IN THE SUPREME COURT OF NEW ZEALAND SC 20/2013

[2013] NZSC Trans 29

BETWEEN **CHUAN WU**

Appellan

AND **BODY CORPORATE 366611**

First Respondent

THETA MANAGEMENT LIMITED

Second Respondent

Hearing:	7 November 2013
Court:	Elias CJ McGrath J William Young J Glazebrook J Tipping J
Appearances:	J D Rooney for the Appellant N R W Davidson QC and G R Burgess for the First Respondent S C Price and D Cross for the Second Respondent

---

CIVIL APPEAL

MR ROONEY:

If your Honours please, Rooney for the appellant.

ELIAS CJ:

Yes, thank you, Mr Rooney.

MR DAVIDSON QC:

Chief Justice and your Honours, I appear with Mr Guy Burgess for the respondents and cross-appellants.

ELIAS CJ:

Thank you Mr Davidson, Mr Burgess.

MR PRICE:

Your Honours, Price and Ms Cross representing the second respondent, which is Theta Management.

ELIAS CJ:

Thank you, Mr Price and Ms Cross.

MR PRICE:

I should advise that the submissions filed by the respondents are adopted by us and so I don't actually anticipate having anything to add to what Mr Davidson will say.

ELIAS CJ:

All right, thank you. Before we get underway, Mr Davidson, I should express apologies to you for the fact that your memorandum was not referred to any of us and so you had very late notice. That was because the Judge who was assigned to manage things was Justice Chambers and I'm sorry, we overlooked substituting another Judge to receive that material.

MR DAVIDSON QC:

Thank you, Ma'am. We did get there eventually.

ELIAS CJ:
Yes, thank you.

Mr Rooney, we think that the sensible way to proceed is to hear both the appeal and cross-appeal together, so we'd ask you to address that in your opening submissions, followed by Mr Davidson.

MR ROONEY:
Thank you, Ma'am.

I have to apologise at the outset that I'm handicapped by the non-use of my right arm.

ELIAS CJ:
Yes. Well, please take your time.

MR ROONEY:
But more so by my glasses having broken about five minutes ago.

ELIAS CJ:
We can all relate to that. Except for Justice Glazebrook.

MR ROONEY:
The irony is that I have a right-hand wing only.

TIPPING J:
I once appeared in front of Mr Justice Roper with a broken arm, and he said, "You'll get no sympathy for that."

MR ROONEY:
No harm in trying.

Well, I'd like to start really by confronting the – essentially it's the contention on the cross-appeal that the effect of the decision of the Court of Appeal is that there is an entirely different basis for liability. Mr Wu's position, in fact, is that there is in fact no different basis for liability in nuisance, but the effect of the Court of Appeal decision is that there is a different basis for calculating damages.

Now, at the outset I think in order to reinforce that, it's probably appropriate to start with the Court of Appeal decision, which your Honours will find at page 91 in the white volume of the case on appeal.

ELIAS CJ:

Mr Rooney, for my part I would be assisted if you could – I have some doubts as to the cause of action, whether the claim was properly one of nuisance. I'm not sure whether you're able to deal with that, but because it ties into the question of damages, which is the purpose of your appeal, I think we would be assisted by some explanation of why you say that this is a claim in nuisance.

MR ROONEY:

Well, Mr Wu would contend that this is classic nuisance in the sense that nuisance is regarded as, is defined as, I suppose, an unreasonable interference with rights and property. The cases which one comes across in nuisance, typically, are things like the emanation cases, fumes, light, that kind of thing. What we have in this case is a direct blocking, essentially, of access to land. In that respect, although it is unusual, possibly even unique amongst the cases on nuisance, it fits directly into that basic definition of nuisance if the facts are accepted, because there was a prohibition on access to property which Mr Wu and the others were the registered proprietors of.

TIPPING J:

Historically, and it may not be so any more, there was a material difference between wholly excluding someone and partially impeding or interfering with their rights. The former was a different cause of action from nuisance. Now, I, too, will need to be helped as to whether that is not still the position. It may

not make a great deal of difference because your pleading was trespass/nuisance, which is a little unconventional, but it may let you in on a basis that is correct in law. But as the Chief Justice says, it may have a material influence on damages. So I agree we need to clear this up. And to simply say that the classic definition covers this situation but there's no case showing that immediately puts one on guard.

MR ROONEY:

Well, the factual basis for it is that the building could not be accessed at all without the access cards and in particular the lifts, which gave access to the individual floors where the units were located, could only be operated by these cards, so essentially the same cards operated the lifts as in a hotel operate the lift and give you access to the, to the actual unit.

ELIAS CJ:

I don't think that there's any question on the findings of fact of exclusion. It's really what the consequence in law is and it may well be that the matter is not, in the end, material in terms of pleadings but it may effect the damages available what tort you're alleging.

TIPPING J:

And, indeed, there is a school of thought which would suggest that you're bettering damages by a tort analogous to trespass or something like that or a tort of recaption of land than you are at nuisance so I would have thought with respect you might be wanting to explore that.

MR ROONEY:

Well, the, the trial Judge expressly reserved the position on the trespass cause of action because he had, had upheld the nuisance cause of action so –

WILLIAM YOUNG J:

He formally dismissed it, didn't he, but he said if he hadn't allowed the claim in nuisance he would probably have wanted further evidence.

MR ROONEY:

Yes, yes, that's quite, that's precisely what he said. I don't think he formally dismissed it. I think he actually left it alive, yes.

WILLIAM YOUNG J:

I think he did actually. I think – thinking from the cost decision, I think he did say he'd dismissed it.

MR ROONEY:

Okay, well, I'm not sure that that's quite what the, the substantive judgment held.

ELIAS CJ:

You did indicate that you were intending to start with the Court of Appeal judgment –

MR ROONEY:

Yes.

ELIAS CJ:

But it may be that, at some stage, not necessarily to throw you off the sequence you had looked at, it will be necessary to go to the High Court determination both for the findings of fact and for how the causes of action were treated.

MR ROONEY:

Yes, yes, well, I will come back to the High Court judgment subsequently, so perhaps if I could move on now and that's something that can be addressed perhaps once I've had a few moments over the break to gather my thoughts and have a look at that.

ELIAS CJ:

Yes, all right.

TIPPING J:

I suggest you have a look at Todd on Torts on chapter 9.3 in contrast to Todd at 10.2.1, I think it is where the learned author who knows something about torts seems to draw the very distinction that's been put to you.

MR ROONEY:

All right, thank you, Sir, that's helpful. All right, well, if I could just continue with an analysis of the Court of Appeal decision. The first part of the decision up to paragraph 20 deals with the facts, which I won't go into at this point, but then at paragraph 24 on page 100 of the bundle, the two competing positions of the respective parties are set out. Mr Wu subparagraph (a) sees the issue of one of individual property rights that neither the Body Corporate nor Theta had a right to exclude him from his individual unit by denying access to common property through which he needed to reach his unit and, on the other hand, the Body Corporate and Theta, if I may just refer to them collectively as the Body Corporate for convenience, framed the issue as one of compliance with the Body Corporate's obligations to maintain adequate insurance and so on. And then at paragraph 25, the Court analysed the reasoning of the trial Judge and further on at paragraph 33 considered rule 3.10 of the Body Corporate's rules.

It then went on to consider the evidence of Mr Chen for the respondents and then at paragraphs 52 and 53 on page 116, 117 sorry. At the end of paragraph 52, the Court of Appeal said, "The first question is whether the Body Corporate and Theta unreasonably presented Mr Wu from accessing his unit thereby interfering unreasonably with his proprietary interest."

And then we move on to paragraph 88, at the bottom of page 128, where their Honours said, "We take the view that Theta, as well as the Body Corporate, acted unreasonably in effectively preventing Mr Wu from entering his own property." Now, then we get to the crux of the matter at paragraph 89 – sorry, they go on in paragraph 88 to say, right at the bottom of the page, "Theta was the Body Corporate's agent. Having said that" – top of

page 129 – “Mr Wu was not entitled to provide an occupier with a key in the absence of that person’s agreement to abide by the terms of the protocol.” And then at 89 their Honours say, “That provides a different foundation for any claim for damages that Mr Wu may make,” and they go on to explain what their view of the calculation was.

TIPPING J:
Do you accept the last sentence in 88?

MR ROONEY:
Well, there are two answers to that. The simple answer is no. But –

TIPPING J:
What’s the less simple answer?

MR ROONEY:
The less simple answer is, well, that didn’t happen, is the second answer. You see, the key issue here, which I think has been lost in the translation to some extent, is that what Mr Wu was asked to sign was something on his own behalf and not on behalf of his tenants. There was a different agreement that was presented to him. After Justice Lang’s decision in 2009, access was granted and tenants were allowed to take up residence, and it appears, or there’s no evidence of it, because Mr Wu simply didn’t know what was required of his tenants by the Body Corporate, but he knows that tenants went into possession of his unit and paid rent, and the indications are, indications in the evidence, are that the tenants did sign up to the protocol for tenants.

WILLIAM YOUNG J:
But that's after 2009?

MR ROONEY:
That's correct, yes.

WILLIAM YOUNG J:

So from December 2009 on?

MR ROONEY:

That's correct.

WILLIAM YOUNG J:

Did he offer to arrange for his tenants to sign up to the protocol?

MR ROONEY:

Yes, through an agent, a Mr Song. There is evidence that a meeting took place between Mr Song, the agent –

WILLIAM YOUNG J:

But that's in December, that's –

MR ROONEY:

Yes.

WILLIAM YOUNG J:

– at the end of the period.

MR ROONEY:

No, that's December 2009.

WILLIAM YOUNG J:

Yes, sorry, but that's when, the end of the nuisance period. But during the time when he says –

MR ROONEY:

Yes.

WILLIAM YOUNG J:

– he was locked out, did he say to the Body Corporate that he was prepared to ensure that his tenants – they're really licensees, but we can call them tenants – would sign a security protocol?

MR ROONEY:

No, because what was asked of him was that he signed one binding himself.

WILLIAM YOUNG J:

Have you got a copy of what he was asked to sign?

MR ROONEY:

Yes. It's in the yellow bundle. If you, take you to page 436, 435, I think, in the yellow bundle. Now this is a letter from Theta to Glaister Ennor, who were the solicitors who were acting for Mr Wu and a number of other owners at the same time – at that time. Mr Chen says, "Theta is willing to programme and provide access cards to your clients, which will provide access to the common areas upon" –

WILLIAM YOUNG J:

Isn't it a reference to the tenants having to sign?

MR ROONEY:

Well, yes, except that the attachments to this letter, particularly if I take you to page 438 which is the security and access protocol agreement –

ELIAS CJ:

Sorry, 438?

MR ROONEY:

Four three eight, yes, it's an attachment to this email. There, it refers specifically to owner, occupant, owner managed unit.

WILLIAM YOUNG J:

But isn't it the occupant that's meant to sign, 442?

MR ROONEY:

Well, not according to Mr Chen. Mr Chen's evidence was that there was a specific and different agreement prepared for execution by owners as opposed to tenants.

TIPPING J:

But this says "signed by occupant 442".

MR ROONEY:

Well, yes, it does at the end but it says at the beginning, "Owner occupant."

WILLIAM YOUNG J:

But it just has occupant details. Look, I mean, presumably, I mean, obviously the owner is material because it's the owner who puts the occupant in place.

MR ROONEY:

Yes, well, although in practical terms, the owner in this case, all of these owners –

GLAZEBROOK J:

No, no, I think the occupant means an owner because if you look at 11.1 –

ELIAS CJ:

What page?

GLAZEBROOK J:

Four four two. I mean, I think they're talking about an occupant owner because I'm assuming that, that means that you keep a schedule of anyone who's in the unit.

ELIAS CJ:

But that might just be the, the, as it were, the head licensee. I mean is there any – is this all there is?

MR ROONEY:

No, no, there is more. Page 462, there's another email from Theta to, in this case, to the Body Corporate Secretary, "I've already advised 42 owners involved directly, attach cover letter," which presumably is the 22 October letter, "and also Glaister Ennor that I can release the cards if they sign the security access protocol agreement and each pay 2650 security deposit. So that's specifically requiring the owners. The other, the other factor is that Mr Chen said in his evidence that there was a specific agreement for owners.

GLAZEBROOK J:

Whereabouts is that?

WILLIAM YOUNG J:

Can I just – look at most of the – I mean, it may be very confused, but most of, this appears as part of a residents book, isn't it?

MR ROONEY:

Of a residents?

WILLIAM YOUNG J:

Residents handbook? Isn't this –

MR ROONEY:

Yes.

WILLIAM YOUNG J:

– rules and regulations and it's –

MR ROONEY:

Well, there are three different things. There's a registration document for the actual occupants which is clearly not objectionable in any way and was required by the Body Corporate rules anyway, never been an issue.

WILLIAM YOUNG J:

Did Mr Chen – Mr Wu ever say, "I'm not prepared to sign, but I promise you that any tenant I put in will sign?"

MR ROONEY:

Well, he didn't say that but he was never asked that and what, what happened subsequently was that the amendments, the rule 3.10 were then put into place which empowered the Body Corporate to require owners to sign the agreement.

TIPPING J:

I rather thought when looking at this slightly confused scene that both parties had to sign, both the owner and the occupant if they, if they were one in the same person and obviously that one would sign in both capacities, but that was the impression I got, Mr Rooney, was that, is that not right?

MR ROONEY:

Well, that can't be right because this agreement is designed for what Theta referred to as "owner managed units" which means that the, obviously that the owner manages the unit and finds his own tenants.

TIPPING J:

Well, where did the Court of Appeal get the idea from that the tenant also had to sign?

WILLIAM YOUNG J:

Well, I think it does have, I mean it does have to sign.

MR ROONEY:

Well, there was a –

WILLIAM YOUNG J:

It's all about tenant obligation.

ELIAS CJ:

A separate – did you –

MR ROONEY:

There was a separate form, it was a different form.

TIPPING J:

Yes, well, it may not have been the same form, but there may have been different obligations –

MR ROONEY:

Yes.

TIPPING J:

– but both occupier, both, sorry, both owner and tenant if they differed had to sign their respective obligation.

MR ROONEY:

Well, Mr Wu has never signed this agreement at any stage even after Justice Laing's decision but it's assumed that his tenants did.

TIPPING J:

Can I put it this way, it was intended that both an owner and an occupant would sign for their respective, never mind what Mr Wu did or didn't do for the moment.

MR ROONEY:

Yes.

TIPPING J:
Is that fair?

MR ROONEY:
Well I don't think I can answer that. I don't know what the Body Corporate intended. All Mr Wu can say is what was required of him and what was required of him was that he sign it.

ELIAS CJ:
Did you say that Mr Chen's evidence covered all of this?

MR ROONEY:
Yes.

GLAZEBROOK J:
But can I just check, in terms of Mr Wu, as I understand it his main concern was the requirement of substantial security deposit that went to Theta was the alter ego, if you like, of the previous failed company.

MR ROONEY:
Yes. Well that was one of his concerns but I don't think it was his main concern.

GLAZEBROOK J:
So what was his, oh well the long-term management.

MR ROONEY:
Yes.

GLAZEBROOK J:
Because initially it looked as though he was even being required to manage it for Theta didn't it? In a sort of back door way.

