agreement, it's still not a consensus in my submission.

**GLAZEBROOK J:**

So for an agreement you have to have a consensus. What authority do you have for that?

**MR CHISHOLM QC:**

Well Your Honour, if one, even if – I don't have a dictionary meaning but agreement by its very nature, in my submission, needs a consensus, it needs agreement and this distinction, in my submission, going back to section 32, the distinction between a formal contract and agreement is being something of a lesser beast, it's not borne out, in my submission. If one looks, for example, section 32(8) references to adopting the agreement and the like. In my submission, those are indicators of a formal, binding contract.

**GLAZEBROOK J:**

Well this is binding?

**MR CHISHOLM QC:**

This is? Is it binding, sorry?

**GLAZEBROOK J:**

Well I said this is binding so…

**MR CHISHOLM QC:**

Well we have a binding, we have binding obligations anyway. In my submission if one was looking in the context of contract law generally one wouldn't imply a term if there was already and express term. If one looks at, for example, the BP Refinery points.

**GLAZEBROOK J:**

I'm not sure why you're implying – I wasn't suggesting you're implying a term at all.

**MR CHISHOLM QC:**

Well, it's the submission that I'm meeting, Your Honour, is that it is implicit that an agreement is present or the Court of Appeal indicated, I think, that it's an agreement imposed by law which suggests, on its face, that there isn't agreement at all it's actually a fiction.

The contract theory arose primarily in respect of the incorporated society cases where there was no ability to enforce under the Act. There were the rules under the Act but there was no ability to enforce. That's not the case in respect of, or no longer the case in respect of the Companies Act after the changes of 1990 where it is clear

that Parliament made the decision to do away with a deemed contract to proceed with a direct or a direct ability to enforce and that's precisely what is present under the Unit Titles Act. There is no need, in my submission, to imply or say that there is the fiction of an agreement when they are express and direct statutory rights.

**ELIAS CJ:**

Just on, just thinking about section 105 and that argument, is there a definition of occupier in the Unit Titles Act?

**GLAZEBROOK J:**

Yes, because all, anybody who's – in fact I think it's a very wide definition from memory, well certainly in the last Unit Titles Act it was a very wide definition.

**ELIAS CJ:**

Was it?

**GLAZEBROOK J:**

To capture anybody who was by licence or any other means in the building, in the units but – actually I've just realised this will be the new one so.

**MR CHISHOLM QC:**

I'm just –

**ELIAS CJ:**

Well I'm just wondering is a receiver an occupier?

**MR CHISHOLM QC:**

I'm just checking – I'm sorry Your Honour that the definition, interpretation section is not in the bundle but there is no express definition of occupier but I would accept that occupier by its very nature but in plain English –

**ELIAS CJ:**

Must be broad.

**MR CHISHOLM QC:**

– is broad?

**ELIAS CJ:**

Yes.

**MR CHISHOLM QC:**

And indeed we sense –

**ELIAS CJ:**

Well I mean do you accept that a receiver could be an occupier for the purposes of section 105?

**MR CHISHOLM QC:**

A receiver could be an occupier for the purposes of section 105.

**ELIAS CJ:**

What would constitute the receiver and occupier?

**MR CHISHOLM QC:**

Well physical possession or control. A lessee or a tenant is clearly an occupier. Mortgagee in possession is dealt with separately in section 105(3) but it would be reasonable to say that a mortgagee in possession may well be an occupier as well.

But to give context to the rules and that's where section 106 is quite similar, perhaps not in setting out but in the words to the old Act, to this 1972 Act, and the cases under the 2000 and, sorry, the 1972 Act made it clear that the, and again, consistent with 106(2), that rules needed to be essentially incidental to existing powers or duties and one of the often quoted cases is the judgment of the Court of Appeal in *Velich v Body Corporate 164980* [2005] NZCA 108; (2005) 6 NZCPR 143 which I think was a judgment of His Honour Justice Young. There are a number of limitations in section 106 to what rules can actually, or what rules can actually be created and we have, first of all, the general limitation in subsection (1). We have the not incidental or incidental in subsection (2), "No powers or duties may be conferred or imposed on the body corporate that are not incidental to the powers and duties conferred or imposed on the body corporate under this Act." And then you have the third restriction in subsection (4), "Any amendment or addition that is inconsistent with any provision of this Act or any other enactment or rule of law is invalid."

And the starting point will be the prescribed rules themselves and they are in, I think they are in volume 2. They are schedule 1 to the 2011 regulations. I think they are at page 473 in volume 2 of the authorities but I will just check that. Yes they are. The appellant's second volume at page 473, 474 at regulation 21 at the bottom of page 473, "The body corporate operational rules set out in schedule 1 are prescribed for the purposes of section 105(1)." And then unlike the 1972 rules, the rules are very, quite scant. There is express reference to both owner or occupier and it can be seen that the nature of the rules relate to the, directly to the use or enjoyment of the property. Not defacing the common property, not leaving rubbish, creating noise and so on.

So that's the starting point and for this body corporate those rules were the operational rules for about a nine or 12 month period from about September 2012 until mid-2013. And it's clear that the body corporate rules or at least the prescribed rules, don't purport to deal with levying. They relate directly to the, essentially the use or enjoyment of the unit and the common property itself.

So one, in my submission, this is a point I come to in respect of the interpretation of the amended rule 29(b). Essentially the Court of Appeal sought to – sorry, it's 31(b). The Court of Appeal sought to interpret that rule as including a, amongst other things, a liability to pay levies not only on the owners themselves but also in respect of mortgagees in possession and occupiers which, in my submission, simply can't be right. It's extending for a number of reasons, both legally and practically. Essentially, it's extending the statutory ability of body corporates to levy owners to be able to levy mortgagees in possession and occupiers. So if one –

**WILLIAM YOUNG J:**
Why, I mean I may have missed something but why aren't the rules binding on the mortgagee who is in possession?

**MR CHISHOLM QC:**
Well –

**WILLIAM YOUNG J:**
You say they are but the levy isn't applicable.

**MR CHISHOLM QC:**

But there's no levy liability in the rules and one would need to, again relying on – there is no levy liability in the rules and to extend, in my submission, to extend the statutory power of body corporates to levy owners to levy other parties, third parties, whether it be occupiers or mortgagees in possession would be ultra vires in contra to section 106. Such a rule would not be incidental to the statutory powers and duties in the Act itself and that's no different, in my submission, to Your Honour's reasoning in occupier *Velich,* and I haven't –

**WILLIAM YOUNG J:**

So the argument is the power to raise levies is confined to owners?

**MR CHISHOLM QC:**

Correct.

**WILLIAM YOUNG J:**

And there's no – the definition of owner in the Act doesn't encompass occupiers?

**MR CHISHOLM QC:**

Correct.

**WILLIAM YOUNG J:**

Unless except in special circumstances where there is an unconditional purchase for sale?

**MR CHISHOLM QC:**

Well for present purposes it doesn't for the occupier. One thing with the extreme consequences, if occupiers were liable, if you were a lessee and there are some examples here, but if you were a lessee or a tenant of a leaky building you could be levied as an occupier because levies will include not only service costs for that particular time, and I will come to what levies will cover, but you will be liable as well for possibly hundreds and thousands of dollars worth of levies which can't have been the intention of Parliament, in my submission. It must, in my submission, it's not incidental to levy third parties.

**GLAZEBROOK J:**

Sorry, I think I've lost where you are in the volumes?

**MR CHISHOLM QC:**

I'm sorry Your Honour. It's the second volume of appellant's bundle of authorities, a white volume.

**GLAZEBROOK J:**

Yes, there's where I was but I still can't find where you are.

**MR CHISHOLM QC:**

Page 474.

**GLAZEBROOK J:**

That's where I was too.

**MR CHISHOLM QC:**

I was just responding to the issue of – because the prescribed rules don't deal with levies. They don't include a power to levy. The only statutory power to levy is to levy owners pursuant to -1

**GLAZEBROOK J:**

So that's the only point you were making?

**MR CHISHOLM QC:**

Correct.

**GLAZEBROOK J:**

All right. I don't have that point. I just still can't see what's on 474.

**MR CHISHOLM QC:**

Well Your Honour, 474 simply gives an indication in context as to what the –

**ELIAS CJ:**

It's just the schedule.

**MR CHISHOLM QC:**

They're the operational rules.

**GLAZEBROOK J:**
All right.

**MR CHISHOLM QC:**
And indeed, these were the operational, as I said, these were the operational rules that applied for this body corporate for a period of approximately nine months.

The point simply comes back to section 106, however, that in my submission one cannot amend the rules so as to include a power to levy. That would not be incidental in my submission. But on the Court of Appeal's reasoning in section 60 of their judgment, they went so far as to say that that rule, which I will come to, included a power to levy, not only owners but also occupiers and mortgagees in possession and, in my submission, that simply can't be right, there must be a limit to the ability to amend the rules in that section 106.

But in respect of 105 the point, and perhaps to Your Honour Justice Glazebrook, 105 makes it clear that the levies, I'm sorry, the body corporate rules are binding. In respect of levies themselves, this is simply dealt with in section 121, however, the nature of the expense as covered by levies is reinforced in section 115 through to 120 which is in volume 1 of the bundle of authorities starting at page 18. This is under the heading, "Financial and property management." And Your Honours will see that there are a number of accounts that can be opened or established by the body corporate. The first is the operating account in section 115 and section 115(2) lists the nature of the expenses that will be incurred by the body corporate and it's only one at 115(2)(b) that relates to the provision in services and amenities for the benefit of the unit title development. Other matters include statutory regulatory compliance, ground rental, et cetera.

**GLAZEBROOK J:**
Can I just check, are you saying you can't have rules relating to levies in the body corporate rules or just that you can't extend the liability for payment?