MR ROONEY:

Yes, that's right. Yes that's precisely right and I have made the point that there are actually three identifiable phases to this – to the period when these owners were locked out. The first was that they were told, "Well you have to join up at least to Theta by next week literally or else there will be no rent next month." The next phase began when the –

GLAZEBROOK J:

And when do you say that –

MR ROONEY:

That started prior to the previous management company moving out, which was late August 2007. That continued until at least mid-October, I say 22 October when the owners' agreement was first submitted to Mr Wu, that was the second phase. They were being asked to sign an agreement and the third phase came when rule 3.10 was first amended in February 2008. It was amended again later but from February 2008 onwards the Body Corporate was relying entirely on the rule 3.10 as amended which was struck down by Justice Lang in 2009.

GLAZEBROOK J:

So the owners' agreement was first presented on 22 October is that right?

MR ROONEY:

With that letter to Glaister Ennor, yes that's right.

GLAZEBROOK J:

And then the third phase was from when sorry I just –

MR ROONEY:

It was February 2008 when the Body Corporate actually had its first meeting. So if I could just go back to –

McGRATH J:

Mr Rooney at this point, just paragraph 11, page 442, is there clarification of what the registration form is in any defined way?

MR ROONEY:

This form at page 438, ending on 442 is very similar to the form that the tenants were asked to sign except that at page 438 it's got that confusing reference to owner/occupant owner managed unit. So I think that clause 11 was simply not changed. Part of the form was changed from the tenant's form but not clause 11.

WILLIAM YOUNG J:

Does owner/occupant mean an owner who occupies?

MR ROONEY:

It's very unlikely.

WILLIAM YOUNG J:

I know it doesn't seem very likely.

MR ROONEY:

No because they all live in Australia and they never had any intention of occupying.

WILLIAM YOUNG J:

But all the details are the occupant, everything else?

MR ROONEY:

Yes, yes it is, except that this form was being presented to the owners who never intended to be occupants and included that reference to owner. But this takes me back to the Honourable Chief Justice's question about Mr Chen's evidence which I'd like to go to now if we can because Mr Chen did actually give evidence that there were separate forms.

McGRATH J:

Just again, one further question if you don't mind, at 8.1 which imposes on the occupant responsibility for anything done by people coming onto the premises with the occupant's permission, does that include the tenant or does that cover people who are more casually coming onto the premises, page 441?

MR ROONEY:

Yes.

WILLIAM YOUNG J:

Presumably the tenant or the tenant's guests or anyone living there who hasn't signed up.

GLAZEBROOK J:

That looks like the more casual people doesn't it? It's the sort of normal thing that you would get with a tenancy agreement perhaps.

McGRATH J:

Is that how Mr Rooney sees it, I did wonder that, yes.

MR ROONEY:

Well I think it clearly, yes I think it must apply to guests, invitees.

McGRATH J:

Of?

MR ROONEY:

Well –

WILLIAM YOUNG J:

Of the tenant.

MR ROONEY:

Of the tenant if that clause is taken at face value and in isolation.

WILLIAM YOUNG J:

But look Mr Rooney at the rest of it, it's about phone usage, I want to use the telephone supplied.

ELIAS CJ:

Sorry which page is it?

WILLIAM YOUNG J:

Page 438. I want to have power supply to my unit, I'm going to – I'll pay for the power I use.

MR ROONEY:

Yes.

WILLIAM YOUNG J:

I'm going to pay $500 if I cause a fire alarm, fire callout.

MR ROONEY:

Yes, which I agree none of which would apply to an owner but I think that's explained by the fact that this form is simply an adaptation of the already existing form which has been used for tenants.

WILLIAM YOUNG J:

Well so Mr Chen explained in his evidence what he required did he?

MR ROONEY:

Well he certainly explains that there were different forms.

GLAZEBROOK J:

So your submission on this basically is that this mightn't make sense for an owner/manager because there's a lot of provisions in it that don't make sense but it was in fact something that was required to be signed.

MR ROONEY:

Quite.

GLAZEBROOK J:

And it doesn't make sense because they just changed a few things rather than actually thinking it through properly.

MR ROONEY:

Precisely that, yes but what was objectionable about it from Mr Wu's point of view as owner which might not have been objectionable to somebody else as a tenant, was paragraph 1 on page 440.

TIPPING J:

See why I think the last sentence in 88 is critical and why now we're exploring how accurate the Court of Appeal was or not, it's the absolute foundation, isn't it, for the Court of Appeal's change of view on damages? Am I right in that? Isn't this the fulcrum on which the damages change substantially hangs that as he wasn't prepared to sign and he wasn't prepared to get his tenants to sign he didn't have any right to the profits if you like.

MR ROONEY:

Well I don't know that that was on its own the basis for the Court of Appeal decision. I think they heavily relied on the first amendment to rule 3.10.

TIPPING J:

All right well I'll just leave it for the moment.

MR ROONEY:

Perhaps if I could just locate that reference in Mr Chen's evidence because I think that's important.

McGRATH J:

Could I just ask Justice Tipping to clarifying the passage he has just been referring to.

TIPPING J:

The last sentence on paragraph 88 of the Court of Appeal's judgment, top of page 129 of the white case on appeal.

GLAZEBROOK J:

What did he object to about clause 1, is that 1.1?

MR ROONEY:

It was not only clause 1 but it was clauses 1 and 3. Sorry I didn't get a chance to expand on that.

WILLIAM YOUNG J:

Sorry what were the other clauses sorry, clause 1 and –

MR ROONEY:

1 and 3 on page 440. Now 1 grants to the occupant and Mr Wu certainly assumed that occupant in this instance meant him even though he was not literally an occupant. So there is a grant of access subject to the obligations set out in this agreement, to access the lifts and the entrances and have access to the services. Now his point was well I've already got that right.

WILLIAM YOUNG J:

Doesn't it occur to you that he might have misinterpreted this? It just looks to me like occupier means occupier and if you look at 2.3(a) occupants acknowledge and agrees to use the unit.

GLAZEBROOK J:

Well if you're being asked to sign it though and you're not an occupant.

MR ROONEY:

Yes well the other thing about, I'll come back to paragraph 3, but the other thing about it is that this is an agreement, not with the Body Corporate, it's an agreement with a completely independent entity that Mr Wu has no legal link

to whatsoever. It's simply a contract to the Body Corporate and in the trial judgment Justice Asher characterised it as a long-term commercial relationship being created by this document and I think that's right because there was no prior contractual relationship between Mr Chen or any owner and Theta as the building manager.

McGRATH J:
But they're entitled to appoint an agent, the Body Corporate?

MR ROONEY:
Yes, but as the contract – especially the contract to pay a sum of money held on an unsecured basis, and it could have been quite a large amount of money because there was 60-odd owners at this stage who were objecting, held by a private company, not on trust or anything of that nature at all. So that in itself was objectionable.

TIPPING J:
So there's nothing in the rules that require people to pay up the security bond?

MR ROONEY:
Not until February 2008 and then, of course, they were both that rule amendment and a later one were held to be invalid later on. But just while we're on page 440, the other objectionable point is that assuming that this agreement does apply to Mr Wu as owner, 3.1 Empire retains the following rights in respect of this agreement, the common areas and facilities of Empire will at all times be subject to the control of Empire, which will have the right from time to time to establish, modify, and enforce rules and regulations with regard thereto. So essentially it's a surrender of an owner's rights if this agreement did apply to owners. Not only a surrender, or not a surrender to the Body Corporate, but a surrender to an independent private company, agent or no agent.

ELIAS CJ:

Doesn't the Unit Titles Act control what can be done in this respect?

MR ROONEY:

Absolutely, yes, and particularly – Ma'am, would you like to go to Mr Chen's point?

ELIAS CJ:

Carry on with what you're doing.

MR ROONEY:

I'll come back to the Unit Titles Act. Page 290 of the blue volume, you see a passage there headed up, "The OMUSAPA," now, that's an abbreviation for, as Mr Chen puts it, the owner-managed units security and access protocol agreement.

GLAZEBROOK J:

Just checking, when they say owner-managed units, they're meaning the ones that are managed by the owner themselves rather than by Theta, is that what the terminology means?

MR ROONEY:

Yes.

WILLIAM YOUNG J:

What's SAPA?

MR ROONEY:

Security and access protocol agreement.

WILLIAM YOUNG J:

That's what you took us to, was it?

MR ROONEY:

At 438, yes.

WILLIAM YOUNG J:

So he says the owners have to sign?

MR ROONEY:

Yes.

GLAZEBROOK J:

Well, the owner-managed units have to sign. Presumably the other owners didn't because the tenants did. Or do we not know or care?

MR ROONEY:

Well, the other – that raises another interesting point in that Theta had a dual role. Now, Theta was the building manager under contract to the Body Corporate, but entirely independently of that, Theta was operating its own letting business for the majority of the units in the building. Those are two quite separate and distinct roles.

Now, the owners who had signed up to the leases with Theta were presumably somehow contractually tied in and Theta was in fact became the lessee to the retail tenants, so we had lease and sublease or licence, I think as Theta characterises it. So they're distinct roles, and the effect of that was that the retail, if you like, tenants or licensees in the units were always under the control of Theta, which presumably could have got them to do whatever they liked.

WILLIAM YOUNG J:

Just looking at this, I mean, obviously it does, looking at page 290 and 291, he is saying that in fact for the owner-managed units the owner was expected to sign, although it's a funny agreement for the owner to sign, and then he goes on, I think, to deal with what happens to the deposits.

MR ROONEY:

Yes. I think somewhere he said that they went into what he described as a separate account, but they're certainly not held in any protected manner.

WILLIAM YOUNG J:

He said that Theta bank funded a separate dedicated bank account?

MR ROONEY:

Well, a separate dedicated bank account is not overtly any kind of trust relationship. That's a small point in the scheme of things.

So those paragraphs on page 290 are where it is explained that there was a, as Mr Chen puts it, an OMU version of the ASPA for signing by OMU owners at the start of paragraph 77.

So I think there is no question, either, on Mr Chen's own evidence that what he was requiring was that the owners tie themselves into this document that we've looked at where essentially there is a creation of a contractual relationship that never existed before but worse than that a surrender of rights.

TIPPING J:

Is the nub of it 82(b) for our present purposes?

MR ROONEY:

Yes.

WILLIAM YOUNG J:

So essentially the owner is on risk for the behaviour of the licensees?

MR ROONEY:

Well, I don't know that the agreement actually says that.

GLAZEBROOK J:

Maybe in 8.1.

WILLIAM YOUNG J:

Yes, it sort of suggests that, I think.

MR ROONEY:

Sort of, yes. I think that's the highest that it can be put.

WILLIAM YOUNG J:

But he says over the page that – I'm looking at page 293 paragraph 90 – that from March 2008 access to the units was offered on part-payment of $1000. Payment made under protest, owners reserving the ability to challenge the ASPA protocols if they wish to. Is that right?

MR ROONEY:

That's never been accepted. I wasn't involved at that stage, but there is a letter.

ELIAS CJ:

Was he cross-examined on this?

MR ROONEY:

Yes, there was cross-examination where I asked whether that letter had ever been sent and there was no clear answer to that. Certainly Mr Wu had never seen the letter and was never aware of it, but –

WILLIAM YOUNG J:

There's been a standoffishness which has resulted in a moderately large claim for damages which could have been solved probably by a payment of two or $3000 under protest which could have been challenged separately.

MR ROONEY:

Well, not quite because there was still the requirement to sign up to this agreement.

TIPPING J:

It says that this offer was made to the plaintiffs through their lawyer. So is Mr Wu's evidence that his lawyer never got it or his lawyer never showed it to him?

MR ROONEY:

Well, he doesn't know the answer to that. But the lawyer at the time was – he had different representation at the time and that simply was unclear.

TIPPING J:

Was there evidence from that lawyer?

MR ROONEY:

No, there wasn't, no. This is something that emerged at trial. My recollection is that it was followed by, and I will try and find the reference, but –

ELIAS CJ:

So it wasn't substantiated by a copy of the letter or something like that?

MR ROONEY:

There was a copy of the letter as sent by counsel who, at the time, was acting for the Body Corporate. But whether it had ever been sent certainly wasn't accepted by Mr Wu.

GLAZEBROOK J:

Was there any finding on this by anybody in the decisions? Perhaps you could give us the reference to the evidence where this was looked at and a copy of the letter.

MR ROONEY:

The letter will be in the bundle. I'm not sure that it has gone into the bundle. I don't know – it appears that it's not in the bundle.

GLAZEBROOK J:

No, it doesn't look like it.

MR ROONEY:

Which might indicate, I suppose, that neither party saw it as being of any particular relevance.

TIPPING J:

Was it relevant to mitigation?

MR ROONEY:

Yes, I think it was raised in relation to mitigation, but I don't think a great deal of emphasis was placed on it. My recollection is that there was a later letter, which was to different effect, I think there was a, another proposal was conveyed –

WILLIAM YOUNG J:

I think Justice Asher dealt with something other than this in his judgment, in dealing with litigation.

MR ROONEY:

Yes. Well, the bundle was prepared by consultation, and I suppose that neither party saw it as particularly relevant then.

ELIAS CJ:

So there isn't a finding of fact on this, is there?

MR ROONEY:

No, there isn't.

ELIAS CJ:

No.

MR ROONEY:

No.

TIPPING J:

The impression I had from reading the case as a whole was that it was part of the factual conclusions that this letter offering to settle for a thousand dollars, reserving rights as to whether even a thousand was payable, had happened. But are you saying that's not right?

MR ROONEY:

Well, you may well be right, Sir, I would need to go back and read again through Justice Asher's decision, but…

TIPPING J:

I thought I'd read that somewhere on the basis that –

MR ROONEY:

Yes, my –

TIPPING J:

– that was uncontroversial.

MR ROONEY:

Mr Davidson tells me paragraph 19.

TIPPING J:

Of Justice Asher?

MR ROONEY:

Yes, page 49. Yes, ah, well, in – yes, quite clearly.

GLAZEBROOK J:

Well, no, it's slightly different, that. Because that's what I'd understood, there'd been an offer to accept $1000 instead of the $2000. But the finding is that that's provided the access and security code card was signed.

WILLIAM YOUNG J:

This must be a reference to a letter though, mustn't it?

MR ROONEY:

Yes, and there certainly was –

GLAZEBROOK J:

Well, we probably need to see the letter now, don't we?

WILLIAM YOUNG J:

I think we do need to see the letter rather than…

MR ROONEY:

The letter was in the trial bundle but it obviously hasn't gone in with it. Apparently it's in the Court of Appeal judgment, is it...

WILLIAM YOUNG J:

Is it in the Court of Appeal judgment?

MR ROONEY:

I understand, Sir.

ELIAS CJ:

39? 49 – thank you.

McGRATH J:

Sorry, could you just repeat that, Mr Davidson?

MR DAVIDSON QC:

Page 113 of the case in this Court, your Honour, at paragraph 49 of the Court of Appeal judgment.

MR ROONEY:

And the letter is set out in full at page 114.

MR DAVIDSON QC:

That's right.

MR ROONEY:

You see, it's still requiring the owner's protocol to be signed.

TIPPING J:

What do you say is the relevance of this letter? Does it have relevance beyond mitigation or is it just relevant to mitigation?

MR ROONEY:

I don't say it has any relevance, Sir, but if it had relevance it could only be to mitigation.

TIPPING J:

Right.

MR ROONEY:

Or it could be, it could, in fact, be a reinforcement that –

TIPPING J:

Well, it must be relevant to mitigation. Whether it, whether it amounts to a failure to mitigate is another matter.

MR ROONEY:

Yes.

WILLIAM YOUNG J:

So there's nothing in here about it being without prejudice or reserving the right to challenge the SAPA, so is that, so that is wrong in Mr Chen's evidence or is the letter not complete? It looks as though the letter's reasonably complete.

MR ROONEY:

Yes, I think that that's, well, it sounds by the way it finishes.

GLAZEBROOK J:

And that's defining at 49 was that it was conditional on signing the security access protocol which, as you say, Mr Rooney, that was the sticking point with Mr Wu not just the money.

MR ROONEY:

Indeed, yes.

GLAZEBROOK J:

Security, the money in terms of the security deposit.

MR ROONEY:

Yes, yes, I don't know that the money itself was the major factor. To be, to be fair and to be complete, Mr Wu's position, it actually set that, this out in his very first affidavit, he gave his reasons for not wanting to have any involvement with Theta at all after the original management company moved out and that was because he saw, rightly or wrongly, that Theta was just an extension of the original management company and that's, that's really why he was reluctant to have any dealings at all and certainly decided the best option was for him to separate himself completely from Theta and to let out his own unit, and I can provide that reference to – this was at the stage when he was being asked to sign a lease with Theta, so if I take your Honours to page 169 which is the very first affidavit filed by Mr Wu, 169 blue bundle and at page 173, paragraph 36, he's referring to the lease, he said he subsequently received the draft lease to Theta. This was just prior to the

original management company moving out. He says, “My wife and I were not impressed with its terms and we did not wish to sign the lease,” and then he says in 37, “There were three reasons for this. Theta and Mr Chen were part of the Sanctuary Group to which Academic belonged. Academic had not paid the rent and we had no confidence that Theta would.” Over the page, “There was no fixed rent period under Theta’s lease and I did not consider the proposed rent to be adequate,” and also importantly, 37.3 under Theta lease, “Theta was given a proxy by each owner to exercise the owner’s voting rights in the Body Corporate to the exclusion of the owner and on the basis that Theta would wherever practical give notice of any matter of substance. Although a similar clause was included in Academic’s leases, it was limited to the fixed rent period which was two years from commencement. The Theta clause had no such time limit and was open ended,” so that conferral of a proxy on Theta ran for a period effectively of 20 years, it was a 10 year lease with a 10 year right of renewal. Now, I have said in my written submissions that Mr Wu was not cross-examined on this and I see that my learned friends have responded saying he was cross-examined but giving no reference and I, when I received those submissions just this week, I went through the notes of cross-examination of Mr Wu again and I don’t believe he was cross-examined on that. He may have been cross-examined on some of those points as evidential points arising separately, but he wasn't cross-examined as to his explanation of his reasons for not wanting to deal with Theta, so I think that set the scene. This was in relation to the lease only, but it certainly set the scene for what happened subsequently, because Mr Wu did see this linkage between the original management and Theta and there’s no question that there was linkage. And then that, just to develop that, going back again to what happened when the original management company moved out, if I could take your Honours to 401 in the yellow bundle, now this is a letter from Mr Groves who was essentially the original developer through the Sanctuary Group but he was also the principal of Academic Accommodation Management 3 Limited which was the original manager and lessee from each of the owners and this letter came out of the blue and said, “Please be informed that John Chen resigned from Academic last month. John has formed his own management company and all of the staff have chosen to take

up positions in the new company effective 1 September. Academic is not in a position anymore to carry on as rental manager of your units in the Empire Apartment Complex, as it won't have any staff. It has therefore resigned as manager of the building." And the final paragraph, "We need to hear from you within three days in order to ensure the handover responsibility for the collection of your rents and to fulfil your obligations and pay all expenses, including Body Corporate levy and rates.

That's then followed a week later by the email on page 402, which was from Mr Chen, circulated to all owners looking at the second English paragraph, two-thirds of the way down the page, "Empire's current management, Academic under Gary Roves will no longer be in business as of 31 August. Theta has been appointed as the building manager and will employ the Empire Management staff from 1 September. For you to be paid rent next month you will need to sign the Theta Management lease appointing Theta to manage your unit." So it's not difficult to understand how Mr Chen and a number of the others would have reacted to that. They're already, the evidence is they're already well in arrears on the rent coming from the original management company. There's a kind of restructuring where it has reinvented itself. This is all from Mr Wu's perspective and he's asked to sign up to the lease and I have no doubt that that did colour everything that happened subsequently. So whether he's right or wrong I think that his position is certainly understandable. And it's in that very same context that subsequently he is given the OMU SAPA and asked to sign up to that contractual relationship with Theta.

Just since we have been looking at that OMU document, it may be timely to look also at the tenant document.

GLAZEBROOK J:

Actually page 410 seems to make it clear that they have to sign the access protocol themselves.

MR ROONEY:

Yes that's right.

GLAZEBROOK J:

Second to last paragraph.

MR ROONEY:

And also page 435.

WILLIAM YOUNG J:

Well I think Mr Chen's evidence makes it clear that he expected the owners to sign.

MR ROONEY:

Yes. So as I say it may be just timely if we look to the different – the tenant's version of the SAPA which we find at page 506 and whereas the one presented to Mr Wu for signature had that curious reference to owner occupant owner managed unit, this one refers only to occupant and it's, it is laid out.

ELIAS CJ:

Sorry, what page is it, I missed that?

MR ROONEY:

Five zero six.

WILLIAM YOUNG J:

This is the ones that Theta was managing?

MR ROONEY:

Yes, well, yes, but there apparently were some units that Theta wasn't managing where this agreement was also presented to the tenants and presumably signed up. And this is, this is also the agreement which it is assumed were presented to Mr Wu's tenants after Justice Laing's decision in

which it is assumed were signed up, although they were never put, they were never disclosed in discovery or never put in the evidence and they are, they're simply not in Mr Wu's possession. He had no means of knowing what the tenants had signed up. He had no direct contact with the tenants nor, in fact, would his agent necessarily. I think the arrangement that was discussed at that meeting in December 2009 was that Mr Wu's agent, Mr Song, would take the tenants along, introduce them to the Body Corporate and then he would leave them, introduce them to Theta and then leave them to work it out amongst themselves, but Mr Wu doesn't actually know what happened after that, except that his tenants were allowed into occupation and were given access cards.

Now, this was – certainly this was, the difference between these two agreements was or the fact that there were different agreements was certainly raised in the Court of Appeal and it was raised in my written submissions to the Court of Appeal but it's not mentioned anywhere in the judgement.

TIPPING J:
I'm afraid I haven't quite grasped what is the significance of the difference for our purposes in this Court?

MR ROONEY:
Well, I, well I understand that the, the Body Corporate will contend that it was reasonable that, under rule 3.10, it was reasonable that the Body Corporate or Theta could have required the, or could have excluded the tenants if they had not signed the agreement –

TIPPING J:
Yes, I understand that.

MR ROONEY:

– or their agreement, but that's not what Mr Wu's case is concerned with. He is concerned with what he was asked to sign not what his tenants were asked to sign, so I think that's the, that's the important distinction.

TIPPING J:

So are you saying we should be focussing on the owner agreement rather than the tenant agreement?

MR ROONEY:

Yes, because Mr Wu never, never raised any objection at any stage to the tenants agreement. He didn't even regard it as any of his business.

GLAZEBROOK J:

What you are saying, as I understand it, is that he was presented with the owners agreement as being a prerequisite to anybody getting an access card –

MR ROONEY:

Yes.

GLAZEBROOK J:

– and so if he didn't sign it, then it really didn't matter what the tenants were or were not going to sign because there were going to be no tenants unless he signed the owner occupier agreement.

MR ROONEY:

That's exactly the point, yes, yes.

TIPPING J:

So he, his case in a nutshell is that by asking him to sign this owner agreement, the Body Corporate were not acting reasonably or the contention is they can't say that their step was reasonable so as to remove themselves from the unreasonableness of nuisance so to speak?

MR ROONEY:

Yes, well, he does say that but he says a lot more things too.

TIPPING J:

I'm sure he says a lot more things, Mr Rooney, but can we just confine ourselves to it.

MR ROONEY:

Well, no, the other things are relevant because that takes us to, to the Unit Titles Act, the former Unit Titles Act which is where we were going a few moments ago and, in particular, section 11 of the Act which effectively creates an easement for access to, well, it refers to doors understandably in a situation like this because the door is the only thing or is the nearest thing that an owner owns. Everything else is owned by, well under the old Act it wasn't owned by the Body Corporate it was owned by all of the proprietors as tenants in common, the common areas, the hallways and the lifts and so on.

So not only does he say that it was unreasonable to require him to sign that, he also says that the Body Corporate had no legal power, no legal right, (a) to require him to sign up to anything and (b) to exclude him from his own property. Now that part, this is an important part of the argument, it may be timely to move to that now.

TIPPING J:

So they were acting both unreasonably and unlawfully in asking him to sign or requiring him to sign this agreement?

MR ROONEY:

Yes.

TIPPING J:

That's your case?

MR ROONEY:

Yes, yes. So it may be, perhaps if we could start with the Act which is tab 2 in the bundle of authorities, tab 1 sorry and the starting point is section 11. Now although this Act has been repealed, something almost identical has been brought forward into the 2010 Act. I think it's section 73 or 74. So it's not a dead issue for other purposes. But section 11(2) is the key point. The common property and each unit on a unit plan shall by virtue of this section have as appurtenant thereto, I'm just paraphrasing it, a right to full, free and uninterrupted access to any doors or other apertures existing at the date of the deposit of the plan and enjoyed on that date. Now my submission is that that is precisely on the point on the facts of this case because the only thing that Mr Wu could have had access to usefully was the door to his unit. And this is an expressed provision which confers that right on any owner.

WILLIAM YOUNG J:

But what's – when's the deposit of the plan? When's the plans deposited?

MR ROONEY:

When the – the plan has to be deposited when the structure of the building is finished, so that it can be surveyed and drawn onto the plan.

WILLIAM YOUNG J:

So the building goes up first and then the plan's deposited?

MR ROONEY:

Yes. And immediately after that I think you'll find typically and I'm pretty sure in this case the deposit of the plan triggers the settlement requirement for purchasers who have purchased off the plans. There will be a period of time after the deposit of the plan within which they are required to settle. Nothing has changed about the building, placement of doors or anything of that nature since the building was finished and the plan was deposited.

WILLIAM YOUNG J:

It's sort of slightly funny because it doesn't say a right to the full free and uninterrupted access and use of the common property but I mean it may imply that by access to doors.

MR ROONEY:

Well the introduction to subsection (2) does refer to the common property and each unit.

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

Well I suppose you don't – you wouldn't necessary have a right of access to the common property, it just says you've got a right of access to your building, to your door. So presumably if you are misbehaving in the swimming pool, then you are able to be removed from the swimming pool.

MR ROONEY:

Sure.

GLAZEBROOK J:

But what you're saying is you can't actually be stopped getting to your door.

MR ROONEY:

No, but I don't think he can be stopped from getting onto the common property, putting aside they're misbehaving in the swimming pool.

ELIAS CJ:

They're tenants in common in equal shares in respect of the property, aren't they, section 9?

MR ROONEY:

Yes, so Mr Wu owns the common property as well, or a share of it, at least.

GLAZEBROOK J:

Well, I'm assuming if you're misbehaving, though, that you could be excluded by rules while you were misbehaving.

MR ROONEY:

That's a very good point, and the Body Corporate always had the power to control bad behaviour under its rules, under both the default rules, which it didn't adopt. It adopted its own rules. But it had ample provision in there to be able to control the behaviour of tenants. Perhaps we could look at that now because this is another important part.

TIPPING J:

Just before you move to the specifics, was there any provision which on any terms allowed the Body Corporate to exclude people from accessing their units?

MR ROONEY:

No, nowhere. The only means –

GLAZEBROOK J:

You say it would be illegal in any event under section 11?

MR ROONEY:

I absolutely say that, without the Court order. To answer that question, could we go to section 37 of the Act, because this is a very important point, tab 1 in the bundle of authorities.

Now, 37(1) provides that, "Except as otherwise provided by this Act, the control, management, administration, use and enjoyment of the units and the common property shown on a unit plan and the activities of the Body Corporate that comprises the proprietors of those units shall, while there are more proprietors than one, be regulated by the rules for the time being applicable to that Body Corporate," and then subsection (2) goes on to say,

"Subject to any amendment or appeal thereof, or addition thereto, the rules applicable to each Body Corporate shall be those set out in schedules 2 and 3 of this Act." Now, there is in fact no statutory power for a Body Corporate to adopt rules outside the provisions of section 37.

TIPPING J:
Well, the proviso to subsection (5) is quite important, I think, in that respect.

MR ROONEY:
Yes, indeed, and subsection (6) is also important.

WILLIAM YOUNG J:
But there is a rule, which I take it you challenge, the rule 3.10?

MR ROONEY:
Well, no. Mr Wu never challenged the original 3.10.

WILLIAM YOUNG J:
I thought you did in your submissions now.

MR ROONEY:
No. I don't – well, I have never challenged the rule by any Court proceedings. The point being made about rule 3.10 is that if it says what the Body Corporate says it says, then it would be ultra vires. But Mr Wu says it doesn't mean what you say it says. For that reason, the original rule 3.10 was not challenged as part of the application which was heard by Justice Lang in 2009. All rule 3.10 does is to reflect the reality that modern apartment buildings will have locked doors, probably locked lifts, which will need some kind of device to make them work so that owners or occupants can get access, and rule 3.10 simply says the Body Corporate can issue cards. It doesn't say the Body Corporate can withhold cards from people who misbehave.

TIPPING J:

So is your argument essentially that under the combination of the Act and the limited scope of rules a unit proprietor has an absolute right to access, that they can't deny access in any circumstances. Is your submission as high as that?

MR ROONEY:

Well, that would be foolish because if somebody is running a drug lab or ...

TIPPING J:

Well, that's what I want to know. You seem at the moment by reference to section 11 to the rules that you've referred to, section 37, to be putting it in those terms. Now, your argument obviously is that they couldn't deny you access in this case, but what are the powers to deny access?

MR ROONEY:

Well, that takes us to section 37(11) and (12). Section 37(11) says the rules are binding on the Body Corporate, all proprietors, and any other person in actual occupation of a unit. So the tenants are bound by the rules of the Body Corporate anyway, and then subsection (12) goes on to say the Body Corporate or any proprietor shall be entitled to apply to any Court for an order enforcing the performance of or restraining the breach of any rule and awarding damages and so on, so the remedy was essentially and literally was to go and get a Court order.

WILLIAM YOUNG J:

But do you say it's not open to a Body Corporate to have any limitation at all on the entitlement of an owner to use the Body Corporate, thus they're not entitled to charge for an access card?

MR ROONEY:

No. That would be putting it too strongly.

WILLIAM YOUNG J:

Where's the entitlement to charge for an access card come from, then?

MR ROONEY:

Well, there probably isn't one.

WILLIAM YOUNG J:

Would it be 3.10, rule 3.10?

MR ROONEY:

Well, to answer that takes me in a slightly different direction.

GLAZEBROOK J:

Wouldn't that be – because you can charge Body Corporate fees for upkeep of the common property, so I would have thought that it probably comes within those general fees that you have for upkeep of common property and access to common property.

MR ROONEY:

Well, it probably does, and I think it's probably right.

ELIAS CJ:

It's incidental, so it falls within section 37 and the rulemaking power, doesn't it?

MR ROONEY:

There probably is something in the rules which –

ELIAS CJ:

Because even the acknowledgement that you can provide keys would have, as an incident of it that you must be able to charge for the keys.

MR ROONEY:

Yes. It's never been part of Mr Wu's case that he couldn't be charged for keys. There was an argument about what was being charged because the keys were of minimal value. They're just simple credit-card size pieces of plastic which are put into a machine and activated and they were charging $150.

McGRATH J:

Would you accept that a rule to be made under 37(1) of the Unit Titles Act, just as part of ordinary control, management, administration?