**MR CHISHOLM QC:**
You can't extend the liability for payment.

**GLAZEBROOK J:**
So that's the only submission.

**MR CHISHOLM QC:**

The rules can only be created by the body corporate that are incidental to statutory powers and obligations.

**GLAZEBROOK J:**

Well, levying powers must be incidental to that, so you could have them in the Body Corporate rules, but your submissions is you can't extend the payment obligation. Is that –

**MR CHISHOLM QC:**

Well, that's correct. The payment obligation is in section – from sections 121 to 128 and there's an express obligation or onus to pay levies. We have a distinction. We have owners liable for levies under 121 to 128, but we have other parties that I – that are bound by the Body Corporate rules, including the occupiers and the mortgagees in possession. And in my submission, one cannot extend the liability for levies beyond owners; that's a statutory obligation.

Coming back to 115 to 119, cover the nature of the expenses that will be covered by the levies and it can be seen that while some will be current expenditure, others will be in respect of, for example, 116 and 117, long-term maintenance. 118, an optional contingency fund; 119, and there's an obligation to have separate bank accounts.

Now, the levies that Mr Gilbert was held liable for, and I can take you to the budget, not only included liability or expenses incurred for the period that he was receiver, but also included liabilities for such things as maintenance contingencies. I could actually take you to the document itself, it's at volume 3 of the case on appeal at page 241. So, it's not simply for services provided for the period of the, the receivership, but includes such liabilities, for example, you'll see about two-thirds or three-quarters down the page "Maintenance contingency" of $155,000 and for "Special projects contingency" $100,000; "Sinking fund" which appears to be a long-term maintenance contingency of $100,000. So, again, Body Corporate levies consistent that were charged went beyond simply the provision of services to Mr –

**GLAZEBROOK J:**

That might be right, but they will be those figures for the period that the person is in occupation.

**MR CHISHOLM QC:**

Well, well, in my –

**GLAZEBROOK J:**

So, they'll be spread over, I mean, in the same way as anybody paying rent to a landlord will be paying a profit conting – payment and probably a contingency, if you wanted to do it that way, for future maintenance, et cetera

**MR CHISHOLM QC:**

In my submission that's not the case, Your Honours, because – Your Honour, because the sections, the long-term maintenance funds and the optional maintenance contingency funds are simply based on that. They're not based on, on maintenance that will occur; by its very nature, a sinking fund is long-term.

**GLAZEBROOK J:**

That wasn't the point I was making. That you're paying your contribution to that for the particular period, in the same way as paying rent to a landlord, the landlord, if they wanted to, could split it up into the same sort of components, couldn't they?

**MR CHISHOLM QC:**

Well, maintenance contingency funds are simply based on that. They are not based on maintenance that will occur, by its very nature, a sinking fund is long-term.

**GLAZEBROOK J:**

That wasn't the point I was making. You're paying your contribution to that for the particular period in the same way as paying rent to a landlord. The landlord, if they wanted to, could split it up into the same sort of components, couldn't they, plus their profit component and a receiver is still liable for rent under section 32.

**MR CHISHOLM QC:**

Well rent will be negotiated but we know what a body corporate is obliged to do under the various funds that it must create that it will be covering long-term obligations as well and contingent obligations as well.

**GLAZEBROOK J:**

Well a landlord would be stupid not to do so in its rent, wouldn't it?

**MR CHISHOLM QC:**
Well, it –

**GLAZEBROOK J:**
If it just covers actual costs of the particular moment it's not going to be doing too well, is it?

**MR CHISHOLM QC:**
With respect though, Your Honour, it will depend on terms of the lease because most leases will have liabilities to make the lessee liable for repair and maintenance on top of the rental liability as well. But it's clear in my submission that what is contemplated under section 35 is simply the liability for the use of property for a particular defined period. What body corporate levies are doing are setting budgets and making parties liable for, owners liable for matters that go significantly beyond that.

Now I took Your Honours to section 121 just to reinforce the statutory nature, and to section 124. 128 reinforces that the obligation is a statutory obligation in respect of the payment of body corporate levies just in respect of interest. If a unit holder owner owes money to the body corporate under section 121, 124, 125, 126 and 127 interest accrues in respect of so much of the debt if it remains unpaid.

And in our submission it's simple. Having regard to this statutory scheme there is no need to have an agreement imposed by law, there are existing statutory obligations, to put a deemed agreement on top of that is simply unnecessary in light of the body corporate, in light of the Unit Titles Act.

We say the incorporated society cases, as I said, don't need to be relied upon. A deemed contract or a contract fiction is not needed in respect of the Unit Titles Act simply because there is express powers and there is reference in our written submissions to the Law Commission's analysis in respect of amendment of the Incorporated Society Act to effectively bring in these direct enforceable rights just as Parliament did in respect of the Companies Act and we say that that is a correct analysis. There is no need to rely on a contract fiction here when there are directly enforceable rights.

We also say the Court of Appeal also relied as a backdrop on the body corporate rules. We also said that they don't need to be in agreement, or deemed agreement given that there was the expressed power of enforcement that I referred to before.

Now in respect of the second point, the words relating to the use, possession or occupation. This has partly been covered in the discussion. What the appellant's submit is that the liability for levies under sections 121 to 128 flows from ownership whether or not the owner uses, possess or occupies the property. Use, possession or occupation is not relevant, in our submission, to the liability. If he or she owns the property or the unit he or she is entitled to pay the levies.

I've covered the point which in my submission points to the fact that levies and rental are not the same when one refers to the budget. Other items though that may not be present in the present case are the example of the leaky building situation. If there was unforeseen defects that arose prior to the receivership but the receiver was appointed at the time of levy, on the Court of Appeal's analysis, he or she would still be liable. In my submission, that can't be right.

For the purposes of interpretation of those words, there is no reference to ownership in section 32. It's simply liability arising from use, possession or occupation.

And finally in respect of those words, the Parliament chose to use virtually identical words in respect of administrators in the Companies Act, that's section 239ADI in respect of administrator's liability. Now administrators have a slightly different provision in that they can actually give notice of non-use and that separate section, 239ADJ, makes it clear that the liability utilising the same words is concerned with a third party owner of the property. So again, consistent with the lease situation.

The written submissions briefly refer to the analogy with mortgagee in possession and we submit that on the Court of Appeal's interpretation there would effectively be a backdoor way of changing statutory priorities for body corporate levies and we note that the Act expressly recognises the right to mortgage. There are references to mortgage, to mortgages in the Act but Parliament, for the purposes of this new Act or relatively new Act, didn't take up the Law Commission's recommendation to make first mortgagees liable. And as a matter of law, first – sorry, mortgagees in possession will only be liable, or first mortgagees when there is a statutory provision making them liable. Examples are rates, section 62 of the Local Government Act,

certain provisions in respect of GST and income tax when mortgagees are made liable. No such provision exists here in respect of body corporate levies and we would submit that it would be inconsistent if receivers may be liable for body corporate levies but mortgagees in possession are not.

As I noted it towards the beginning, levies will normally be paid in any event given section 124(2), the fact that levies essentially run with the land and, secondly, given the requirement to provide a section 147 certificate which can be withheld by the body corporate if payment is not made of levies at the time of sale. So we submit ultimately that section 32(5) does not objectively cover or include body corporate levies. Simply an incident, payment is simply an incident of ownership.

Now the next point I wish to cover was the interpretation of rule 31(b) which is essentially the rule that the Court of Appeal relied upon as imposing a liability for the levies. This is in volume 3 at page 272 of the case on appeal. It's rule 31(b), “An owner must comply with all Acts including the noise control provisions of the Resource Management Act by laws and regulations for the time being enforced in the area in which the unit is situated as they relate to use, occupation or enjoyment of the unit, accessory unit or common property. Now the Court of Appeal acknowledged that this was a rather awkward provision for the purposes of imposing liability for levies. I submit that the starting point in interpreting this is those original prescribed rules which give a feel for the nature of the obligations that are being covered by the rules. There is no reference to levying at all in those original prescribed rules. I've referred to the limitations in section 106 and in particular the fact that a separate contractual power to levy would not be incidental to the rules or the Act. In particular, a separate contractual power to levy third parties when it is only owners under the Act that can be liable for body corporate levies.

We submit that rule 31(b) needs to be interpreted objectively. Firstly, having regard to the express obligations in the Unit Titles Act. There is simply no need, in my submission, to interpret use, occupation or enjoyment so broadly that it would include the payment of levies or, indeed, any obligations relating to financial property or management. In my submission, standing back, the provision is simply intended to relate to the use of the unit itself, whether it be noise control or rubbish or those type of use factors.

The fact that it is a distinct obligation, in my submission, has some support from the Act itself. When one compares section 80(1)(d) of the Act one sees essentially a very similar provision to 31(b), the reference to use, occupation or enjoyment of the unit, but that is a distinct obligation to the obligation to pay levies on the other hand pursuant to section 80(1)(f). So standing back, in my submission, the creators of this rule did not objectively intend it to cover payment of levies.

Now the appellant's fallback position is in respect of relief under section 32(7). It will be apparent from the proceedings that are before the Court that there are significant issues regarding the rights claimed under the development covenant. Essentially the body corporate is asserting that it is entitled, I think, to something in excess of $1.9 million compensation. There are presently undertakings given to the Court where, while a licence has been revoked which is disputed, there will be no interference with property on the site and there will be no further development undertaken by the respondents. None of these issues can be resolved with agreement or ultimately Court ruling when this matter goes to trial in June. It's clear, in my submission, that there is a stalemate between the mortgagees and the body corporate. Without the Court orders or agreement the premises are going to remain empty. No income is going to be derived, no development will occur and no levies will be paid by the owner, simply not –

**GLAZEBROOK J:**
Why do we know this?

**MR CHISHOLM QC:**
Well, Your Honour, we see it from the litigation.

**GLAZEBROOK J:**
Well I don't know that we see anything from anything. There is one that's assert there are subtenants there, you assert no rent has been received. None of that material is actually before the Court. Now you tell us there are no subtenants there because of the dispute. Where is any of this that we are supposed to be resting relief on?