MR ROONEY:

No, because the effect of (2) is that the rules are the rules set out in schedules 2 and 3 to the Act, which can then be amended under 37(3) and (4), but there are still formal requirements for the amendment of rules, the schedule 2 rules can only be amended by – or could only be amended by unanimous resolution.

McGRATH J:

But they were, weren't they, initially?

MR ROONEY:

Initially when the plan was deposited, yes, they were at that stage because the developer was still the owner of the units.

McGRATH J:

It was able to be unanimous?

MR ROONEY:

That's how it's always does.

McGRATH J:

Yes, but why cannot section 37(1) empower a rule if it is made which allows party control and management?

GLAZEBROOK J:

Subsection (6), I think. It must be subject to section 11 but it says you can't do anything. I mean, I would have thought that you can actually say to people that you're only allowed in the swimming pool to swim, though, as long as that's not impeding access, and you're not allowed in the swimming pool if you're not – if you're attired in hobnail boots or the gym, probably, rather than the swimming pool.

MR ROONEY:

Yes. There has to be an application of common sense for things like that.

GLAZEBROOK J:

That must comes in terms of the regulation for use, and if you do turn up in hobnail boots they can tell you, "Either take your hobnail boots off or you're not coming in." Your point is you can't by that restrict access to the building if by that you're restricting access to the person's own property via section 11. Is that the submission?

MR ROONEY:

Yes.

GLAZEBROOK J:

Unless you get a Court order because somebody is misbehaving in some way that is putting the building at risk?

MR ROONEY:

Yes, precisely. I mean, in practical terms you would expect a Body Corporate dealing with a tenant who is misbehaving would, in the first instance, go to the owner and the owner would probably give the tenant notice to move, but the ultimate final sanction is section 37(12) to get a Court order if it really becomes problematic.

WILLIAM YOUNG J:

Just thinking of the other things that were covered in the security and access protocol, how would you say that fire alarm callouts should be dealt with? Are they dealt with in the rules generally or not?

MR ROONEY:

There is a provision in the Act about where there is required to be expenditure on a particular unit. It's section 33, generally referred to as "work", is of benefit to only that unit then that cost can be recovered from the owner. I think that would apply to things like false fire alarms.

GLAZEBROOK J:

What about 34?

MR ROONEY:

Yes, or 34. 34 is probably more to the point, isn't it?

WILLIAM YOUNG J:

That's where it does repair, work or act.

MR ROONEY:

Well, act, where the Body Corporate does any repair, work or act.

WILLIAM YOUNG J:

I'm thinking if someone burns something on the element and the fire alarm people come and it's a $500 callout.

MR ROONEY:

As evidently happened many times here. Well, I think that probably would fall under section 34. It's an act.

WILLIAM YOUNG J:

But is it required or authorised by or under this Act or any other Act?

GLAZEBROOK J:
You could probably stretch it, wouldn't you?

MR ROONEY:
I think there's a requirement in high-rise buildings for the fire service to respond to alarms. So it may be a stretch but I think it would fall under that.

But Mr Wu's not raising any objection to anything of that nature. Never was. In fact, there is a long passage in his cross-examination by Mr Davidson where he agreed to every proposition that was put to him in respect of keeping the tenants under control. It's just never been an issue for him.

TIPPING J:
What if something is a requirement of the insurers? Would it be then under the general duty to obtain and keep insurance in force if it was a reasonable requirement of an insurer? And I'm not necessarily saying that applies here, but there has been some discussion, hasn't there, about the insurance position? As a matter of principle, before we go into the specifics, if an insurer or the insurance industry generally could reasonably require such-and-such a provision in order to achieve insurance. That, I would have thought, would be a reasonable thing to impose upon the occupiers and tenants.

MR ROONEY:
I should think so.

TIPPING J:
Some of these things were done because of the insurance situation. Is that something you want to address or just leave it until we see what Mr Davidson says about it?

MR ROONEY:
I'm happy to address that now. The point was made, I think in the trial judgment, that Mr Chen's evidence was that his motivation or at least part of his motivation for wanting to bring in the security and access protocol

agreement was to make it easier to get insurance, to make it possible to get insurance.

However, the Judge said, well, there's actually no external evidence that any insurer imposes that requirement. So Mr Chen may well have seen it that way and may have been justified in seeing it that way, but there was nothing – there was no letter from an insurer or no evidence from an insurer saying in this case –

TIPPING J:
But did the Judge find the, Mr Chen's attitude to be reasonable or not reasonable?

MR ROONEY:
I don't think he found it unreasonable. It was a question of – or his motivation, to put it more accurately.

GLAZEBROOK J:
Well, what you say anyway is that Mr Wu never objected to his tenants doing anything. What he objected to was the requirement that he either as well or instead of entered into that agreement. Then you also say that that was the foundation and he wasn't allowed to even look at tenants until he had signed that agreement.

MR ROONEY:
And he couldn't because he couldn't get a tenant into the building.

WILLIAM YOUNG J:
But wasn't he allowed access to the building? Wasn't the manager allowed access to the building?

MR ROONEY:
Only after Justice Lang's decision in November 2009. That all happened after Justice Lang.

TIPPING J:
The period during which this so-called nuisance ran was, what, about August ’07 to November ’09, is that right?

MR ROONEY:
Yes.

TIPPING J:
Give or take.

MR ROONEY:
Yes.

TIPPING J:
I’m not asking you to bound yourself to precise dates. So it’s two and a bit years?

MR ROONEY:
Yes, 27 months.

TIPPING J:
And this is the period during which Mr Wu was not able to make use of his unit through tenanting it because of the problems you’ve described.

MR ROONEY:
Yes, yes.

TIPPING J:
So essentially his harm is his inability to achieve a return on his investment.

MR ROONEY:
Precisely, yes.

TIPPING J:

Is there any claim for anything beyond that?

MR ROONEY:

There were two very small – this is a very small point but we may as well deal with it now. The Court of Appeal set aside the whole judgment, but there were two components of the judgment which can't have been intended to have been set aside, and I think they just may have been overlooked. One was when the access was finally given after Justice Lang's decision, the Body Corporate said that the batteries in your doors have gone flat. The doors have been deactivated –

TIPPING J:

I don't want you to trouble yourself with this unless it's necessary at this stage. It's out of sequence. I just wanted to get a broad picture of it.

MR ROONEY:

Well, the short point is that there was a cost to Mr Wu and the other owners of something like 3 or $4000 to get physical locks put into their doors immediately after Justice Lang's decision because the Body Corporate said it couldn't reactivate the doors so that they worked off the same cards that operated the external doors and the lifts. It turned out in cross-examination Mr Chen actually admitted that he found out subsequently that the Body Corporate or Theta could have done that. It could have reactivated the doors, so this $3000 spent to put in physical locks was essentially unnecessary wasted expenditure by Mr Wu and Justice Asher included that amount as part of the judgment. Now, that's unaffected by anything the Court of Appeal dealt with and yet the whole judgment was set aside. Similarly, there was another issue about the cost of the access cards. There was a declaration that the fair price for an access card was not $150 but $25 and that seems to have gone also as a sort of unintended consequence.

GLAZEBROOK J:
These are points that Mr Davidson challenges, so they probably are points we need to consider.

ELIAS CJ:
We'll adjourn for 15 minutes now, thank you.

COURT ADJOURNS: 11.29 AM

COURT RESUMES: 11.51 AM

MR ROONEY:
Just following on from the discussion about the Act and, in particular, section 37. I thought it will be helpful if we could look at the, initially at the default rules under the Act and, in particular, the schedule 3 rules. These are the rules that can be amended by ordinary resolution of the Body Corporate and that's to be found on the second last page of tab 1 of the bundle of authorities. You'll see that the, the default rules are very brief and to the point but also very general and all embracing in terms of allowing Body Corporate to keep control of behaviour and activities in the building bearing in mind, of course, that under section 37(11), I think it was, these rules apply not only to proprietors but also to occupants in the building.

Now, as it happened in this case, the Body Corporate did amend those rules –

WILLIAM YOUNG J:
Amendment presumably means amend but only within the scope of what's there, within the general scope of what's there so you can –

MR ROONEY:
Yes.

WILLIAM YOUNG J:
– I'm not sure how you can really amend (a).

MR ROONEY:

Well, the amendments have to comply with the various provisions of section 37, so as to the second schedule rules, there has to be a unanimous resolution and beyond that there's section 37(5) and (6) which essentially limits what, what a Body Corporate can do even with a unanimous resolution. Section 37(4) is the, applies to the schedule 3 rules which are the sort of day-to-day household management rules, if you like, which govern the relationship between the Body Corporate and the owners and the occupants of the building. 37(3), the second schedule rules relate to powers which are conferred on the Body Corporate.

Now, the actual rules in this case, the schedule 3 rules as well as the schedule 2 rules were amended at the outset when the owner was still the owner of all of the units and that's to be found, those amended rules are to be found at page 383, that's the front of the yellow bundle. We're not really particularly concerned I don't think with the second schedule rules except I probably should just mention in passing rule 2.3H on page 387 and 388 which relates to that discussion we had previously about recovering the costs of fire callouts and so on and I think that rule probably does cover that. I don't think there's any question about the vires of a rule like that. It confers a power on the Body Corporate in the second schedule and all that seems to be in order.

I'm more interested in looking in some more detail at the amended version of the schedule 3 rules, which start down towards the bottom of page 396. Now, generally these rules are pretty much consistent I think with the default rules except that they are quite expanded and you will see 3.1 limits the use to which a proprietor or occupier can put a unit. Can't – in 3.1(b), not able to use the unit in such a manner as unreasonably to interfere with the lawful and enjoyment by other proprietors and occupiers and so on; 3.4 deals with matters like obstruction of drives and paths, and access ways; 3.5, cleanliness; 3.8 dangerous substances; 3.9, very relevant I think particularly 3.9(b), a proprietor or occupier must not leave the unit inadequately secured, that's of no great consequence but the next sentence,

in particular, proprietor or occupier shall be observed and perform all rules and regulations relating to security of the building and any common proprietary as the Body Corporate may from time to time prescribe.

Now, the effect of that is that if the SAPA was valid and enforceable as a rule, then there was no need to require anybody to sign up to it.

WILLIAM YOUNG J:
But just, I understand that, but of course it may not have been much harm signing up to it if the obligations were the same under the rules in the Act.

MR ROONEY:
Yes, well, I think they went quite a bit further –

WILLIAM YOUNG J:
Yes.

MR ROONEY:
– as far as the proprietor was concerned under the, under the agreement but if there were valid rules providing for security and, in my submission, there were in this amended schedule 3, nobody needed to sign anything is my point.

I'll come back to 3.10 –

GLAZEBROOK J:
And is your point anyway that they weren't signing up and Mr Wu's point, in particular, they weren't signing up, being required to sign up with the Body Corporate, in any event, they were being required to sign up with a management company but not our management company, but somehow in its own right?

MR ROONEY:

That appears to be as the document read, yes, yes. One confusing thing, just further to that, one confusing thing about the agreement is that, the agreement was presented to the owners anyway, is that Theta Management Limited is defined as Empire, but then the agreement used Empire seemingly to refer to Theta but also to the building itself.

GLAZEBROOK J:

Yes, I was going to ask you about that because I hadn't quite worked out what that was.

MR ROONEY:

Yes, well, I think that's just a drafting issue, but it's fairly obvious what's intended to mean Theta and what's intended to mean the building I think.

McGRATH J:

So, Mr Rooney, did – these rules concerning security and we get onto security keys, there's nothing in the default rules that goes as specific as this, is that right?

MR ROONEY:

No, no, there isn't.

McGRATH J:

So there is no, nothing we can say as of general compass that would include this subject matter in the default rules?

MR ROONEY:

No, there is, no, I don't think there is. They're very brief.

McGRATH J:

Well, no doubt, Mr Davidson would draw attention to it if your answer wasn't right.

MR ROONEY:

Yes. No –

McGRATH J:

Thank you.

MR ROONEY:

– no, there isn't. But it's not unusual to see amended rules in, particularly in larger buildings and this is a large building, 300-odd units that will have provisions like that.

Just before I come back to 3.10, 3.14 refers to animals and pets and so on, and then 3.17 is noise. 3.18 is another, on page 400, another rule which could apply to the collection of costs that are false fire alarm or something of that nature.

But let's go back to 3.10 and particularly 3.10(a). Now, the first thing about this rule, and this is a point that was made by Justice Lang in his decision, if this rule is a rule which confers a power on the Body Corporate, then it should have been in schedule 2 anyway. The fact that it is not in schedule 2 would indicate that its purpose is not as the respondents contend. The purpose is simply to allow the Body Corporate where the building is locked and where there's a security system in the lift, to issue the access cards. It can't be expanded so as to say that this confers a power on the Body Corporate to exclude any owner or any occupier in itself.

WILLIAM YOUNG J:

Well, it must to some extent because what if the owner won't pay a dollar for an access card?

MR ROONEY:

Well, with that rule, you see, I don't think that rule would –

WILLIAM YOUNG J:

Well, do you say that a person must be given the access card?

MR ROONEY:

No, but what I say is that this rule isn't something which empowers the Body Corporate to charge for the access cards and it's not something which empowers the Body Corporate to refuse to issue an access card if an owner refuses to pay.

GLAZEBROOK J:

But there may be an ability to levy charges somewhere else under the rules.

ELIAS CJ:

And recover those directly.

GLAZEBROOK J:

Because you do have levies for looking after the common property and for matters of that kind. So I would have thought that there would be the power to charge for an access card.

MR ROONEY:

Yes, and I'm sure there is and that's probably –

GLAZEBROOK J:

Your point is that it's not this – that provision, it's another provision?

MR ROONEY:

Precisely, yes.

ELIAS CJ:

And there may not be under the power to charge any implicit power to exclude in any event if the charge isn't met. Rather, the Body Corporate may be forced to its contractual right to recover the money.

MR ROONEY:

It may well be. Contractual under the rules.

ELIAS CJ:

Yes. Can you just indicate, where is that charging power?

MR ROONEY:

It will be in the Act, right towards the beginning of the Act. Somewhere in the Act there is a power to levy.

ELIAS CJ:

Yes, I'll find it. Recovery of contributions, perhaps.

MR ROONEY:

There's a general power to levy. There must be, because every Body Corporate does it.

WILLIAM YOUNG J:

But that's levying everyone. Is there a power to charge for services particular to an individual proprietor? They impose levies and impose charges on people at fault, but are they entitled to levy or impose charges for services provided to a particular proprietor, in other words, other than collectively?

MR ROONEY:

Like issuing a card?

WILLIAM YOUNG J:

Yes.

MR ROONEY:

Well, I can't answer that off the top of my head, I'm afraid, but all I can say is, well, it's not really an issue here. There's no argument that a reasonable charge for a card could be charged. Whether that's within the Act or the rules

or not, but again I think there has to be an application of common sense. I mean, there must be a provision for some payment to be made.

McGRATH J:

Is section 15(2) the provision you're looking for?

MR ROONEY:

Yes, but that probably doesn't extend to a charge for an individual unit.

ELIAS CJ:

Section 33 is quite wide. I know it also concerns repairs required by local authorities et cetera but it's wider than that and it does require, it does permit charges where work is for the benefit of one unit. It may be possible.

MR ROONEY:

Well, it's not only work. See section 33 also refers to an act. If you paraphrase an act, where the Body Corporate does any act which is substantially for the benefit of some of the units only or benefits one or more of the units, it's actually more than the others, so I think the issue of a card would probably fall into that and then there's a rule under the adopted rules, the actual rules, which I mentioned before, 2.3H, which says that the Body Corporate can levy and require payment from a defaulting proprietor. Probably no default involved in the issuing of an access card, I suppose, but I think it –

ELIAS CJ:

Well, except presumably the Act says cards are issued to all owners and if somebody hasn't paid for theirs they're in default.