**MR CHISHOLM QC:**
Well Your Honour, it's pleaded – the difficulty we have is that we –

**GLAZEBROOK J:**

So what? It could be pleaded, it might be totally idiotic for all we know. How do we give relief just because something is pleaded? It's not a strikeout.

**MR CHISHOLM QC:**

Well it's not a strikeout, Your Honour, but it's simply a defence. It's clear even on the face of what's being asserted. We have one issue, we have –

**GLAZEBROOK J:**

Well you can assert anything. If there's no evidence of it it's not, it's certainly not clear to me.

**MR CHISHOLM QC:**

Well Your Honour, the fact there are disputes in respect of a development covenant are on the record.

**GLAZEBROOK J:**

So what?

**MR CHISHOLM QC:**

Well in our submissions it's a matter of commercial reality. While those disputes exist it is highly unlikely that this property will be able to be sold. It is not unreasonable for a receiver to resolve to try and sort those issues out.

**ELIAS CJ:**

Why is this relevant to the point of statutory interpretation?

**MR CHISHOLM QC:**

Sorry Your Honour, this is only relevant to the relief under 35 – 32(7).

**ELIAS CJ:**

I'm sorry, yes of course, yes.

**MR CHISHOLM QC:**

It's not relevant to the interpretation –

**ELIAS CJ:**

Yes, right.

**MR CHISHOLM QC:**

– point it's simply a fallback point.

**WILLIAM YOUNG J:**

So the substantive proceedings is the statement of claim that we've got in the, and the counterclaim that we've got in the –

**MR CHISHOLM QC:**

And statement of – yes you have.

**WILLIAM YOUNG J:**

Now what was struck out because the security of the costs wasn't paid?

**MR CHISHOLM QC:**

Your Honour, that was a former proceeding brought by the company. Essentially now it's clear that the company and the receivers are being controlled. This is all for the benefit of the mortgagees, the first and second mortgagees.

**WILLIAM YOUNG J:**

So they say they are entitled to redevelop?

**MR CHISHOLM QC:**

They say they are entitled to redevelopment. They say they are not obliged to pay $1.9 million in compensation for the space. They say that the body corporate has interfered with their business in respect of taking down subtenant signs, interfering with access, but the primary issue, the real difficult issue is the interpretation of the development covenant.

**GLAZEBROOK J:**

Can I just check, what's the set off that you're saying is here? Because if the receiver is liable for the body corporate fees why aren't they just liable for those body corporate fees, why should there be relief because what you're saying is they are not obliged to pay something more to the body corporate rather than the body corporate is supposed to pay something to them. So where's the set-off or

relief that's supposed to ground that relief, apart from the fact there's no evidence of any of this from pleading?

**MR CHISHOLM QC:**

The – we, using set-off in the sense of a summary judgment, we say that if we're correct it's unfair and unjust that a receiver who is stuck in a dispute should be personally liable if the defendant –

**GLAZEBROOK J:**

What is the relief, let's have a look at the relief provision.

**MR CHISHOLM QC:**

Go to the front of volume 1 of the bundle of authorities, page 3 of volume 1, subsection (7).

**GLAZEBROOK J:**

So you're not saying there's a set-off in any sense, you're just saying it's unfair because you should be able to sort out the other proceedings and whether the receiver is liable for even more money or the company, or the trust is liable for even more money?

**MR CHISHOLM QC:**

Well, or the body corporate is liable. There – one, in my submission, doesn't need a set-off to rely on subsection (7). The receiver is sitting there because he's not receiving money, he –

**GLAZEBROOK J:**

Well we don't know that.

**MR CHISHOLM QC:**

Well with respect Your Honour, you don't know either that he is receiving money.

**GLAZEBROOK J:**

Well no but the point is if you're giving relief you have to have some evidence, surely, upon which you give relief. You don't just pluck it out of the air because it's unfair in some way.

**MR CHISHOLM QC:**

Sorry, I'm not saying it's simply unfair in a vague sense. We have a receiver who, by reason of adopting or being involved in litigation, he was sued. He is a defendant to proceedings and until the development covenant is interpreted as a matter of practical reality it is impossible to sell these apartments or unless agreement is reached with the body corporate. You have a development covenant and it's pleaded where there are issues as to interpretation. There is a claim that the owners, or the ultimate owners who purchased this property will need to pay $1.9 compensation to the body corporate for the common area that's in issue. The defendants and Mr Gilbert say that's an incorrect interpretation but until those issues are resolved it will be impossible to sell this property. Realistically, impossible. It's not possible, and this is one of the indications we say why section 32(5) shouldn't apply. One could never realistically sell a property in 14 days in any event but it would be unjust to Mr Gilbert, as a receiver, to be liable if the defendants turn out to be correct in the litigation.

**GLAZEBROOK J:**

But why would that be? Because if he's liable anyway and they're correct and they don't have to pay the compensation why is there a problem?

**MR CHISHOLM QC:**

Because he would have been able to sell the property two years ago. This litigation has been going on for virtually the whole time he's been the receiver.

**GLAZEBROOK J:**

But why does that stop him having to pay? I don't understand.

**MR CHISHOLM QC:**

Well –

**GLAZEBROOK J:**

Apart from the fact we don't have any evidence of any of this.

**ELIAS CJ:**

Well is it just that the Court might relieve him?

**MR CHISHOLM QC:**

Well that's precisely the, that's precisely what subsection (7) does. It either limits or excuses.

**ELIAS CJ:**

Yes.

**MR CHISHOLM QC:**

It simply he wouldn't be there or a receiver logically, whether it be Mr Gilbert or anyone else, will not sit there and, for the sake of it. He would not be there now but for this litigation. One could sell these properties. This is – there are major claims. If one party is claiming a $2 million compensation it's not realistic to expect a purchaser to take on that risk and that's the issue. These issues – if assuming that the appellants, that's Mr Gilbert and the company in liquidation, are correct in respect of the interpretation and the mortgagees the value of the property to them is substantially more and they will be able to sell it. But until this litigation is resolved or until agreement is reached with the body corporate Mr Gilbert, as a receiver, is in an impossible position, in my submission. And that's hence the excusing or seeking –

**O'REGAN J:**

What were the grounds he put forward in his application for relief? What does he say in that?

**MR CHISHOLM QC:**

Well Your Honour, he hasn't filed, he simply put in his notice of opposition and we can, I can take Your Honour to the notice of opposition that was filed in the summary judgment because there was some criticism of Mr Gilbert in the Court of Appeal to say well you actually formally made an application but, in my submission, Your Honour, as with any summary judgment under, I think it's High Court Rules 12.9 and 12.10, provided you file your opposition that's sufficient. But his opposition is at, in volume 1 of the case on appeal at page 78. Your Honours may appreciate that this was filed a few months shortly after Mr Gilbert was appointed, so it's page 79, reference to relief under section 32(7).

**O'REGAN J:**

This is paragraph (c)?

**MR CHISHOLM QC:**

Correct, yes.

**GLAZEBROOK J:**

So where's the affidavit?

**MR CHISHOLM QC:**

His affidavit, Your Honour, is in volume 2 at page, starting at 145. It explains the dispute between the parties and at paragraph 7 at the top of page 146, until the dispute is determined or resolved by agreement it would be very difficult to complete a sale of the property and so enable the mortgagees to be repaid.

**ELIAS CJ:**

So the argument being though it's not suitable for resolution by summary judgment because it's inextricably tied up with the dispute?

**MR CHISHOLM QC:**

Correct. Absolutely correct, Your Honour. It's acknowledged that if ultimately the body corporate is right with its interpretation then Mr Gilbert will have to wear the personal liability because he's run the risk, he along with the company in liquidation have challenged the interpretation but he is right, it's unjust, in my submission, that he should also be personally liable if essentially the receivership has been delayed for a period of two years or so or more while the litigation has been conducted.

**GLAZEBROOK J:**

But he won't be personally liable if we say he's not personally liable, will he?

**MR CHISHOLM QC:**

Well no he won't be, Your Honour, but that's the issue.

**GLAZEBROOK J:**

Well no. You say he will have to wear the liability in the end. The purchaser will have to wear the liability and always would have to in respect of unpaid levies but the receiver, under your interpretation, never does and he doesn't because we don't give summary judgment on the basis that he might have been relieved from liability. That has to be the submission.

**MR CHISHOLM QC:**

Well, sorry Your Honour. This is a 32(7) this is a fallback –

**GLAZEBROOK J:**

Well because 32(7) is your fallback position.

**MR CHISHOLM QC:**

Correct.

**GLAZEBROOK J:**

But your fallback position must say he is liable for it.

**MR CHISHOLM QC:**

Well as a fallback I can only need to seek –

**ELIAS CJ:**

It seems a bit strange that you could argue as a fallback that if you're wrong in the litigation you've taken to the Supreme Court summary judgment should nevertheless be declined because you're being deprived of the argument that the period of the litigation makes it unfair for you to be personally liable for the whole period.

**MR CHISHOLM QC:**

Sorry Your Honour, it's two separate – it's distinct causes of action. The litigation has been going on, this is, this first cause of action in many respects that has come to the Supreme Court is a side issue to the primary cause of action.

**ELIAS CJ:**

I understand that, I'm just wondering why there's a fallback on the summary judgment issue as to his liability?

**MR CHISHOLM QC:**

Well it's only, it's – I describe it as a fallback, Your Honour, because it's a fallback on the basis that –

**ELIAS CJ:**

Wouldn't it only be able to be a fallback if there was set-off and that had been put forward?

**MR CHISHOLM QC:**

In my submission, there doesn't need to be a set-off and that's in fairness, Your Honour, that's what the Court of Appeal found that essentially there needed to be a set-off between Mr Gilbert and/or the company in liquidation and the body corporation. In my submission, that's not required under subsection (7). Mr Gilbert is only liable, he wouldn't be liable for occurring levies assuming we're unsuccessful on the primary argument but for the fact of the delay.

**GLAZEBROOK J:**

Well but the point is, in most cases even if there's a delay and even if there's a dispute you'd be able to rent in the meantime having the benefits of the use and occupation and we have nothing in front of us that says that isn't possible and if in fact the receiver is personally liable because it's a payment for use or occupation, why on earth would we say, well just because he's going to be in occupation for two years getting rent rather than six months if he was going to be able to sell it immediately, it's unfair, I don't understand?

**MR CHISHOLM QC:**

Well, Your Honour, the –

**GLAZEBROOK J:**

But your submission has to be on the basis that the litigation is preventing not only sale but renting but we don't have anything in front of us about that?

**MR CHISHOLM QC:**

Well not –

**GLAZEBROOK J:**

Because most litigation doesn't stop you doing anything, does it?

**MR CHISHOLM QC:**

Well, Your Honour, there are presently undertakings given to the Court, they are not in the bundle but I can hand up copies of the undertakings that have been given in respect of not, the body corporate not interfering with the property that's there and us not, us not taking any steps to develop, that's where it is. There is a holding position in place at the moment.

**GLAZEBROOK J:**

Well that still doesn't say anything to me about whether there's rent on the holding position as it is at the moment and if there is well why not pay the body corporate levies in relation to it?

**MR CHISHOLM QC:**

Well –

**GLAZEBROOK J:**

Because we're assuming for this purpose that the receiver is personally liable for them.

**MR CHISHOLM QC:**

Correct, well Your Honour, the evidence and unfortunately for the purposes of this stay application that ultimately didn't need to be argued, both parties gave evidence of what had been occurring in the last two years and it's perhaps unfortunate that that evidence is not before the Court but it's referred to in both parties' submissions. There have been numerous attempts to try and resolve this. There is reference to the fact that it's impossible to lease and, indeed, the relief that is being sought, the damage that has been suffered is by – that's claimed in the counterclaims which I can take Your Honours to is the inability to actually utilise these, to utilise this space.

**ELIAS CJ:**

So the short position is that until the principal litigation is resolved summary judgment is not appropriate even if we determine that the statutory interpretation point against you?

**MR CHISHOLM QC:**

Correct.

**ELIAS CJ:**

Yes.

**MR CHISHOLM QC:**

Thank you, Your Honour, yes.

**WILLIAM YOUNG J:**

In the affidavits originally filed Mr Gilbert said there wasn't any rent. The witness for the body corporate said well there should be because there are people occupying it, there's a manager and they say they are paying rent. Now, so that was the position as it was in front of the Associate Judge, I think?

**MR CHISHOLM QC:**

Correct.

**WILLIAM YOUNG J:**

And then, as I understand it, when you came to this question of a stay at the Court of Appeal judgment there was the assertion again that no rent was being received, there was the evidence about the interposed entity that had received rent but now, do you say, that there's no rent at all being received by anyone?

**MR CHISHOLM QC:**

There's no rent at all being received. The difficulty, in fairness, the issue of rent or not rent was raised, initially raised in a reply affidavit originally in the summary judgment proceedings. So Mr Gilbert didn't respond to that at the time.

**WILLIAM YOUNG J:**

But if there were tenants there then his response was a bit incomplete. Sorry, his initial assertion would have been incomplete if there were tenants there who were paying another associated entity rent then his assertion of absence of rent was, while no doubt, while probably strictly speaking correct, was incomplete?

**MR CHISHOLM QC:**

Well, I'm not sure whether he made that initial assertion, Your Honour, I'm –

**WILLIAM YOUNG J:**

Well, perhaps he did, I may be wrong, I thought he did.

**MR CHISHOLM QC:**

There was a, the submission was made on that basis, but the, the – we were just referring to his affidavit in volume 2, there, Your Honour, it's 25 October, starting at page 145. The receipt of rent was not an issue at that – it wasn't put in issue in the initial proceedings served, it was an assumption of receipt of rent was made in the

reply affidavit. Just to put this in context to Your Honours that there is colloquial references to the interests of *Finnigan v New Zealand Rugby Football Union* [1985] 2 NZLR 159 (CA) interests or something, there is a first mortgagee. There are two mortgagees. Both mortgagees are independent of each other. The first mortgagee, ultimately, if there was any suggestion of wrongdoing, the first mortgagee's there to protect itself, and –

**GLAZEBROOK J:**
What does that mean?

**MR CHISHOLM QC:**
Well, well, Your Honour, there's –

**GLAZEBROOK J:**
Well, who are these mortgagees, for a start?

**MR CHISHOLM QC:**
Beg your pardon, Your Honour?

**GLAZEBROOK J:**
Who are they?

**MR CHISHOLM QC:**
Well, they're called Aston and Gartmore.

**GLAZEBROOK J:**
And, but who are they?

**WILLIAM YOUNG J:**
Gartmore is the *Finnigan* interests company.

**MR CHISHOLM QC:**
That's right, and I think, I don't think there's evidence of it, but I think the, the first mortgagee is the, Myers, the car person, I think is the, is the individual behind the first mortgagee.

**GLAZEBROOK J:**

So, what was the point you were making, sorry?

**MR CHISHOLM QC:**

Sorry, Your Honour, it was just that there were colloquial references to *Finnigan* interests and the like in the respondent's submissions, which, in my submission, doesn't take matters that far. I'll –

**O'REGAN J:**

So, the first mortgagee hasn't, is acquiescing in there being a receiver appointed by the second mortgagee?

**MR CHISHOLM QC:**

Your Honour, I'd be giving evidence to the bar. He, he, they did acquiesce, but not really, not so much any longer.

**WILLIAM YOUNG J:**

But there isn't another, they haven't taken any enforcement init –

**MR CHISHOLM QC:**

They haven't appointed a mortgagee. If I could –

**WILLIAM YOUNG J:**

They haven't appointed a receiver?

**MR CHISHOLM QC:**

They haven't appointed a receiver, but they're certainly, and again I'm giving from the bar, but they're certainly becoming more proactive in respect of the property itself and clearly they can, they can trump the second mortgagee and –

**WILLIAM YOUNG J:**

But only by going into possession.

**MR CHISHOLM QC:**

Beg your pardon?

**WILLIAM YOUNG J:**
Only by going into possession.

**MR CHISHOLM QC:**
Correct.

**WILLIAM YOUNG J:**
Which they may not want to do.

**MR CHISHOLM QC:**
Well, on my interpretation it would be safer for them to be in possession rather than a receiver if, indeed, the Court of Appeal reasoning is withho – is upheld. All we say, and all I can say –

**WILLIAM YOUNG J:**
So, sorry, I should say you are right. Mr Gilbert did not in his first affidavit say that he hadn't received rent, he simp – he, he listed the affi – the assets that he was in charge of.

**MR CHISHOLM QC:**
Your Honour, Your Honour may have been referring to the, the submissions of the appellant that referred to that, but I think I, I – the issue is simply the prejudice from the delay, that it's inappropriate on a summary judgment basis, and we accept that if we're wrong on our interpretation and this Court finds that we're wrong on that substantive point, and then we're wrong at trial, in respect of the interpretation in particular of the development covenant, then it's difficult to resist, or rely on the delay, but we haven't got to that point. We say it's unjust if we're ultimately successful on the interpretation of the development covenant, that Mr Gilbert should be personally liable in the meantime for Body Corporate levies.

Finally, I just mention the issue of cost and it, and the Court of Appeal found that Mr Gilbert was liable for indemnity costs. The assumption in the Court of Appeal judgment at paragraph 77 was that there was a solicitor-client cost clause in the Body Corporate rules themselves. That was, that's simply not correct as a matter of fact. It seems, though, putting that to one side, that the Court of Appeal's reasoning was, effectively, that if the owner is liable for anything, whether it be under the Act or the Body Corporate rules or, indeed, under a Body Corporate resolution which talked

about resolutions then the receiver should also be liable and, in my submission, that can't, can't be correct. Certainly, a Body Corporate resolution can't be an agreement for the purposes of section 32(5).

Sorry, unless you have any further questions?

**ELIAS CJ:**
No. So, so one outcome if we were with you on the statutory interpretation point is that we could enter judgment in terms of the Declaratory Judgments Act on the point of statutory interpretation, but that summary judgment shouldn't, as sought, shouldn't have been entered. Is that?

**MR CHISHOLM QC:**
That's if you're against me on the interpretation point?

**ELIAS CJ:**
Yes.

**MR CHISHOLM QC:**
Correct, yes.

**ELIAS CJ:**
Yes, thank you. Any further questions? No? No, thank you, Mr Chisholm QC.

Yes, Ms Anderson? Well, it's just on the adjournment, so we'll take the adjournment now, thank you.

**COURT ADJOURNS 11.26 AM**

**COURT RESUMES: 11.47 AM**

**ELIAS CJ:**
Yes Ms Anderson.

**MS ANDERSON:**
In the respondent submission, Your Honours, the Court of Appeal took what was a conventional approach to the interpretation of section 32(5) interpreting, that is, the

text in light of the purpose of that section to conclude that the receiver was liable for body corporate levies.

The statutory purpose is to ensure that the receiver and effectively, if you like, for the benefit of the secured creditor, cannot take the benefit of use, possession or occupation of property in receivership without meeting the incidence of that use and occupation.

The section was designed to remedy the inequity at common law whereby a receiver could permit a company to go into – to obtain the benefit of use, occupation or possession without meeting the obligations associated. The obvious injustice that can arise if that occurs can be seen, as pointed out by the Court of Appeal, that if a receiver can simply go in, take the income off a property but not be liable for occupation is that the secured creditor can effectively be, eventually be, have its security paid off at the expense of the party who would otherwise be receiving the rental, what other payments relating to the occupation of the property.