MR ROONEY:

I think that's true, or if they lose a card, for example, and need a replacement.

TIPPING J:

Mr Rooney, could I ask for some help with the language in 3.10A? To my eye, it's a little strangely worded. Is it true that if, for security purposes, the Body Corporate wishes to restrict access et cetera to common property, it shall make available to that person a security key? I mean, it says "may" and that's my primary query. It's anticipatory, isn't it? If it wants to restrict access it may or perhaps shall make available.

MR ROONEY:

Well, I would say that it reflects the reality that access is restricted by the fact that there are locks on the external doors which you need a card to get through and you need a card to operate the lifts.

TIPPING J:

Translated more loosely, it really means if you have a security system you shall make keys available.

MR ROONEY:

Well, it's as close to saying that as it is to saying if we don't like you or we want you to do something and you won't do it we're not going to give you a card.

TIPPING J:

Well, I'm not suggesting for a moment it means that.

MR ROONEY:

Well, I think the respondents are suggesting that.

TIPPING J:

It will be interesting to hear what they say. But in essence, I would have thought it's a rather convoluted way of saying if you've got locks, as you inevitably will, you must make keys available.

MR ROONEY:

I think that's right. It's not contrary to that, is it? Logically taking into account section 11 in particular that must be what it means.

TIPPING J:

It says if it restricts access then it must not restrict access. But it can't mean that, so it has to be read in a rather more ...

McGRATH J:

It's saying how section 11 will continue to be complied with.

TIPPING J:

Yes, yes.

GLAZEBROOK J:

Well, it may be referring back to 3.9, which says you've got to keep the building safe so that it's just empowering them to give an access card to people to get through the safe building.

MR ROONEY:

So that the – yes.

GLAZEBROOK J:

– may be saying nothing more than, well, you have that obligation to keep the building secure but that doesn't mean we can't give an access card to people to get in. I mean, it might be sort of self-evident but –

MCGRATH J:

Notwithstanding paragraph A.

GLAZEBROOK J:

Yes, notwithstanding 3.9, we can actually let you go in.

MR ROONEY:

Yes, but not members of the public. They're not going to leave it open to people off the street in the middle of the night.

GLAZEBROOK J:

Yes. So we don't, we don't have to have a doorman there letting in people, we can, we can give them a security access card.

MR ROONEY:

Well, even, even then, even if you get through the exterior door, you've still got the lift and it's unlikely that

TIPPING J:

My main purpose in raising it is it appears to give a discretion, but I would have doubted whether that's really what it's meant to achieve.

MR ROONEY:

I agree. That's entirely Mr Wu's point.

TIPPING J:

Yes, well, I think – I raise it because I think Mr Davidson's going to have to deal with it.

MR ROONEY:

Yes. Well, that is, that is precisely the point as I said earlier that's it's never been Mr Wu's view that it does confer a power on the Body Corporate to exclude certain people and if it did it would be ultra vires, ultra vires, not because it's not unanimous because it was, but it's ultra vires because of section 37(6).

WILLIAM YOUNG J:

And in section 11(2)(a).

MR ROONEY:

Indeed, yes.

WILLIAM YOUNG J:

But I did actually wonder a bit about section 11. It does look to me as though it may have physical structures in mind. You can't block a window, you can't block a door, you've got to leave overhanging eaves in place, you can't take away support.

MR ROONEY:

Well, access to door – well, yes, well, of course, that Act was passed in 1972, really before high rise apartment buildings, so their may be something in that but it has to, the Act has to adapt as the environment adapts and if it says there's to be unrestricted access to doors, well, my submission is that it means that owners must be allowed to get to their doors, whether they're in a one-off townhouse or on level 30 of a high rise building through the, through the lifts and the corridors.

TIPPING J:

Well, it's a bit odd because it says over the land and every part thereof and the land for present purposes is presumably the whole, but I don't think we need to detain ourselves with such subtleties. Mr Rooney, you raise a powerful argument that it must mean you can't stop people going to their door.

MR ROONEY:

Yes.

TIPPING J:

And subject to what Mr Davidson says I think that's all you need assert.

MR ROONEY:

Yes, yes. All right, well that I think deals with 3.10.

TIPPING J:

Are you coming in due course to deal discretely with the curtailment of your damages, ie. the essence of the cross-appeal?

MR ROONEY:

Yes. I think I'm, I think I'm going there now, Sir, actually. Yes, I think the starting point for that is to look at exactly what the trial Judge did and how he arrived at the conclusion that, or the conclusion that he arrived at for calculating the loss and in the end that was non-controversial and, indeed, right up, as between the parties, right up to the Court of Appeal stage where the, although the original notice of appeal challenged the loss calculation somewhat to my surprise, that was not pursued at the hearing, it was abandoned at the start of the hearing.

TIPPING J:

Either as to quantum or as to concept?

MR ROONEY:

Well, both. I think the way that the, that the Body Corporate put it was if there was a nuisance then we accept that the Judge's calculation of the loss was correct and I think that's been said in the written submissions in this case, in this hearing, subject to a couple of –

WILLIAM YOUNG J:

I don't think there's much, I don't think there's much doubt subject possibly to an argument about mitigation and some arguments about the little bits at the end that if your, if a nuisance has been committed that had the effect of preventing your client renting the property then the damages that awarded are not challenged.

MR ROONEY:

Correct, Sir.

WILLIAM YOUNG J:

So there's a mitigation issue and some trivial issues about the last two items I think.

MR ROONEY:

Yes, the –

GLAZEBROOK J:

Well, if you're not challenging quantum or concept can you bring up mitigation unless it's explicitly said you, you are doing so. I would have thought the withdrawal of an objection to quantum –

WILLIAM YOUNG J:

Was mitigation argued in the Court of Appeal, it was, wasn't it?

MR ROONEY:

Yes, yes, it was.

WILLIAM YOUNG J:

Yes.

MR ROONEY:

I'm not sure that it's raised in this appeal anyway. I may be mistaken about that, but ...

TIPPING J:

Well, I assume that your opponents, the respondents, are trying to hold onto the Court of Appeal's approach to damages.

GLAZEBROOK J:

No, they're trying to get rid of it altogether –

TIPPING J:

Well, yes, if they're trying to get rid of it altogether, but if they can't do that, they are presumably trying to hold on to the Court of Appeal's more narrow –

GLAZEBROOK J:

Yes, despite the concession.

TIPPING J:

Well, it will emerge but ...

GLAZEBROOK J:

Not the concession, but the withdrawal of the objection.

MR ROONEY:

Yes, the personal, the limitation to the personal damage, if you like, to Mr Wu rather than to his loss of, loss of rent.

TIPPING J:

Exactly. No, it may be you prefer – but you carry the burden of the cross-examined appeal on this respect, don't you?

MR ROONEY:

Yes.

TIPPING J:

I for one would like to hear, not at any length, what the essence of your client's argument is on why the Court of Appeal were wrong to take the view of damages they did.

MR ROONEY:

Well, the first point in that respect was to draw the distinction in rule 3.10 between owner and occupier. Now, if rule 3.10 doesn't confer a power to exclude tenants, then there is no basis for that finding because rule 3.10

doesn't come into play at all, and the separation out of owner and occupier in rule 3.10 was the entire basis for the Court of Appeal's finding.

TIPPING J:
Would you take us to the ...

MR ROONEY:
Well, essentially, it's at that final sentence in paragraph 88 at the top of page 129 in the white bundle. Having said that, Mr Wu was not entitled to provide an occupier with a key in the absence of that person's agreement to abide by the terms of the protocol. Now, if we, if we refer that back to section 11, if it's accepted that that has, has the effect of protecting access, there's really no logical reason why there should be a distinction between Mr Wu's rights and his tenants' rights, but particularly when everybody accepts that Mr Wu owned this, bought and owned this unit as an investor seeking a, a return from the rent that it generated.

WILLIAM YOUNG J:
Well, the problem is the Court of Appeal came up with a judgment that no one was asking for or contending for. Do you – I mean, I think I know what your answer is, but can you make it clear, would it have been open to the respondents to allow access only on the basis that the occupiers, the actual occupiers signed the security and access protocol?

MR ROONEY:
Yes and that's what happened.

WILLIAM YOUNG J:
So they were entitled to do that?

MR ROONEY:
They were entitled to? Well, I don't think I do accept that they were entitled to, but I don't take issue with it.

WILLIAM YOUNG J:

All right, so although you sort of come at it from a different angle, you don't necessarily challenge the sort of construct of the Court of Appeal's judgment, you challenge the application of it because, you say, that in fact Mr Wu would have been prepared to get his tenants to sign security and access protocol?

MR ROONEY:

Yes. I don't think this is a case of him being prepared. He just didn't care. It was of no consequence to him. That was something for his tenants to decide. It's not anything that he was ever concerned about.

TIPPING J:

So in relation to that crucial last sentence in 88 you accept the premise but you say the facts don't support the conclusion?

WILLIAM YOUNG J:

Accept the premise for different reasons.

MR ROONEY:

Yes.

GLAZEBROOK J:

Well, I'm not sure that you necessarily accept the premise. You just say it's nothing to do with Mr Wu. It would be to do with his tenants to say whether or not they should sign, and presumably for the same reasons that you say that Mr Wu can't be made to sign an agreement with a totally unrelated party and pay money to that totally unrelated party in the sense of not being the Body Corporate or the landlord and that there was no right under the rules or anything else to require that to be done, but from Mr Wu's perspective he doesn't care if the tenants sign it or not.

WILLIAM YOUNG J:

Well, they would have to because they wouldn't sign – they would only probably sign it if he made it a condition of the sub-licensing agreement that they sign it.

GLAZEBROOK J:

That doesn't seem to be what's happened in fact, but ...

MR ROONEY:

Well, it's still entirely for the tenant to decide.

ELIAS CJ:

But you say that point wasn't reached.

WILLIAM YOUNG J:

I want to hear about that.

MR ROONEY:

Which point wasn't reached?

ELIAS CJ:

The point of asking the tenants to enter into this, their agreements.

MR ROONEY:

Well, the point got pretty close to being reached. I'm thinking of that meeting in December 2009. There's a memorandum from that which was prepared by the respondents.

GLAZEBROOK J:

This is after the period, though, isn't it?

ELIAS CJ:

Yes, and it's after Justice Lang's judgment isn't it?

MR ROONEY:

Yes.

GLAZEBROOK J:

So what you say is that because Mr Wu wouldn't sign there was no question of anyone else signing because they were saying Mr Wu couldn't have access to the building unless he signed, and if he couldn't have access to the building then there was no question of there being any tenant.

MR ROONEY:

Yes. That's right.

ELIAS CJ:

Yes, he couldn't put tenants in.

MR ROONEY:

He couldn't show them through, yes, precisely.

TIPPING J:

Well, the point, as the Chief Justice says, was never really tested, was it? I mean, it just didn't happen. So I have some real problems in understanding the logic of this approach of the Court of Appeal. I mean, the fact is, if you're right and you have a course of action, you weren't able to get access to land to which you were entitled to get access. The direct result of that was you couldn't put tenants in and the direct result of that was that you lost the rent.

MR ROONEY:

It's really as simple as that.

TIPPING J:

We will, no doubt, be told it isn't.

MR ROONEY:

Yes. Well, I mean, as far as Mr Wu's case is concerned, it is as simple as that, and frankly it always has been.

TIPPING J:

Did the Court give the parties any opportunity to address this point or did it just come out in the judgment?

MR ROONEY:

It just came up in the judgment. What happened was that some months after the appeal was heard the – this is a very important point – Court of Appeal issued a minute asking for further submissions on a case they had heard between our hearing, well, they had issued a judgment on, anyway, between our hearing and the delivery of the judgment in our hearing. It was a case called – it's incorrectly spelled in the report as *Berachah Investments Limited v Body Corporate 164205* [2012] NZCA 256. It's actually *Berachan*. But the view – and their Honours asked for some further submissions on the relevance of *Berachan* and I think the common view between both of us was that it didn't really have any impact at all and we said that. But also in this minute, the Court of Appeal asked the respondents to clarify their position on damages and in the bundle at page 608, the yellow bundle 608, right near the end, I haven't put the whole document in and you'll see it runs to 11 pages, and I've only put in 10 and 11, but the rest of it is of no consequence. Paragraph 43 on page 609, this is the respondent's memorandum, respondents in this Court, they set out what the Court had asked, "We also seek clarification on another issue. A number of arguments were advanced in writing to challenge the amount ordered for damages. One involved the question of mitigation. Another concerned the calculation of damages and whether it could begin as from 28 November, the date on which the liquidator of Academic disclaimed. We understood other challenges to the quantification of damages to have been abandoned at the hearing. We wish to clarify whether that understanding is correct. If not, we would appreciate it if counsel could identify those questions of damages that remain at large." The response to that was, "That is correct. To confirm the status of the

appellant's arguments relating to damages are as follows. One, mitigation. The appellants maintain their argument. Two, damages. That's whether it starts at the disclaimer date or the effective lockout date. Three, importantly, calculation of damages. The appellants abandoned the relatively minor challenges to the calculation of damages based on occupancy rates and door lock costs with the result that if nuisance is founded, damages would be on the same basis as in the High Court, subject only to one and two."

Now, this was the first response to the Court of Appeal's minute, so my response was second. My response didn't need to address the issue of damages at all except in those limited respects. So that –

WILLIAM YOUNG J:
But this is referable to nuisance – I mean, I think this is a point that we've past, but that's referable to nuisance as found by the High Court Judge.

MR ROONEY:
Well, it says there in subparagraph (3) with the result that if nuisance is founded, yes, so it presupposes that there was a finding of nuisance.

ELIAS CJ:
What, effectively, the Court of Appeal has done is say, "We find nuisance in respect of Mr Wu's own interests but not in respect of the tenancy arrangements, so the basis of damages has to be different."

MR ROONEY:
That's correct. Yes.

GLAZEBROOK J:
But it probably is predicated on 3.10 as you say, I think, giving the power to require the signing of that agreement and whether it's reasonable to require it from one and not the other, and your argument would probably be, well, it probably isn't reasonable for either in the sense that it's an agreement with a management company and not an agreement – and actually not necessarily

because you already are required to do all of those things under the rules, in any event.

MR ROONEY:
Yes.

GLAZEBROOK J:
So to say that you have to sign something as well as just being required in any event just can't be necessary for security. I suppose it focuses someone's mind, perhaps, a bit more which is why you might get a tenant to sign it.

MR ROONEY:
Yes. But the difficulty with that was that that wasn't foreshadowed in any way by the Court of Appeal to any party.

GLAZEBROOK J:
I understand that. Your friends will make the same point. You seem to be ad idem on that point, at least.

MR ROONEY:
Yes. Well, the interesting thing about that is that yes, the respondents do say that, but then they say, "Well, yes, but there are still some parts of this judgment we'd like to hold on to," which is highly ironic.

WILLIAM YOUNG J:
Well, they want to hold on to the view that the conclusion that rule 3.10 permits access cards to be withheld.

MR ROONEY:
That's what it boils down to, yes.

TIPPING J:

But do they also want to hold on to the view, because I am in doubt about this, assuming that is not so and there has been a tort committed the damages are as limited by the Court of Appeal's approach?

MR ROONEY:

Well, I expect we will hear that but the way that the argument is framed is that that approach to damage, in fact, is referable to liability and that there is a different basis for liability. Mr Wu doesn't accept that. He accepts it's a factor relating to damages only.