**ELIAS CJ:**
Well I think we can all see the force of the policy arguments, it's whether really it was achieved on the legislation.

**MS ANDERSON:**
Yes, and so the choice if you like for Your Honours is whether the wording of that section is broad enough to capture the context for the Unit Titles Act and I accept that when one looks at explanatory materials and so on there's nothing that will say, well, a unit title situation is covered by this and that is understandable because the usual situation when this will occur is in the historical situation, if you like, is leasehold and, well real estate, leasehold and we will say chattel leases and so on. But of course if you think about it the Unit Titles Act is really an effort to avoid the difficult situations that arise where you try to have a joint ownership or joint occupation of property through several owners in a, for example, trust lease, several lease, subleases situation. So in a way the Unit Titles Act was intended to make it easier and more efficient for property to be managed in common by sensible approaches like having a body corporate make decisions and so on in place of that complicated situation of several subleases and so on. So, in my submission, it would be somewhat perverse if as a result of that the inequity to which the statute is directed is not encompassed by the wording of the statute.

**WILLIAM YOUNG J:**
Just to break the theme, can you tell us what your position is about rent? What rent hasn't been received or has been received?

**MS ANDERSON:**
Well I can tell you what the evidence is on that to start with which is as I think you saw the evidence of Ms Barreto was there were 25 to 30 licensees and it's on that basis that the Court of Appeal made the decisions it did make and, indeed, in her first affidavit there was a lot of documentation showing that the property had been leased.

At the Court of Appeal hearing, of course there was no attempt of putting any evidence to the contrary and, indeed, I don't believe the body corporate was aware, and in fact I believe at that point there were still people in the premises. As I understand it, at the moment there is not but that's, I believe, a relatively recent development and I can't tell you what efforts have been made to lease that property, it's not within my knowledge. But certainly at the time of the Court of Appeal hearing and the evidence on which that decision was based is that there were, there had been 25 to 30 licensees or occupiers presumably paying rent. What we didn't know, of course, until it came through in the reply affidavit to the stay application was that there was this interposed entity.

So I will come to the wording of the statute and to start with I do want to point out that on its face it is intended to, it seems to be intended to be broadly based because, for example, the subsection which is in stage 3 of the first bundle of authorities. The subsection refers to rent and any other payments. The general word "agreement" is used and you'll see in the balance of the section the word "contracts" used. There's a broad connecting word, it's payments relating to, becoming due under an agreement relating to the use, possession or occupation. The words are, "By the grantor of property in receivership." There's nothing in the section itself as the Court of Appeal noted that determines that this was intended to apply only to property of a third party. To the contrary, it refers to property in receivership generally.

So the initial point I want to make, if you look at context if you like before interpreting the words. The intention seems to be to grab a broad scope here. So if we look at the word "agreement" which is really the crux of this matter, is there an agreement here? Now Mr Chisholm repeatedly said, "There's no need to create an agreement."

Well of course the question is whether there's an agreement within this section, that's the first point and that's why the context is relevant.

In the respondent's submission there is, if interpreted purposively, an agreement by the, buying in if you like to the statutory scheme to, and to thereby take on, if you like, the mutual rights and obligations imposed, and it is a statutory scheme I accept, imposed and created by the statutory scheme.

**ELIAS CJ:**
You mean by accepting the appointment as receiver?

**MS ANDERSON:**
No, no I'm really talking about the acquisition of the property here because the agreement has to relate to –

**ELIAS CJ:**
Yes.

**MS ANDERSON:**
– stepping back and the receiver's accepting of the appointment.

**ELIAS CJ:**
So buying in is agreeing to the charges that are imposed under the legislation?

**MS ANDERSON:**
Yes, it's buying into a construct. This is the scheme of rights and obligations that I am acquiring when I go into a unit title just as if I'm going into other complicated structures where there's several subleases of property which are also actually relatively common. I mean Princes Wharf, for example, there's a sublease structure with common areas that everyone agrees to look after collectively through subleases rather than through unit title. But, nonetheless, it's in my submission sufficient for there to be an agreement that one is acquiring into the statutory scheme.

**GLAZEBROOK J:**
And you're talking about the agreement with the original owner so the trustee, aren't you, at that stage, is that right?

**MS ANDERSON:**

Yes, yes, I'm not talking about the receiver and I accept of course –

**GLAZEBROOK J:**

So you have the trustees agreement to buy into the statutory scheme which includes the payment of levies, is that the –

**MS ANDERSON:**

Yes and the benefit of what they receive for those levies. And the agreement thereby to have, as Your Honour pointed out, agreement to decisions being made by resolution and the right of course if they don't agree with those resolutions to also the right to exercise minority rights that are also provided by the statutory scheme.

So my primary proposition is that that is really the core of the agreement here and purposively it should be covered by the statute and there's no reason, if you like, why it shouldn't and for all the reasons I start out with that it's an appropriate interpretation to take of the statute which is really fundamentally what the Court of Appeal found.

The Court of Appeal alternatively found on the basis of the particular rules of the body corporate here and I think in a sense what I'm saying is for the same reasons that one becomes bound to by contract to body corporate rules, I take that back a step. At the time of agreeing to enter into the scheme you come bound, if you like by the statutory scheme by voluntarily assuming those statutory rights and obligations.

**O'REGAN J:**

So do you rely on the Court of Appeal's interpretation of rule 31(b)?

**MS ANDERSON:**

It's probably my alternative argument as opposed to my primary argument but certainly there is plenty of law as the Court of Appeal referred to that shows that rules of that nature are in the binding and contractual sense and that particular rule on its face does oblige an owner to pay levies, so –

**GLAZEBROOK J:**

Is that only just because it says they are bound to comply with any Act though not explicitly?

**MS ANDERSON:**

Yes, that's right, yes I accept it's not explicit and the Court of Appeal didn't say it was either. I would note to the extent that – I don't necessarily support that a mortgagee in possession would be liable under that particular rule. The rule does say that occupiers include mortgagees and so on but to the extent, only to the extent that it's appropriate as the context applies and I accept that that wouldn't necessarily be incidental to the statute to impose on a mortgagee in possession liability for levies under the provision but I will come in a minute, I think, to how the mortgagee in possession does become liable for levies or must meet levies. So I don't undermine the Court of Appeal's decision on the rule but I think my primary argument is the first one.

**GLAZEBROOK J:**

So the primary argument is that you enter into the agreement to be bound by the statutory scheme by buying the property in the first place. So the owner has an agreement to abide by the statutory scheme?

**MS ANDERSON:**

Yes, and it's a continuing agreement in the sense that so long as you are an owner –

**GLAZEBROOK J:**

Yes.

**MS ANDERSON:**

– what your obligations are. And I accept it is statutory and there's a big point made from the appellant that this is all statutory but I don't think that excludes there being an agreement.

**GLAZEBROOK J:**

But the choice you have in the initial stages is to agree to buy the property?

**MS ANDERSON:**

Yes.

**GLAZEBROOK J:**

Or not buy the property?

**MS ANDERSON:**

Yes, you're saying, well, okay, I'm signing up to this community and in fact I read some material on the background to the Unit Titles Act which is this is all about communities, you're buying into a community and everything that that entails.

The appellant makes – there's quite a bit in the written submission at least on distinguishing unit title from leases and how easy it is to walk away from a lease, if you like. In my submission, that's more theoretical than real because, of course, some leasehold situations are tantamount to ownership really.

So, what a receiver, when you're appointed, does is find out what is the ownership of the property and so on and find out what the obligations the receiver has in respect to that property, and that's what the 14 days is about, it's finding out what the obligations are. It's not to, necessarily, walk away from them, it's to find out what they are and decide what to do about that. So, the stark distinction between leasing and unit title, in my submission, is misplaced.

The appellant also refers to various other statutory regimes. Now, the first point about that is, the question for Your Honours is, is this section covering the situation we're dealing with here, what is the work for the interpretation of this section in the light of this purpose; but I do want to comment on mortgagees in possession, because in section 154 of the Property Law Act, it's at page 78. Page 78 of the appellant's first volume, so 79.

**O'REGAN J:**

So, what section number is it again?

**MS ANDERSON:**

It's 152, sorry, 152 of the Property Law Act at page 79 of the appellant's first bundle. And what that section provides is that a mortgagee in possession must first, and it's in (a), must apply all income first to the payment of all amounts referred to in subsection (2), and if you refer to subsection (2), which is over the page, they include the payment of outgoings and maintenance, preservation of the goods and land. In other words, the income a mortgagee receives, if they're in possession, must first go to, for example, in this case –

**GLAZEBROOK J:**

Where – where does it say – I see, first, secondly, third; yes, sorry.

**MS ANDERSON:**

Yes, so, so it says they are (a), (b), (c) in subsection (1) but then if you go to subsection (2) it's setting out what those first items are.

**GLAZEBROOK J:**

Yes.

**MS ANDERSON:**

So, if a mortgagee was in possession and they were receiving income from property, they must pay for the Body Corporate levies. Now –

**GLAZEBROOK J:**

Where do you get that from; the other outgoings, is it, or –

**MS ANDERSON:**

Yes, yes.

**GLAZEBROOK J:**

Yes, on (b).

**MS ANDERSON:**

And I don't, I don't understand it's contested, but that would be the case if income was being received, the Body Corporate levies would be included among outgoings.

**ELIAS CJ:**

Sorry, where, which one are you referring to, (e)?

**GLAZEBROOK J:**

No, you turn over to page, subsection (2)(b), other outgoings.

**MS ANDERSON:**

So, if the mortgagee is in possession –

**ELIAS CJ:**

I see.