So I'd just like to pursue something of the – well, if I need to, for your Honours, the process that the trial Judge went through in order to arrive at his calculation and I think –

WILLIAM YOUNG J:

But I don't think it's an issue.

ELIAS CJ:

No.

MR ROONEY:

No, all right.

WILLIAM YOUNG J:

Providing the trial Judge's approach to what the nuisance was is right, I don't think there is a substantial issues as to damages other than as to mitigation.

MR ROONEY:

Right. I'm not sure that mitigation is still an issue. I – is it?

ELIAS CJ:

Well, you can be heard on that and reply if need be.

MR ROONEY:

Well, I think I've – the one other, yes, there is one other little point which I feel obliged to emphasise and it, it has been somewhat glossed over probably in both Courts to some extent, but the fact is that Mr Wu and the others that he represents actually had two injunctions of the District Court upheld on appeal in his favour requiring access to be given. Now, the argument at that point was far less sophisticated than it eventually became and the, the wording of the orders were to the effect that the Body Corporate, I think only the Body Corporate was a defendant at that stage, was required to hand over the access cards. Now, it, that may be imprecise given the way that the case has developed up to today, but its meaning was very clear at the time and the Body Corporate and Theta simply didn't abide by those Court orders and continued to refuse to grant access and, in fact, in Justice Lang's decision on the appeal judgment, this is not the November 2009 judgment. There's an earlier judgment on appeal from the District Court judgments, which I'm sure is in the bundle somewhere, yes, page 483A yellow bundle. This is in March 2008, so a few, a few months after the District Court judgments. There's a whole part of this judgment which is concerned with a procedural issue about whether counsel had sufficient notes about what was going to be happening, what was to happen at the second District Court hearing and his Honour accepted that but, nevertheless, left a slightly modified version of the District Court decision to stand and then he said at paragraph 59 on 483Q starting at second sentence of 59, "I would expect that by 12 March the Body Corporate will have required Theta to hand over the keys to the respondents. If it refuses to do so or makes demands that are unreasonable, I would expect the Body Corporate to have applied for leave to issue third party proceedings including an application for interim injunctive relief against Theta by the time the matter is next called before the District Court." Now, in fact, what happened was that the Body Corporate called a meeting shortly after that in August 2008 and the minutes of that meeting are at page 515 and the Body Corporate resolved, despite what the Judge had said, resolved, at page 517(iv), "Should the Body Corporate sue the building manager, Theta, for not releasing the key cards resolved by the Body Corporate that it should not sue the building manager,

Theta Management Limited, for releasing the key cards." Now, and there might not have been any legal compulsion arising from Justice Lang's appeal decision, but it's a little unusual and it's even more extraordinary really when the majority of the votes that, almost all of the votes, that seem to be cast in this Body Corporate are cast by Theta exercising these proxies that it's required under its leases, and you'll see from page 515 that it says that Mr Chen attended this meeting holding 229 proxies, a majority in itself.

TIPPING J:
Well, all this may be very odd, Mr Rooney, but where does it fit into the issues that confront us?

MR ROONEY:
Well, I think it's a practical, a practical indication that these owners should not have remained locked out for such a long period. Not only on the much more sophisticated argument that comes up now does Mr Wu say, well, it shouldn't have happened but at the time that it was happening, there were these Court orders requiring the access cards to be handed over so it's a, it's part of the factual circumstances I think which it's appropriate to take into account.

GLAZEBROOK J:
Or do you say that it was a defiance of a Court order and therefore damages just arise directly from that?

MR ROONEY:
Well, it was never pleaded that way but that's, it probably could have been. Probably could almost have been a content on that basis.

ELIAS CJ:
Well, it does seem really principally a matter of background and it may be that we, we now need to move on. Where, where did you want to take us in your argument? Does that really complete your argument?

MR ROONEY:

I think it, I think it does. If I could just have a quick look at my list, Ma'am. Yes, thank you, Ma'am.

ELIAS CJ:

Yes, thank you, Mr Rooney. Mr Davidson, can I just clarify, I was a little slow on the uptake when Mr Price entered his appearance. In the documents we have, you appear as counsel to both respondents?

MR DAVIDSON QC:

Yes, I do with Mr Burgess in that capacity. Mr Price is here to represent the separate interests of Theta should they emerge in the course of this hearing and he's also got a role I think because he has a much better historical understanding of some of the things that have just been discussed regarding the way the rules were, came down, Body Corporate rules came down here.

ELIAS CJ:

Well, the point, is he appearing with you representing both respondents or is he appearing separately?

MR DAVIDSON QC:

He's here for Theta, Ma'am.

ELIAS CJ:

He's here for Theta?

MR DAVIDSON QC:

Yes.

ELIAS CJ:

All right, so he's adopting your submissions?

MR DAVIDSON QC:

He is.

ELIAS CJ:

So you're not appearing for the second respondent? I just want to get the thing clarified.

MR DAVIDSON QC:

Mhm, mhm, that's what he said, yes.

ELIAS CJ:

Yes, thank you.

MR DAVIDSON QC:

So, may it please the Court, the way the argument has developed this morning means I'm going to take a different track than the sequence of submissions filed. It will take more than the day is long to complete the submissions as they've been prepared, but I want to really just leave aside the submissions made for a moment, for a few minutes possibly until the lunch break to really put the case for the respondents on a factual setting before addressing the legal issues which have taken up so much of the morning.

There appears to be no doubt that the approach of the Court of Appeal with regard to the law of nuisance is not in any context, it involves the unreasonable interference with a person's proprietary interest, the right to use or enjoy land. It does involve proof of damage and therefore if a nuisance has been committed which caused here a loss of rental income, then that second requirement is established but for the respondents it is important to lay down this marker of their case, that they say that in terms of the Court of Appeal judgment as it stands, there is no basis to go back to the High Court. If the Court of Appeal judgment holds then there is no, on the evidence that is already before the Court, there is no basis to establish or find any damage whatsoever. Totally different if in fact the Court concludes the nuisance constitutes something which prevented the renting of these properties as his Honour Justice Asher found.

The Court of Appeal did not uphold that finding. The Court of Appeal concluded that the nuisance was not the basis, was not founded on the inability to put tenants into the property but rather, and the reason for that was the Court of Appeal has held that rule 3.10 operated to allow the imposition of the protocols and broadly that included the deposit, security deposit, but did not extend to an entitlement to restrict the owner of the property, Mr Wu, going to his premises and that was the effect, of course, of the protocol. He was not able to get there on the face it. I'm going to come to a factual differentiation of that point in a moment.

ELIAS CJ:

Sorry it didn't exclude him from the premises because it was a reasonable imposition?

MR DAVIDSON QC:

Correct. What the Court of Appeal has concluded and this was not argued. The contest in the Court of Appeal was, were the actions of Theta and the Body Corporate lawful in terms of the rule 3.10 and section 16 of the Act had application as well in the argument, extensive application. Were they lawful in bringing down the protocols? The Court of Appeal has concluded that for reasons differing from those of his Honour Justice Asher, they were reasonable, they were lawful and therefore Mr Wu could have no claim to the damages for not being able to let his premises during this period. That's the fundamental finding of the Court of Appeal. But out of the blue and for all of us out of the blue, the Court said but when we look at the rule we must distinguish between the occupier, whoever that may be, and the lawful imposition or reasonable imposition of restrictions on the occupier and the owner, because they are two different parties and Mr Wu is an owner and therefore we are sending it back to the High Court for evidence and they start to postulate what the evidence might be as to whether Mr Wu may have lost something personally, namely in respect of his personal use, or in respect of his loss of a chance of securing a tenant.

So on that basis the respondents come to this Court and say well when you look at the evidence that was given and test it extensively in cross-examination Mr Wu was not prepared to accede to the protocols at all so far as tenants were concerned. So if the protocols were valid so far as the tenants or occupiers were concerned, he would not accede to them therefore he could not have lost anything and that is exactly what –

GLAZEBROOK J:
Was he ever asked to accede to the protocols as far as the tenants were concerned, rather than acceding to the protocols in his own right? So if you are making a factual distinction and have got different factual things that you are pointing us to, then I'd be assisted by it and I have to say I wasn't assisted by the long list of factual issues that were attached to your supplementary submission because most of them seemed to be just saying "They were right, they were wrong".

MR DAVIDSON QC:
Well your Honour I think the question –

GLAZEBROOK J:
Are you going to take us to the factual background?

MR DAVIDSON QC:
Yes, yes I am, yes I am.

ELIAS CJ:
Can I just say isn't there an inconsistency in drawing – in acknowledging that he might have lost a loss of chance in securing a tenant and maintaining this distinction between things that accrue to him as owner and what was required of the tenants. There seems to be some logical disconnection here.

MR DAVIDSON QC:
That is really the heart of the appeal by the respondent your Honour. There is a disconnect. I just want to answer the question more fully by taking you to

the judgment of his Honour Justice Hammond at page 142 of the first bundle, first part of the section over case. It's page 142 at paragraph 127. Here his Honour is looking at the question of damages. Perhaps just go back one paragraph to page 141, paragraph 126, where his Honour concludes that Mr Wu personally was entitle his judgment in nuisance in respect of his own direct property interest but we don't have a damages analysis from the High Court on this basis. So his Honour has already in the preceding paragraphs and particularly 124 distinguished between the rights qua Mr Wu as proprietor and his rights in respect of tenancy.

TIPPING J:

I just don't understand this Mr Davidson. This is not a criticism of you. This man had a proprietary interest in the land. Now that proprietary interest could sound in his own personal enjoyment, it could sound in his using the land as an investment. What is the distinction that the Judge is trying to draw?

MR DAVIDSON QC:

Well, thank you for the introductory comment Sir and I have found difficulty – we found difficulty in getting to the point as well.

ELIAS CJ:

So in other words why can't you have a rolled up basis?

MR DAVIDSON QC:

No.

WILLIAM YOUNG J:

Well the reason he says is that they take the view that Mr Wu was not prepared to insist on his licensee/tenants signing the security and access protocol.

MR DAVIDSON QC:

Correct, yes.

WILLIAM YOUNG J:

Now whether that is a correct factual finding is obviously an issue but that's – and secondly the Judge here is taking the view that the Body Corporate and Theta were entitled to restrict access unless or until that was signed.

MR DAVIDSON QC:

Exactly.

TIPPING J:

I agree with that but may I interpose, I think there is a conceptual issue here which in 127 where the Judge purports to make what he calls he an absolutely necessary distinction but I'm not at all sure that it's a distinction that actually runs.

MR DAVIDSON QC:

Well I think it stems Sir from rule 3.10 with regard to –

TIPPING J:

From rule 310 of the High Court rules?

MR DAVIDSON QC:

No, no.

TIPPING J:

Oh sorry, sorry.

GLAZEBROOK J:

See I think this is where all the difficulty arises in the case really because it is an interpretation of rule 3.10 but I don't think anybody is actually contending for that interpretation as being correct.

TIPPING J:

No.

GLAZEBROOK J:

So I'm not sure, I suspect we're wasting time on worrying about what the Court of Appeal may have done because nobody's really contending for their interpretation of rule 3.10. Now it may be that you want to retain aspects of the Court of Appeal's decisions and I am not criticising that but you're not doing so on the basis of their interpretation of rule 3.10, as I understand it.

MR DAVIDSON QC:

No, no, indeed the, I was coming to the point but I'll come to it right now. The rule 3.10 is at the foundation of this case. Justice Asher concluded that it did not empower, therefore did not make lawful the protocols as brought down, as required. The Court of Appeal took a different view on that issue. On that issue it said that his Honour had not brought to account in particular the provisions of the Act with regard to the, under section 15, which you've had a look at already briefly this morning and section 16 was raised as well for the respondents, with regard to the obligation to maintain the insurance on the property. That was not bought to account by his Honour. The Court of Appeal's reasoning which is set out fully in our written submissions, primary submissions, is that having regard to all the facts of the case, because this is facts specific, in assessing whether in fact it was a reasonable thing to do, it was reasonable on the undisputed evidence of Mr Chen as for the severity of the problems. This is not simply the passage of management in this building. This is, these are two towers of 19 stories with 313 units and 800 students mainly overseas with real language issues. It was a building and the evidence is replete with reference to this, where the building was failing in terms of safety, in terms of cost and, in particular, in terms of insurance, something that has been raised by Mr Rooney. Only one company is prepared to quote for the insurance on this building. Down to one and if there's none, Mr Wu in the evidence that I took him, in his evidence which I took him through, acknowledged the gravity of the situation and the sense and soundness of the protocols that were brought down. That's the factual setting which the Court of Appeal bought to account when it looked at the legitimacy of the steps that were taken to bring down the protocol.

GLAZEBROOK J:

Can I just check with you? The way I understand the Court of Appeal's decision is that they say that the protocols were perfectly reasonable to require of tenants but you couldn't require them of Mr Wu and you couldn't require them of Mr Wu because there was no suggestion, apart from the fact that he wasn't there and therefore no suggestion, an absentee landlord, that he would be doing any of those things so you couldn't impose those restrictions on him so that it was ultra vires, if you like, in respect of him but intra vires in respect of the tenants. Now, one of the difficulties is, is if he was factually required himself to sign those protocols, then he couldn't be made to do so because it was ultra vires the powers of the Body Corporate, on the findings of the Court of Appeal. Now, the difficulty I have is that why that doesn't lead to the view that, saying he couldn't get into the building, he couldn't allow tenants to get into the building and therefore the losses flow naturally from that.

MR DAVIDSON QC:

Well, Ma'am, several points in that proposition. You're correct that paragraph 86 of the judgment of the Court of Appeal which is page 128 of the bundle records in the last few lines, well, I'll take the whole of 86 because this is the way the Court approached it, it's the genesis of their thinking, "Rule 3.10 treats proprietors and occupiers." Well, yes, it refers to them separately but for the respondents, my submission is that that doesn't create a disjunctive setting. It's simply identifying the fact that you can have issues of security relevant to 3.10 in respect of owners or occupiers.

TIPPING J:

Or both presumably.

MR DAVIDSON QC:

Or both and you may have a mix, and the passage of time, your Honour, you may have owners living there with families in the main –

GLAZEBROOK J:

I doubt in those particular units but, from the sound of them but ...

MR DAVIDSON QC:

Well, that may be judged, your Honour, as we see it, but it's a multi unit, multi room place, built as a hostel, designed as a hostel. That's part of the reasoning, the respondent's case here. There was no suggestion, not even today, that there could be or would be an owner/occupier use. These were bought for letting and what has occurred in the Court of Appeal is that when the Court looked at the circumstances which applied of such severity, it assessed the application of rule 3.10 and it referred to section 16 of the Act as well, which is ...

GLAZEBROOK J:

Well I can I just check what your submission is? So is your submission that the Court of Appeal was wrong and that the restriction should have applied equally to the owners and occupiers and therefore they were perfectly entitled under rule 3.10 to require Mr Wu as well to sign?

MR DAVIDSON QC:

Yes, yes.

GLAZEBROOK J:

So that's the submission?

MR DAVIDSON QC:

That is the submission. They could require any owner or any occupier to join into this process.

GLAZEBROOK J:

So, but your argument is dependent on 3.10 or your particular interpretation of 3.10 which Mr Rooney would say, "Well if that interpretation is right then it was ultra vires" and then I suppose you take a pleading point would you?

MR DAVIDSON QC:

We have taken a pleading point.

GLAZEBROOK J:

That's what I was assuming.

MR DAVIDSON QC:

Yes.

GLAZEBROOK J:

So you take a pleading point but if your interpretation is right and his interpretation is wrong then Mr Wu should have taken – said it was ultra vires and hasn't.

MR DAVIDSON QC:

Well he seems to do now, that's what the supplementary submission is about.

GLAZEBROOK J:

Well no he doesn't, he says well it doesn't mean that.

MR DAVIDSON QC:

Well I don't accept that.

WILLIAM YOUNG J:

I think he said if it does mean it then it ultra vires.

GLAZEBROOK J:

Well he does, exactly, exactly.

MR DAVIDSON QC:

Mmm.

GLAZEBROOK J:

And that's where the pleading point arises.

WILLIAM YOUNG J:

There's a point that I'd slightly misheard before in para 87 of the Court of Appeal judgment. What they're saying is that it was permissible for the Body Corporate not to permit Mr Wu to copy or hand over an access card.

MR DAVIDSON QC:

Yes by virtue of the second leg of 3.10.

WILLIAM YOUNG J:

And that may be a significant feature in their reasoning. Although part of it's the breaking apart of owners and occupiers but the other component of it is the ability to prevent access cards being handed over.

MR DAVIDSON QC:

Yes but there's something that's missing from the argument today in its entirety. Forgetting the working in 3.10, when this situation developed and 2007 is something I am going to return to probably just after lunch and the crisis occurred. The whole substratum of the arrangements that were made for people like Mr Wu collapsed. He had purchased his unit, as had the others, as investors for the purpose of letting. The letting was undertaken by a company which was set up, took a lease in every case and thus investors over here, mainly in Australia, the lessee company, Academic, and over here the occupiers. When Academic collapsed, not paying the money that was guaranteed to these people which I think was an 8% return, there is suddenly a crisis for all owners and the future of the building. Into that setting comes the idea and the bringing down of the protocols and it was a crisis but here is the nub of the different. At this point in the new arrangements there was no obligation of Mr Wu or any other owner to enter a lease with any new party at all. So while Theta said, "We'll do it, it's on different terms but we'll become the lessee and we'll find your occupants and you'll get your return that way", the OMUs, the owner managed units were able to run their own cutter.

The moment that occurred the ability to achieve a unified control of the building through the lessee who licensed all occupiers, disappeared and when the discussion took place this morning about the SAPAs, does it apply to an owner, does it apply to an occupier, the contractual link has gone so that now the Body Corporate and Theta or whoever the manager is, don't have control anymore, knowledge of the occupiers of the building under the arrangements made, for example by a Mr Wu. No names, no knowledge of who they are, the coming and going, whatever, nothing and this is in the context of the massive costs of callouts, vandalism and insurance loss on the cusp.

So when the discussion took place in this Court this morning about the provisions of the SAPA, my submission is that the Court should reflect further and I will come back to it straight after lunch, on what really was being asked here. It was all directed to deal with a situation I have just described. Who are the occupiers? Give us the names, sign here, understand the conditions on which you are receiving these cards, access cards. Understand the implications of fire callout, of cost, loss of cards. Loss of an access card to a building like this is – it's the rupturing of the wall of security when an access card to a building, multi storey building or even this building gets out on the street. These protocols are not odd, unusual or coercive. They were brought down, held by the Court of Appeal to be appropriate in the circumstances. Justice Asher had not brought to account the insurance issue in section 15 of the Act at all in his reasoning. The Court of Appeal did. This was the real moment of truth for this building.

So when we look at the correspondence that was sent out there was, in my submission, a glaring misunderstanding in the submissions you have heard. Mr Chen, dealing with the crisis I have just described, wrote to Glaister Ennor, it's at page 435 and it is not a lock out situation, it is a letter – of the yellow bundle Ma'am. You've been taken to it earlier today. This is to Mr McKendrick. So he represents Mr Wu and others at the time. Second paragraph, "Theta will provide a programme to provide access cards to your clients with access on confirmation from AML", that's because AML had a lease and it needed to strip that away, it had to go, "That your client is entitled

to occupy that apartment but as part of our requirements any person given access to the building must comply with the protocol and related materials, then squarely to provide owners or occupants access, they need to read and comply with the attached rules."

Now it goes on in the last paragraph, "Theta is also willing to provide you, as your client's lawful authorised person, access to the building at reasonable times required in the course of your duties, what are those duties, why will you require access and so forth and there will someone accompanying you." So it's a very careful explanation that yeah you can go onto, you're the agent and you can go on and what is the purpose of that. So all it's doing is consistently wanting to know what's going on, if Mr Wu's agent in this case wants to go there. So it's not a lock out at all. It's a reasonable inference that the answer was want to look at renting the property on behalf of Mr Wu or anyone else. There's nothing there to indicate, quite the contrary, that there would be any impediment to that occurring.

GLAZEBROOK J:
Well apart from not signing the protocols.

MR DAVIDSON QC:
Apart from not signing the protocol but now and obviously it's just on 1, after 1, I want to go through 436, 7 and 8 and so forth and really have a look at what they were being asked to sign because the submission for the respondents is that there is nothing unlawful in the context I have just described, of asking an owner to be part of that and secondly, there is nothing in this case to suggest that Mr Wu would have done other than let the property and all he had to do was to accede to this in the same way as everybody else did, including owner managers who simply got the rents, got the bonds from their occupants and life went on and they got their money, that's the mitigation point.

COURT ADJOURNS: 1.04 PM

COURT RESUMES: 2.18 PM

ELIAS CJ:
Yes Mr Davidson.

MR DAVIDSON QC:
I want to spend a little time only in addressing the Court of Appeal judgment because it's my submission that to date the rationale for the judgment on its finding that the protocols were lawful for the purpose of rule 3.10 has simply been lost in the argument. I want to go back to that and then I want to turn immediately after that to the documentation which surrounded the imposition or the attempted imposition of the SAPAs beginning at page 435 of the bundle, of the volumes in front of you.

For the respondents, the position is held and is advanced exactly as the Court of Appeal contended with regard to the lawfulness of rule 3.10 and I am conscious that in making that submission I have to address section 11 of the Act because that appeared to be potentially a supervening factor which in my submission is not and I'll come to that after I have addressed 3.10. This is set out at paragraph 33, page 104 of the case in front of you, of the judgment, appeal judgment.

So the first point is starting at 3.10B, a proprietor or occupier who has a security key must not duplicate it, et cetera, make sure it's not lost or handed. Fundamental security measure. 3.10(a), "If for security purposes the Body Corporate or its agent and/or the building manager restricts the access of any proprietor, it may make it available." So that is on a presumption that there are measures that may be taken so to restrict for security purposes.

McGRATH J:
Yes it doesn't confer them, it presumes their existence.

MR DAVIDSON QC:
Correct.

McGRATH J:
Yes.

MR DAVIDSON QC:
So factually, obviously to make this sound or to uphold it, there have to be circumstances that would warrant that step being taken, a step being taken for security purposes. This came down in a way that was obviously accepted in the sense it was brought down by an amendment to the default rules and the Court of Appeal has made a comment in this judgment that it is a bit unattractive to have a go at something when you have actually brought into something and that's a rule that's in place.

The Court then looked at the protocols, it looked at the rule 3.10 and looked at the protocols in the succeeding pages of the judgment by looking at the attempt and discussing the attempt to make amendments to the rule. Of course what's happened here is the attempts to validate or have held valid the amendments have failed and so from the time we have been in Court, we have back in the High Court, Court of Appeal now and now, we've been back to the original rule, the rule first amended,

The Court then, at paragraph 36 onwards, refers as we submit is critical to the nature of the building and the setting in which Theta came on the scene and you can see a passage from Mr Chen's affidavit. He moves from affidavits to affirmations, at page 109, under his number 27, just above the 39 in the judgment paragraph, areas of most immediate concern ongoing damage, possibility uninsurable and security and Mr Chen's was that protocols were required to protect the economic interests of all owners and this is important in the respondent's submission because the unity of purpose of the protocols is a founding element of the argument for their lawfulness. You can't succeed with a set of protocols like this unless they come down uniformly on all the potential sources of grief to the property interests and the people who live in them. It's a hole in the dyke.

So Mr Chen then, in one of a series of depositions, referred and the Court of Appeal refers to this, through to paragraph 41 about the undisputed evidence from Mr Chen for the insurance claims arising out of property damage and vandalism.

ELIAS CJ:

These all indicate – these are all reasons why this approach may have been reasonable but you have to start, don't you, with the authority to exclude why that's lawful.

MR DAVIDSON QC:

Well the expression "exclusion" Ma'am in my submission, is in itself an invitation to go down the wrong track in looking at the fact of the –

ELIAS CJ:

Well how would you frame it, how would you say it?

MR DAVIDSON QC:

It is making access conditional on performance of certain requirements which are directed and it was held by the Court of Appeal, sensibly directed to meeting the problems that exist in the building and to convert that into anything the equivalent of a lock out or a restriction on access in my submission is wrong.

ELIAS CJ:

But it has the effect. Don't you have to start by demonstrating and maybe you should be starting with section 11. Don't you have to start with that?

MR DAVIDSON QC:

Well I will, I will go there.

TIPPING J:
Your conduct may have been, or your clients, as reasonable as you like but if they had no power to do what they did, i.e. change the locks and refuse to give out an access card, there's a problem.

MR DAVIDSON QC:
If they had no power, there is. There is, however, also section 16 of the Act referred to at page 120 of the case, paragraph 61 of the judgment, Court of Appeal.

ELIAS CJ:
Sorry section 16.

MR DAVIDSON QC:
Of the Act.

TIPPING J:
General power isn't it?

MR DAVIDSON QC:
General power to have all such powers as reasonably necessary to carry out the duties imposed on it by this Act and by its rules which includes of course in particular the provisions of section 15 with regard to maintaining the insurance on the building which was part of the Court of Appeal's reasoning and that's your Honour, why I was going through these steps.

I accept the thrust of your question and that of his Honour Justice Tipping, there has got to be a founding position from which the rule or imposition can be brought down. Section 16 was always a part of the case. The Court of Appeal ultimately did not have to use it because it found the validity lay in the exercise of rule 3.10.

TIPPING J:
Is there anything more specific than section 16?

MR DAVIDSON QC:

No there is not, your Honour. Other than the provisions of sections 15 on the preceding page, page 119, paragraph 59 of the judgment, the Body Corporate shall and then in (b), "Insure and keep insured all buildings and other improvements on the land." Now with that absolutely fundamental obligation, to achieve that, there had to be a mechanism or a response. To meet that duty there had to be the step, some steps taken that would address the potential disastrous effect on all the owners of this building.

ELIAS CJ:

But hang on, this insurance obligation is in relation to the building and the improvements.

MR DAVIDSON QC:

Yes.

ELIAS CJ:

And you say that the security arrangements were directed at those matters?

MR DAVIDSON QC:

Absolutely your Honour. This building was, because of the performance history described by Mr Chen, on the edge of losing all cover.

ELIAS CJ:

Oh yes.

MR DAVIDSON QC:

And if it lost all cover, from the point of view of the unity of interest of every owner in that building, there was – it was fatal to the economic interest.

GLAZEBROOK J:

I can understand the argument that something was necessary in order to get insurance. I suppose one of the difficulties I have is that I don't know that the

powers of a Body Corporate can depend upon the particular circumstances of a building, either Body Corporates have the power to do this or they don't because it's very difficult to – I can understand it can depend on the character of the building because there may be different measures that can be seen as necessary for managing to towers of 19 storeys than there are for managing a free unit property that happens to be under the Unit Titles Act but the powers can't really change can they? The reasonableness of a response within power might change.

MR DAVIDSON QC:

If you have an obligation, this is in answer to your question your Honour, if you have an obligation of this kind and that is a statutory duty you have got to meet it in the circumstances in which you confront. Now if in fact there is not by necessarily implication a source of power, unless by necessary implication there is a source of power, you can't find it specifically in the Act otherwise, you'd be left disempowered.

TIPPING J:

Well you clearly have a power to fulfil a duty. That's what you're saying I think.

MR DAVIDSON QC:

I am Sir. There has to be some power to perform a duty of such fundament as this.

GLAZEBROOK J:

But you could fulfil the duty, I suppose, by saying that we're locking everybody out and then we can insure it because there will be nobody to burn the place down which can't be the argument and I'm not suggesting it is your argument but that's the problem with your argument I think. It doesn't say by any means can you fulfil a duty, even if it means getting rid of the duties that you have to other people. What I was going to ask is, I'm assuming there is nothing in the Body Corporate rules that says you can't let to people or that anybody has to vet the tenants you let these things to because that would seem to be one,

just not in accordance with the way the building was supposed to be run anyway.

MR DAVIDSON QC:

Well it also denied, forgetting for a moment the validity of rule 3.10, the 3.10(b) which is expressed as to the circumstances in which keys can be given to a third party.

GLAZEBROOK J:

Well no it's nothing to do with keys being given to a second party. I mean that just strikes me as if you're given an access key, you can't give it to someone else but it doesn't say anything about whether you're required to give an access key to people who are lawfully in the building as occupiers. It just says neither an owner or an occupier can hand their key that they're given to anyone else and Mr Wu I doubt was – well he probably wasn't wanting a key but if he had got a key he wouldn't want to hand it to anybody.

WILLIAM YOUNG J:

Well he might have handed to it a tenant of course.

GLAZEBROOK J:

But he would want a tenant to get their own key.

MR DAVIDSON QC:

Yes.

GLAZEBROOK J:

Because actually I imagine he would've wanted a key because he wouldn't have wanted his agent not to be able to access the building.

MR DAVIDSON QC:

And that's what they've had and that's what the letter which I referred to –

GLAZEBROOK J:

No, I understand that, all I'm saying is that he would not have wanted to hand his key to a tenant.

MR DAVIDSON QC:

No.

GLAZEBROOK J:

Leaving himself without a key or his agent without a key.

MR DAVIDSON QC:

Correct.

GLAZEBROOK J:

And all (b) is directed at is that when she got a key you're not allowed to hand it to anyone else, that seems eminently sensible.

MR DAVIDSON QC:

But your Honour, in respect of the question, the point raised by Justice Tipping, if you have got to look always for the express power to do something and yet you have an obligation of such consequence of the kind we can see at section 15 and you can't find the power express, despite the duty being express, it is our submission that the legislation cannot be read to say well you can't do anything about it. Even though there is a course here which is available, in a sense that it's practically available, it's needed and it turns out to be successful, you can't do it because you can't point to a specific power which says you should do that. This is the nub of this case on the facts because if there was no remedial response available under the rules, then nothing could be done and of course this building was to be sustained for the owners' benefit, it was to be run properly. It's not just a question of insurance although that's a massive issue, it also –

GLAZEBROOK J:

What do you say though, because just to say that there must be power to do something doesn't mean that you have the power to do what was done which was effectively, and it's not your client of course now, but it was effectively pay money to a third party, not under a trust arrangement and relinquish control to that third party, rather than the Body Corporate, which is already the case under the rules anyway.

MR DAVIDSON QC:

Well there are some factual answers to that your Honour which I – can I just –

GLAZEBROOK J:

I think you were going to come to those.

MR DAVIDSON QC:

I'm coming to those things but the picture that emerges when we look at the evidence here is that yes it is true, I cannot get past the point that there was a requirement to put some money up, that was going to be held by a party as effectively security against these events and its gone up over time. At the time of the Court hearing it was at $5000. It had gone from $2650 to $5000 because of the excess increasing over the years.

McGRATH J:

Insurance excess.

MR DAVIDSON QC:

Yes insurance excess.

ELIAS CJ:

But I just don't understand why it's thought that 3.10(a) permits the building manager to restrict access. I know it's expressed as it may make available but surely in context it must make it available.