**MS ANDERSON:**

So, if the mortgagee was in possession, receiving income, they can't simply sit there receiving income but not meeting the obligations that, that go with the, the taking of that income. Now, the appellant rightly says that that's only if income's being received, and so receiver, in that sense, is, would be in a worse position, they say, but two things about that. Of course, the converse is also true, and a mortgagee who has the, has in respect of a security like this the option to either appoint a receiver or go into possession is in a better position, if you like, to appoint a receiver and receive the income without meeting the levies than going into possession, because if they go into possession and receive the income they're going to pay the levies.

So, we're, as the appellant says, well, the receiver's in a worse position, in fact, it's giving the mortgagee the ability to, as I said at the start, to have a receiver go in, take the income and pay off the security and waltz off into the sunset, whereas if the mortgagee was in possession they could not do that.

**ELIAS CJ:**

But it is a different provision, isn't it, making the receiver liable for the amount and saying that the mortgagee has to apply the receipts?

**MS ANDERSON:**

Yes, it is different, and I say, at the outset, in a way, in my submission, we can't expect there to be a totally cohesive set of provisions relating to all the various controls, if you like, because we don't have that in New Zealand, so it is different, I accept, but I'm just saying that there is this inconsistency whichever you look, but in my submission it's more appropriate for the receiver to be liable because, of course, usually, unless there's some un-commercial arrangement like the present, usually, income would be sufficient to at least cover the outgoings.

I'll go on and talk about the, I – in my submission the primary issue's agreement, because I'll go on to talk about whether the levies relate to use, possession or ownership, but in, given the word relating to, I submit that it's a no brainer, if you like, that that part of the limb, in respect of this section, is met. Levies are, and an

agreement to pay levies, if you like, is by definition relating to the use, possession or occupation of property.

**GLAZEBROOK J:**
What about the argument it's just ownership?

**MS ANDERSON:**
That it's just ownership; well –

**GLAZEBROOK J:**
In that you pay them whether or not you use, occupy or possess? Well, I suppose you possess if you're an owner.

**MS ANDERSON:**
Well, you do, well, you get the benefit from it. That's the point. A unit title owner continues to get the benefit of, you know, the payments for insurance and so on and the receiver, therefore, has the benefit of the Body Corporate and the other unit titles owners preserving their security at the expense of the unit – the other unit title owners who are charged with paying the full amount. So, yes, so they may not be in physical possession, but they're still getting the property. The benefit of the, the levies, the payments for which levies are made.

And really, the ownership issue is more about whether there's an agreement or not, because if there's agreement, what we're talking about in that second limb is whether the agreement relates to use, possession or occupation. In my submission, these levies clearly do.

And, in fact, I haven't got anything further to say on that, that relating to issue, unless you have any – you know, the type of payments, this, that relate to use, possession, occupation, unless you have anything further you want to ask me about that.

**ELIAS CJ:**
Well, is there any other contextual indication of what those words mean in the statute? Is it used –

**MS ANDERSON:**
In that statute?

**ELIAS CJ:**

Yes.

**MS ANDERSON:**

No, no, because it – not that I'm aware of, because this specific provision is directly meeting that specific mischief, if you like. And the only context is the mischief, in, for that.

**ELIAS CJ:**

And there's no definition, we don't have a definition section of any of those.

**MS ANDERSON:**

Well, property in receivership is defined broadly, property is defined broadly and property in receivership is defined as –

**ELIAS CJ:**

But possession isn't?

**MS ANDERSON:**

No, I don't believe so.

**ELIAS CJ:**

It would be odd if it were.

**MS ANDERSON:**

In fact, I think I'll move on to the relief provision, unless there's anything further on the substantive interpretation point.

The Court of Appeal held that there was no arguable case for relief under section 32(7), first because the receiver had not made an application, and, I make that point but I can't accept that you may not decide on that ground. Secondly, that there was no possibility of the receiver claiming a set off based on the claim by QSTML and that's, really, because there were insufficient nexus between the receiver's liability and that potential claim which, of course, is the basis for setoff and that there was no evidence, no factors in the evidence that could arguably lead the Court to exercising its discretion.

Fundamentally, the relief provision, in my submission, although on the face of it a wide discretion, is to be interpreted and applied by reference to, again, the mischief behind it so that the factors relevant relate to whether, as a matter of fact, the party is receiving the, that is, the receiver in light of the secured creditor is receiving benefits from the property.

The appellant raises the historic, well, the present litigation but in respect to the redevelopment covenant. As a matter of fact in respect of that what you need to be aware of, in my submission, is that the, there were proceedings on foot brought by the company, the trust at the time the receiver came into, took appointment as receiver which the receiver then allowed, if you like, to lapse, failed to place security for costs and so on. So proceedings that could have, if you like, brought this to a head were abandoned by the receiver. So in my submission it's not for them to say, well, “Poor me.” The first action –

**WILLIAM YOUNG J:**
Was it abandoned by the receiver or by the security holder?

**MS ANDERSON:**
Well the receiver was managing the secured assets so the secured creditor clearly didn't want to put up the security for costs. So when the receiver now says, well, “I haven't been able to sell this property,” and so on. The first thing the receiver appears to have done, if you like, is to abandon proceedings and I think that needs to be taken into account as to whether there is any factual basis for any relief under this section.

But secondly, the receiver and the secured creditor a bit behind him, does continue to get the benefit of the levies that are payable. The other unit holders are preserving the value of the security by ensuring by, you know, all the things that levies are paid for while the receiver, that is the secured creditor, receives the benefit for that. The delay issue that's been raised is completely undermined by my point about abandoning the proceedings. But in any event doesn't, in my view, go to the crux of it which is, as I think Justice Glazebrook might have said, the issue is whether there is rent being, there is an ability to raise rent from this property and there continues to be an ability to raise rent from this property. Well there’s no evidence that, well we don't know what attempts are made to obtain rent from this property.

But, in the meantime, benefits are being received without being paid for and there's nothing, in my submission, that attaches to that discretion in terms of the mischief of the Act which would justify granting relief.

**ELIAS CJ:**

Is it necessary for your argument that there's the ability to obtain rent for the property. I'm just thinking about how – the extent to which you are tying that as the purpose of the legislation. I mean presumably on your argument it's simply the fact of the receiver being in possession of the property?

**MS ANDERSON:**

Yes, well I think that's probably right but I was just meaning something that Justice Glazebrook said but that's right, they're still getting the benefit of the preservation of the security by the efforts taken.

**ELIAS CJ:**

And is it the case, I'm sorry, I should know this, but is it the case that the receiver is rightly characterised as being in possession of the property?

**MS ANDERSON:**

Well the receiver himself is not because the receiver is the agent of the company –

**ELIAS CJ:**

Yes.

**MS ANDERSON:**

– but the company is in possession and that's actually the test under the section that it's the company being in possession, occupation of the section and the company certainly is.

**ELIAS CJ:**

Well, yes I'm just wondering about the receiver being liable in those circumstances.

**MS ANDERSON:**

Well the company and therefore the secured creditor is still receiving the benefits. The receiver would never be in actual possession that's why we need this section because a receiver is the agent of the company and so whether or not the receiver is

liable, sorry, in possession is I don't think the correct issue, with respect, because the whole point of this section is the receiver isn't in possession.

**ELIAS CJ:**

Well it's just that it's the statutory language, isn't it?

**MS ANDERSON:**

Well the statutory language – I will just go back to section 32 –

**GLAZEBROOK J:**

Is a use occupation by the grantor.

**MS ANDERSON:**

Yes, which is the company.

**ELIAS CJ:**

By the grantor, yes, yes.

**MS ANDERSON:**

So it is the grantor that's in use –

**ELIAS CJ:**

Yes.

**MS ANDERSON:**

– possession or occupation.

**ELIAS CJ:**

Yes.

**GLAZEBROOK J:**

And when you say “company” it's the trustee?

**MS ANDERSON:**

Yes.

**GLAZEBROOK J:**
Yes.

**MS ANDERSON:**
That's the grantor.

**GLAZEBROOK J:**
Yes, I'm just –

**MS ANDERSON:**
Yes.

**GLAZEBROOK J:**
I'm double checking that that was…

**MS ANDERSON:**
So in my submission there is no basis for the relief, there certainly isn't any evidence before you and I know there's been attempts from the Bar to give evidence and there's evidence on the stay application but on the actual evidence that was before the Court of Appeal there simply isn't any basis for relief.

And I should also say, of course, the receiver isn't stuck being a receiver. The receiver can resign and indeed a receiver can ensure to obtain an indemnity from the secured creditor. So Mr Gilbert isn't forced to remain there.

And the only other issue was the interest in costs issue and I simply comment on that, yes, the Court of Appeal awarded solicitor client costs and 10 percent interest on the basis of the body corporate resolution. Under the Unit Titles Act the body corporate is specifically empowered to charge interest and this resolution was to the effect that this is the interest we're charging. In my submission, that's really just the imposition of those costs and interests by the Court was really kind of incidental to the base liability of the company and therefore the receiver for the levies. So the view that, well how can there be an agreement in terms of a body corporate resolution or so on isn't really the issue. This was really the Court of Appeal saying, there's the base liability, there's a flow-on incidental liability to pay interests and costs and we award them.

Unless you have anything else for me I think that's all I've got to say to you.

**GLAZEBROOK J:**

We were taken to the particular aspects of the levy that were at issue and especially the more long-term aspects of it. What do you say about either under the relief section or otherwise that it's only the actual costs of possession that the particular time that should be taken into account rather than the more long-term costs?

**MS ANDERSON:**

Well I would endorse, if you like, what Your Honour said yourself to Mr Chisholm which is that in the context of rent, those kind of payments are probably bundled up with the rent and, equally, if they were specific provisions in a lease that you must pay these costs I would regard those as relating to use, possession or occupation. So in my submission, they nonetheless relate to use, possession or occupation and then, nonetheless, something for which the receiver is liable under the provision.

**GLAZEBROOK J:**

Thank you.

**ELIAS CJ:**

Thank you, Ms Anderson. Yes Mr Chisholm, do you want to be heard in reply?

**MR CHISHOLM QC:**

Your Honour, first the agreement that it primarily relied upon is an agreement to buy into the statutory scheme. The first question, asked rhetorically, is who the agreement is with. When a potential purchaser comes along the only agreement that that purchaser or potential purchaser has is with the vendor. There is no reason, in my submission, to imply an agreement, essentially with third parties. What the alleged agreement behind the statutory scheme is, is that it's an agreement that's alleged to be made with third parties, namely, the body corporate, and the existing owners, and such an agreement is simply unnecessary because of the circular nature of buying into a statutory scheme. The statutory scheme itself expressly defines the obligations, expressly defines the rights of enforcement, and the obligations of the owners and the Body Corporate themselves.

The – my friend referred to the leasehold situation. At the end of the day, while section 32(5) will make a receiver liable and if we take the neutral position of a

lessee, the lessee still has his or her own rights, contractual rights, so if the lessee is unsatisfied he or she can still terminate the lease, so those contractual rights are always there in any event, and that's what the realistic situation is in respect of a leasehold situation. Clearly, a receiver will make a judgment call to preserve the asset in the meantime to ensure that the value is there if it's worth keeping.

The mortgagee in possession issue is a slight side issue, but I do dispute, in reflection, on my friend's interpretation of section 152 of the Property Law Act at page 79 of volume 1 of the appellant's bundles. I'm – it's clear and it's common ground between us that a mortgagee in possession is only liable in respect of income, but the provisions in subsection 2 are only, will only have liability to the extent that the mortgagee has actually chosen, voluntarily chosen to pay them. Now the starting words, the amounts are amounts reasonably paid or advanced at any time by the mortgagee. So, for them to get possession, to get priority under 1(a), the mortgagee must first choose to pay those sums and one can see under 1(a) –

**GLAZEBROOK J:**
So they could decide just not to?

**MR CHISHOLM QC:**
Correct.

**GLAZEBROOK J:**
They could not pay the rates or other outgoings, is that the submission?

**MR CHISHOLM QC:**
Well, they're obliged to pay the rates separately, but one can see under 1(a) that, essentially, it's for the benefit of the mortgagee who chooses, because then the mortgagee also secures interest at his mortgage rate on the sums that he's paid. So, it's effectively the mortgagee making the choice to pay those sums and, indeed, it may have been a second mortgagee that's paid those sums, as well, but they ultimately get priority. But the point is with that, in any event, it's only out of income.

The third point in respect, and it's a point Your Honour Glazebrook J raised in respect of the liabilities or the expenses that are covered by levies. It's not only those long-term levies that are included in the budget.

**GLAZEBROOK J:**

What about subsection (1), a mortgagee in possession must apply all income first to the payment of those amounts?

**MR CHISHOLM QC:**

Yes. First of those are payments –

**GLAZEBROOK J:**

Well, it says it must do so, so why do you say it just has a choice not to pay the outgoings?

**MR CHISHOLM QC:**

Because reading first there payment of all amounts if any, then 2, subsection (2) is the amounts are amounts reasonably paid or advanced at any time.

**GLAZEBROOK J:**

Well, that only says that if you pay some absolutely idiotic amount they're not going to have priority and you do it at your own peril, doesn't it?

**MR CHISHOLM QC:**

Well, they're – with respect –

**GLAZEBROOK J:**

It doesn't say the amounts that the, the mortgagee decides to pay. It actually says they must pay it, in subsection (1).

**MR CHISHOLM QC:**

Well, in my submission, the – one still must have regard to the, the words in subsection (2). One is conce –

**GLAZEBROOK J:**

Well, yes, because if you pay something unreasonable you won't have priority. So, you're only allowed to pay amounts that are reasonable for insurance, so you couldn't, you couldn't insure it for $5 million dollars and say, "I've paid –

**MR CHISHOLM QC:**

Well –

**GLAZEBROOK J:**

Or say that, "I actually drove there in five Rolls Royces and you should pay me the hireage fee of my five Rolls Royces under (b)." Doesn't it, see –

**GLAZEBROOK J:**

It's a bit odd, isn't it, because subsection (2) clearly refers back, it's not, it doesn't do anything except as Glazebrook J says, emphasise that these matters must be reasonably paid, but where do they come in under subsection (1)?

**GLAZEBROOK J:**

Under subsection (1)(a).

**MR CHISHOLM QC:**

(1)(a) –

**ELIAS CJ:**

Referred to in subsection (2), of course, yes.

**GLAZEBROOK J:**

Yes, so they must pay those.

**GLAZEBROOK J:**

Yes, I see, yes.

**GLAZEBROOK J:**

But they only, they can only be reasonable amounts and can't be the five Rolls Royces.

**ELIAS CJ:**

Yes, exactly I would – yes.

**MR CHISHOLM QC:**

Well, in any event, there's a difference between us, but in any event, for present purposes it's common that it's under, or it can only be from all income, so it's not an abs –

**GLAZEBROOK J:**

Well, is there a difference, are you still maintaining that "must" means, "Must pay those amounts" means "if it feels like it"?

**MR CHISHOLM QC:**

Well, the commencing words are "amounts reasonably paid or advanced" –

**GLAZEBROOK J:**

Well, it couldn't be suggested that it, if outgoings includes Body Corporate levies, it couldn't be suggested that it wasn't reasonable to pay those, could it?

**MR CHISHOLM QC:**

I accept that, Your Honour.

**GLAZEBROOK J:**

All right.

**MR CHISHOLM QC:**

In any event it's from income received that's relevant, which is, which begs the question, obviously, if there is a liability there is a liability for a mortgagee in possession. The, Your Honour asked –

**GLAZEBROOK J:**

Well, it takes away from your argument so the only difference is that it's only from income received, but there is certainly an argument that might say, well, it's a very odd building if the outgoings are going to be higher than the income received, usually, isn't it?

**MR CHISHOLM QC:**

Well, but it would be a question of fact, then. There is not an absolute –

**GLAZEBROOK J:**

No, no, there's a limit, but it wouldn't be, it would normally be expected that your income, whatever it is, from the possession of property, would cover outgoings.

**MR CHISHOLM QC:**

Well, one would hope it does.

**GLAZEBROOK J:**

Yes.

**MR CHISHOLM QC:**

But that's a question of fact and here we have an insolvent situation.

**GLAZEBROOK J:**

No, I understand what your submission is on that.

**MR CHISHOLM QC:**

Yes.

**GLAZEBROOK J:**

We're looking at a more general interpretation, though.

**MR CHISHOLM QC:**

Well, one would, wouldn't own property if, if –

**GLAZEBROOK J:**

Exactly.

**MR CHISHOLM QC:**

- rental was less than outgoings, or for income.

**GLAZEBROOK J:**

Well, unless one was hoping for a major capital gain in some way.

**MR CHISHOLM QC:**

True, true. I think Your Honour allies, or one of Your Honours asked for possible context in respect of these words that are used and the only other section that refers to it, which makes it clear in my submission, is the, the company's acting respective administrators and if I can take you back to that, that's at section – page 74 of the same bundle and – sorry, 73.

**GLAZEBROOK J:**

Can I just, because I think we've all been getting a bit het up with the receiver being in possession, but actually it's the grantor that's in possession, does that mean anything more than being in it?

**MR CHISHOLM QC:**

Well –

**GLAZEBROOK J:**

And if you're renting it as the grantor, you're using it.

**MR CHISHOLM QC:**

Well, use is different to possession, although both are co –

**GLAZEBROOK J:**

No, I understand that, but there, the terminology is, but it's only relating to the grantor not the receiver?

**MR CHISHOLM QC:**

Correct. But it's not, it's, it's –

**GLAZEBROOK J:**

Well, so why, why isn't the body, the trustee company in this case, in actually where is it, its use, possession or occupation? In fact, isn't it in all three? At least up until recently, because it was renting it, it must've been using it.

**MR CHISHOLM QC:**

Well –

**GLAZEBROOK J:**

It possesses it and now it's probably occupying it because it owns it.

**MR CHISHOLM QC:**

Well, it's whether possession, whether possession is automatically, or whether possession automatically flows from ownership.

**GLAZEBROOK J:**

Well, it's difficult to see why it wouldn't, unless you have given away your possessory rights in some manner to a lessee.

**MR CHISHOLM QC:**

But, with respect, Your Honour –

**GLAZEBROOK J:**

And then you're using it.

**MR CHISHOLM QC:**

It begs the question as to why ownership wasn't included. Possession means something –

**GLAZEBROOK J:**

Well, it might, but I'm just asking you why an owner isn't, if they're renting it, using it, if they've got a shop there, using it, if they've got a shop there, possessing it, and if they've got a shop there, occupying it?

**MR CHISHOLM QC:**

If the owner is renting –

**GLAZEBROOK J:**

Well, they're using it.

**MR CHISHOLM QC:**

They would be using it, I accept that.

**GLAZEBROOK J:**

So why doesn't it come within those words, because it's the grantor we're looking at, not the receiver.

**MR CHISHOLM QC:**

Sorry, Your Honour, when I've been referring or making the argument it's really on a hypothetical basis. It is accepted that for a period –

**GLAZEBROOK J:**

No, no, if they are not using it they are in possession of it. We're talking – because why can't there be? Nobody else is in possession of it and if you're an owner you're in possession of it. It doesn't mean physical possession, does it?

**MR CHISHOLM QC:**

Well, there must be something more than ownership or it must be distinct from ownership.

**GLAZEBROOK J:**

Well, why? Because ownership's not mentioned or?

**MR CHISHOLM QC:**

Well, correct.

**ELIAS CJ:**

Is there a –

**WILLIAM YOUNG J:**

Doesn't it normally mean right to possession?

**ELIAS CJ:**

Yes, it's right to possession.

**WILLIAM YOUNG J:**

Doesn't possession normally encompass a right to possession?

**ELIAS CJ:**

And isn't it defined – is it defined in the Property Law Act?

**MR CHISHOLM QC:**

Possession?

**ELIAS CJ:**

Yes, as right to possession.

**GLAZEBROOK J:**

I couldn't see it. I haven't actually –

**ELIAS CJ:**

I thought it was –

**GLAZEBROOK J:**

I had the Property Law Act up, I'll get it up again.

**ELIAS CJ:**

Well I've always understood possession to be right to possession.

**MR CHISHOLM QC:**

But it's accepted that the point that it is the grantor as opposed to the receiver, it's clear that that's accepted.

**ELIAS CJ:**

Yes, yes, it was me that had sort of forgotten that.

**GLAZEBROOK J:**

Well no, I think some of the submissions have perhaps forgotten that because it was looking at who had the – because what you were saying is who had the right, who had the obligation to pay the levy? Well there's no doubt that the owner had the obligation to pay the levy, that's the grantor. Now I take the point about the obligation coming out of the statute not coming – but – out of the agreement and obviously we have to deal with that point.

**MR CHISHOLM QC:**

But it's defined as an incident of ownership not possession.

**GLAZEBROOK J:**

No, no and I understand that, I certainly understand that argument.

**MR CHISHOLM QC:**

Just context for these words because the supporting material and again it's the supporting material which has, I accept, limited interpretation value but the Law Commission Reports and the various Parliamentary material reinforces that it is the

rental situation. The only other reference that we could find that utilised the same words was in the Companies Act in respect of administrators and that's included in the –

**GLAZEBROOK J:**

Yes, you were going to take us to that.

**MR CHISHOLM QC:**

I'm sorry I've lost my place. It was at page 75, 74/75. Sorry, starting at 73. And again you're seeing the administrator is personally liable – this is at the bottom of page 73 – relating to the use, possession or occupation. And again, analogous to the grantor it's by the company, so same situation. And at the top of the page there, "The administrator is liable for rent and other payments that accrue in the period," so same reasoning. But in the context of understanding or defining what property is in issue, we see in 239ADJ at the bottom of page 74 reference to a non-use notice. There's no such thing in the Receivership Act but it's absolutely clear in the context of the receiver's liability under 239ADI that one is talking about third party property. You see, for example, in 2A it's given by the administrator to the owner or the lessor of the property. So again, same wording contemplates a third party owner of the property in question.

**ELIAS CJ:**

It's not clear to me that that's so, that it's third party.

**GLAZEBROOK J:**

Well it might be under 239ADJ because you can't give a non-use notice to yourself but it doesn't necessarily mean that if you are using it yourself under 239ADI as an administrator that you're not liable, does it?

**MR CHISHOLM QC:**

In my submission though, Your Honour, gives some context to the –

**GLAZEBROOK J:**

Well it may just say that if it is a third party you can give a non-use notice and not use it and then a not liable but if you are using it yourself.

**MR CHISHOLM QC:**

Well –

**GLAZEBROOK J:**

See, what say the company is actually, the administrator is actually running the shop from there, they're using it?

**MR CHISHOLM QC:**

Then he or she couldn't give a non-use notice in that case.

**GLAZEBROOK J:**

Well no that's – does that matter?

**MR CHISHOLM QC:**

Well the – it must matter in my submission. It distinguishes the definition of use.

**GLAZEBROOK J:**

Well it depends what other payments mean, whether you relate rent, other payments are relating to the rental of a property or whether you just say other payments relating to the use of a property which would include outgoings like a body corporate levy, wouldn't they? And yes of course you can't give yourself a non-use but then you wouldn't get, you wouldn't expect to be not liable for – if you were using it you would expect to be liable for the outgoings, wouldn't you?

**MR CHISHOLM QC:**

Well in my submission it would be surprising if the legislation objectively intended again in this situation with an administrator that he would be obliged, he or she would be obliged to actually somehow get rid of or dispose of property and even a lesser period of time, seven days, because it's not an administrator's job.

**GLAZEBROOK J:**

No doesn't have to get rid of it they just have to pay the outgoings if they're using it.

**MR CHISHOLM QC:**

But – well in my submission, there would be no logical reason why that particular liability would be given some sort of priority. And it's not an administrator's job to sell

property it just says essentially there's an automatic liability for some outgoings or some liabilities but not others.

**GLAZEBROOK J:**
Well liabilities if you're using it.

**MR CHISHOLM QC:**
Essentially, my submission and other payments will relate to matters colloquially such as hire purchase arrangements, licence fees and the like in the nature of rental.

Now in respect of the relief, my learned friend referred to the proceedings on foot at the time of the appointment of receiver. It's – there is no evidence of those proceedings but there are proceedings on foot but they are not proceedings that the receiver or indeed the mortgagees wanted to adopt at that time. The nature of the proceedings were such that they were not prepared to adopt those proceedings. So merely the fact of those proceedings can't be held against them.

**WILLIAM YOUNG J:**
Do they cover the same ground?

**MR CHISHOLM QC:**
Well they covered all sorts of things like claims against body corporate members and all sorts of allegations which the receiver and the mortgagees resolved couldn't be sustained. They were significantly broader than the issues in this proceeding. There were large numbers of defendants that were joined to the proceedings so, again, quite broader than here.

**WILLIAM YOUNG J:**
Well I think we joined all the tenants, they are all the unit owners, all the shop owners.

**MR CHISHOLM QC:**
I think, no I think they may have joined every committee member, body corporate committee member and there were large numbers of defendants, from memory.

**WILLIAM YOUNG J:**
There were 30 or 40 defendants, weren't there?

**MR CHISHOLM QC:**
I don't know if there were that many but there were quite a few. But in any event, those proceedings weren't specific simply to resolve the issues that need to be resolved.

Ultimately, in my submission, if the defendants or the appellants in this case are correct on the interpretation of the development covenant it would ultimately be unjust in the meantime that Mr Gilbert should be liable for the effective delay. There's reference to benefit as a matter of fact that my learned friend said, "We don't know whether we can rent this space." It's pleaded by the body corporate that they've actually revoked the licence for the space in question so it's their position that we're not legally entitled to rent the space. That again is one of the issues that needs to be resolved.

**GLAZEBROOK J:**
What about – so you think it's unfair that if there is a liability that, for instance, Mr Gilbert doesn't participate in ensuring the building in the meantime?

**MR CHISHOLM QC:**
Well –

**GLAZEBROOK J:**
Because that's what, that's the sort of thing that levies cover, isn't it?

**MR CHISHOLM QC:**
But that liability will ultimately be covered on sale and that's –

**GLAZEBROOK J:**
But in the meantime, well that's assuming that it doesn't accrue to such an extent over the proceedings that one can't recover it but in the meantime the other parties, aren't they, or the other members of the body corporate are actually paying for insurance for the benefit of ultimately of the purchaser, the receiver and the secured creditors?

**MR CHISHOLM QC:**
And they've also resolved to bring an assertion of rights which may turn out to be incorrect.

**GLAZEBROOK J:**

Well, it may, but then that just means that the, well, the trustee, I suppose, isn't liable for that.

**MR CHISHOLM QC:**

Sorry, the –

**GLAZEBROOK J:**

Well, it's, we're getting confused with receivers and who's actually liable in respect of it. The only party that can actually be liable is the trustee, isn't it?

**MR CHISHOLM QC:**

It will always be liable.

**GLAZEBROOK J:**

Yes.

**MR CHISHOLM QC:**

It's liable in any event.

**GLAZEBROOK J:**

Yes.

**MR CHISHOLM QC:**

We're only concerned about personal liability. Whatever happens, the owner, the trust will still be liable in the meantime. There is no doubt about this. This is only, we're only concerned about Mr –

**GLAZEBROOK J:**

But in terms of the policy of the section, isn't it that the receiver and, ultimately, the person that they're not acting for but is the secured creditor, should not get the benefit of rent free of outgoings?

**MR CHISHOLM QC:**

Yes, but clearly there are, there are circumstances that justify a departure from that, and that's what subsection (7) recognises.

**GLAZEBROOK J:**

Well, there are, but why, in this case, should the secured creditor get the benefit, say, of insurance without paying for it?

**MR CHISHOLM QC:**

Well, the secured creditor isn't getting the benefit. We're saying –

**GLAZEBROOK J:**

Well, they are, because the building's being insured.

**MR CHISHOLM QC:**

Well, but it may be getting the detriment of not selling this property and ultimately the secured creditor's not being paid out in full because liabilities appear accruing. The accruing of liabilities is not assisting, or the delay in this action is not assisting the secured creditors because ultimately, one way or another, levies will have to be accounted for.

**WILLIAM YOUNG J:**

Unless the property is not worth the amount of the levies.

**MR CHISHOLM QC:**

Well, if, well if that's the case then everyone loses. But there is no benefit to the secured creditors or the receivers in resolving, in simply delaying matters indefinitely.

**O'REGAN J:**

Well, why didn't they institute proceedings earlier if they wanted to get it resolved?

**MR CHISHOLM QC:**

Well, the receiver only went in there in July 2013, I think, June or July 2013. The proceedings were issued against him in, I think, in August 2013 and they, ultimately, provided a means of obtaining interpretation of the covenant.

Other issues have arisen since then that have resulted in the counterclaims, for example, issues in respect of the roof and the like, but they're relatively new.

So, ultimately there is no benefit for Mr Gilbert personally, and that's all we're concerned about. We accept that the levies will ultimately need to be paid or at least

there's a liability accruing, but for the mortgagees and Mr Gilbert there is simply no benefit coming from this delay and we submit that if we're correct in our interpretation, we shouldn't be penalised for that and that's an issue that, we say, shouldn't be resolved in summary judgment; should be received at trial. So, unless Your Honours have any further questions?

**ELIAS CJ:**

No, thank you. Thank you, counsel, for your submissions. We'll reserve our decision.

**HEARING CONCLUDES**