MR DAVIDSON QC:

Well –

ELIAS CJ:

Is it important to your case that that is to be read as conferring a discretion to withhold a security key except on terms dictated by the Body Corporate or its agent?

MR DAVIDSON QC:

Well it has to be. That was the case and that was the case upheld by the Court of Appeal and that's where they differed from his Honour Justice Asher.

ELIAS CJ:

Yes but why? Tell me why that is the natural meaning of this?

MR DAVIDSON QC:

Well in my submission it starts with the –

ELIAS CJ:

I mean a proprietor is not going to burn down the building. Why, if you've chosen to structure your investment under the Unit Titles Act and you've made everyone proprietors and common owners in common in terms of the common parts of the building, why would you deny them a security key if you find it necessary to have a security key?

MR DAVIDSON QC:

The reason in this case denying them the security key which was not an absolute denial. As you can see from the letter that was written founding this whole exercise.

ELIAS CJ:

Well they have to pay some money to them.

MR DAVIDSON QC:

Well not money to them, money for the purpose of addressing the issue which was there. It reasoned, it's rational, the money was paid for a purpose and it was held to separate account. Mr Wu wouldn't go along with this for one reason. He thought Mr Chen was part of the ownership structure and operating structure that had failed and in his evidence it's the last part of his evidence, where I cross-examined him on the point, I put to him that the only reason he didn't go with these protocols and having put to him that all he has to do is what everybody else does and go to the tenants, occupiers and say get aboard, which is what everybody else does. The only reason he didn't was because he thought this was a dirty business, having regard to the investment which failed. In other words he wasn't taking any objection as such to the wisdom of this or the reasonableness of it at all.

ELIAS CJ:

Well what's the wisdom of it? That's what I'm asking. What's the wisdom in withholding the security key under 3.10 from a proprietor?

MR DAVIDSON QC:

There was no intention to withhold it from Mr Wu personally for Mr Wu's personal use. There was no intention to withhold it from him for the purpose of showing tenants the premises. There seems to have been an assumption in this Court today that it was withheld in that regard as well.

GLAZEBROOK J:

Well was it given to him?

MR DAVIDSON QC:

No but from the off – he wasn't here for one.

GLAZEBROOK J:

Well no but it was never offered to him. It was said he was never going to get an access key unless he signed that agreement. It's hard to read that as

you're never going to get an access, but you will get an access key for certain purposes but otherwise you have to sign an agreement, isn't it?

MR DAVIDSON QC:

Well with respect Ma'am, this is where I think we've gone off the rails today. From the very outset of the involvement of Theta, the very first communication that you've already seen today which is at page 435 of the case.

GLAZEBROOK J:

Well that wasn't the first communication but –

MR DAVIDSON QC:

Well it's one of the very –

GLAZEBROOK J:

Oh no the 401 was the first communication wasn't it?

MR DAVIDSON QC:

Yes, this is 22 October and 401, you're right, is the first communication. That, and there was no evidence at any time that Mr Wu could not get a key through his agent or himself to show people through these premises. He's gave no such evidence at all because he wasn't going to be party to any arrangement which involved a protocol on his tenants, occupiers, he just wouldn't have a bar of it.

GLAZEBROOK J:

Well you show me where that's said, which is what I asked you right at the beginning. So show me where he's told he can have a key to show people through the building.

MR DAVIDSON QC:

Well starting with 435 in the last paragraph.

GLAZEBROOK J:

Well do you want to start, what's 410.

ELIAS CJ:

Which one are we in blue or yellow is it?

MR DAVIDSON QC:

Yes yellow 435.

GLAZEBROOK J:

435?

MR DAVIDSON QC:

435 in the last paragraph. Having set out, and I'm going to come back to this for analysis in a minute or two, the last paragraph, "Theta will provide you or as your client's authorised person, access at reasonable times, in which duties will be carried out." Now it's not just an invitation to go and wander round, this is a representative of the owner. There's no bar to Mr Wu or Mr Wu's representative having access to his unit for the purpose of showing tenants through if he wants to do so. He didn't say this in evidence. This is part of the evidence to the contrary and in the primary submissions in this Court for the respondents at paragraph –

McGRATH J:

What you're saying is that the access that's being offered, being such as is required in the course of your duties to the solicitor agent includes your duties in showing prospective tenants over?

MR DAVIDSON QC:

Yes. Mr Wu never said he couldn't show prospective tenants over. He never suggested that. In the primary submissions for the respondents here at paragraph 77, in the first submissions filed in this case, it is submitted that on the unchallenged evidence –

ELIAS CJ:

What page are we at now?

MR DAVIDSON QC:

This is the submissions for the respondents, your Honour.

ELIAS CJ:

Oh yes.

MR DAVIDSON QC:

At page 24, paragraph 77.

ELIAS CJ:

Thank you.

TIPPING J:

Is this perhaps a sort of silent echo of the Court of Appeal's approach to damages, that he wasn't prevented from showing people round, therefore he can't claim damages for prevented from showing people round?

MR DAVIDSON QC:

Well there's two legs your Honour because he wasn't prevented from showing people round, that's the first point. Secondly, he was able to let the building to his own tenants as an owner manager if he chose.

GLAZEBROOK J:

But able to get them access cards without signing the security agreement himself, personally.

MR DAVIDSON QC:

Well no that's not correct either your Honour.

GLAZEBROOK J:

All right well show me why.

ELIAS CJ:

Can you just pause just a moment. Would you like the window shut? Yes thank you Madam Registrar, it's a bit noisy. Yes thank you.

MR DAVIDSON QC:

So could I just address, the point that we're discussing at the moment is one that Mr Wu never sought a card simply for the purpose of showing tenants through. Two –

GLAZEBROOK J:

Well that wasn't offered. It was reasonable access accompanied by a member of the Theta staff, if you could say why you needed it.

MR DAVIDSON QC:

Well that doesn't preclude, whether you think that's draconian.

GLAZEBROOK J:

I'm not suggesting, I was just correcting you when you said he was offered a card.

WILLIAM YOUNG J:

No never asked. It was put the other way, he never asked for a card.

GLAZEBROOK J:

Well it was made fairly clear he wasn't going to get one unless he signed it wasn't it?

MR DAVIDSON QC:

No it wasn't, with respect. That is fundamentally incorrect your Honour.

GLAZEBROOK J:

We're willing to provide access clients only if they'll sign the protocol agreement, isn't it?

MR DAVIDSON QC:

No this is nothing to do with signing the protocol agreement. This is, you can through your agent go through the building, go into the building, go into that unit.

GLAZEBROOK J:

No, sorry, oh well I – it's a small point, it's just he was never offered an access card.

MR DAVIDSON QC:

That is so. The access card was going to be conditional obviously of entering the protocols and I'm going to come to the submission that –

ELIAS CJ:

Can I just ask you, this letter to Mr McKendrick.

MR DAVIDSON QC:

Yes.

ELIAS CJ:

Mr McKendrick was at that stage representing a number of people wasn't he?

MR DAVIDSON QC:

Yes.

ELIAS CJ:

So the references to your clients which then morphs into occupiers in the way that owners and occupiers seem to be slightly muddled in the documents, that's a reference, your clients are the owners.

MR DAVIDSON QC:

Yes, that's right.

ELIAS CJ:

Yes.

GLAZEBROOK J:

And what was Mr McKendrick's role?

MR DAVIDSON QC:

Well he was, I was involved then, but he was the solicitor acting for a number of these people at the time, not just as their solicitor.

GLAZEBROOK J:

He wasn't acting as somebody getting tenants was he? Wasn't he acting in the dispute in terms of –

ELIAS CJ:

Dispute, yes.

MR DAVIDSON QC:

Well he was engaged, it's my understanding he was engaged in the context of the problems that had arisen.

GLAZEBROOK J:

Well he'd filed proceedings had he?

MR DAVIDSON QC:

I don't –

GLAZEBROOK J:

Because just the earlier rant on page 410, I'm just wondering about the timing of the District Court proceedings. Is this letter, really the question is, is this letter before or after those District Court proceedings were issued?

MR DAVIDSON QC:

I can't answer that Ma'am. I think Mr Rooney.

TIPPING J:

Isn't the point that's troublesome Mr Davidson, that it might have been all right for Mr McKendricks to go in according to this final paragraph but it was clearly not all right for anyone who was interested in renting the place to go in and that doesn't help.

MR DAVIDSON QC:

It doesn't say that your Honour.

TIPPING J:

No it doesn't say that but it says that by the comprehensive statement at the top from which the last paragraph is only a very minor retreat.

MR DAVIDSON QC:

Well I think that, with respect Sir, they are in fact two different propositions.

GLAZEBROOK J:

But what duties was he, because if he was only acting as a solicitor in a Court case, then he wasn't going to be showing tenants round, was he, and that wasn't part of his duties. He wasn't Mr Song, for instance who I gather is the rental agent.

MR DAVIDSON QC:

He was one of the agents.

GLAZEBROOK J:

Mr McKendrick was a rental agent?

MR DAVIDSON QC:

No I don't know anything about Mr McKendrick apart from the fact he was in Glaister Ennor.

McGRATH J:

But there is an enquiry as to what his duties are in the last paragraph.

MR DAVIDSON QC:

Yes there is.

McGRATH J:

And an assurance that he will be given access for whatever they are. That I think is your point, isn't it?

MR DAVIDSON QC:

That seems to be the case but with that point your Honour goes the important corollary, there is no request anywhere in the evidence for me, Mr Wu or one of the other eight to say I need a card to go through the building to show people the premises. There never was a request to that end and the reason there was no request, as the Court of Appeal found, was that he would not accede to the protocols coming down vis-a-vis himself or vis-a-vis an occupier he placed there as an OMU.

GLAZEBROOK J:

Where did the Court of Appeal make that finding?

MR DAVIDSON QC:

It's in the passage at paragraph 129 Ma'am at page 142 of the first volume, in the last –

McGRATH J:

Sorry what page was that 122?

MR DAVIDSON QC:

142 at paragraph 129.

GLAZEBROOK J:

Isn't that Justice Hammond's judgment?

MR DAVIDSON QC:
Yes it is.

WILLIAM YOUNG J:
There's something similar said perhaps in a rather conclusory way by the majority or by the other two Judges.

MR DAVIDSON QC:
That's right, yes.

GLAZEBROOK J:
Paragraph 129.

MR DAVIDSON QC:
In the last three lines.

TIPPING J:
I think paragraph 89, the second half of it may be of some moment here Mr Davidson. I'm not quite sure at the moment which way it goes but they were certainly, the Court was there talking about the issue about Mr Wu being able to show people round.

MR DAVIDSON QC:
Yes, if there were evidence. I've got the paragraph Sir, "If there were evidence that Mr Wu was unable to show potential occupiers because of the restrictions, that might be relevant to a loss to let or licence, assuming Mr Wu was prepared to do so on terms set out in the protocol." You see it doesn't matter, if the protocol is unlawful, whether as outside the powers or not within the powers given by section 16 or rule 3.10, if there's no other basis for it being lawful then you can't do it but if in fact, on the evidence, the conclusion is as we submit, that he could have had access, either through Mr McKendrick or in other respects I am going to come to in a moment, but there's no point

because he's not going to allow any accession to this protocol at all, whether for him or anybody else.

GLAZEBROOK J:
Well you perhaps do need to take us to the evidence of that because so far I've only seen him not wanting to accede on his own behalf.

MR DAVIDSON QC:
Well I have got evidence to go through your Honour. There's a bit to do on this.

ELIAS CJ:
Can I just ask, the page 436 that is what is annexed in the earlier email?

MR DAVIDSON QC:
Yes, that's right.

WILLIAM YOUNG J:
That rather, 435, I mean and there other bits that go the other way, it rather looks as though all they want is the occupier to sign but in other times they seem to want him to sign.

MR DAVIDSON QC:
Yes I agree and indeed that was – I'm going to come to that now Sir.

ELIAS CJ:
Well I think that's made clear by the attached letter isn't it. We understand that –

GLAZEBROOK J:
The letter says, "We understand wishes to occupy the unit or manage and tenant out unit 436."

MR DAVIDSON QC:

Yes and the second paragraph, reading this in its entirety, the second paragraph, second line, "Accordingly before Theta will grant security access Theta requires the occupier to complete the registration form and a deposit to be paid." Now we're working heavily in this Court on the assumption that it had to be signed by the owner.

GLAZEBROOK J:

But that's what Mr Chen said in his evidence or are you saying he didn't say that?

MR DAVIDSON QC:

No reading all his evidence, which I'll come to, it's not what he said, with respect. It was a way in which some owners could have chosen to meet the protocols by assuming the responsibility to do so.

WILLIAM YOUNG J:

So the owner could sign or the occupier could sign?

MR DAVIDSON QC:

Yes.

ELIAS CJ:

And the owner or the occupier could pay the security deposit?

MR DAVIDSON QC:

Yes and so when we look at this letter 436, the explanation is given at the bottom and perhaps you don't want me to take you through that now and then over the page at 437, here we are out of fairness, this all about other owners not having to contribute towards costs incurred by individual owners or their occupants such costs should be borne by the owner or occupier where applicable. It's addressing the logical circumstance that if you're going to go it alone then you as the owner or through your occupiers are going to have to meet the requirements of these protocols.

ELIAS CJ:

Well you as owner are going to be treated as though you were someone to whom Theta had let the premises.

MR DAVIDSON QC:

That is so. That is one of the possible factual circumstances.

ELIAS CJ:

And yet these are proprietors.

MR DAVIDSON QC:

Yes but they're not necessarily proprietors just as an individual coming in from Sydney and going in there, they can go in with family, a perfectly legitimate thing, they could have children who are being educated here, which in fact is part of the story of Empire. It's not to treat them as some kind of responsible commercial person necessarily, they are still people who have got to stick, they're still people who are capable of breaching the security around this building which has so threatened its future. So the idea that this was somehow unlawful to say to Mr Wu, "You must sign this", is simply unsound. That is not the evidence and the next passage of the case at 438, looking at it again, it is replete with references to the occupant details, occupancy details, including the security deposit itself at page 438, 2925 to be paid before commencement date, refunded by cheque upon satisfactory return for the use of the occupant when these things are returned.

So all these are doing is focussing on who are these people, making it clear what the implications are of failure and if you go to page 440, the Court goes to 440, the Empire obligation, Empire grants the occupant access to lifts et cetera subject to the performance of the occupant's obligations. It's all around this.

TIPPING J:

What about 8.1, isn't that rather suggesting it's the owner occupant?

MR DAVIDSON QC:

No it just means that the occupant is any student, for example, is responsible for anything done by a person who is there under his or her licence. In other words you carry the burden if you have visitors in this building, you have the responsibility for them.

McGRATH J:

And what do we make of the fact at the beginning on page 438 at the beginning of the document, the other party as well as Theta is the owner occupant?

MR DAVIDSON QC:

Well plainly it can't just be the owner occupant. It can't just be – there's a bit of – some of the language is not as skilful.

McGRATH J:

Not always consistent.

MR DAVIDSON QC:

You're right it's not but it does contemplate two things here and the one that is critical is the owner managed unit. Now it's not going to be an owner occupant in an owner managed unit.

McGRATH J:

Yes.

MR DAVIDSON QC:

It has to be – this must contemplate the occupant, as certainly an occupant under an owner managed unit setting.

McGRATH J:

So whatever the concept is, the words immediately following "owner occupant" indicate it's going to be occupied by someone?

MR DAVIDSON QC:

Correct by somebody.

ELIAS CJ:

But it imposes on the owner the responsibilities of the occupant.

WILLIAM YOUNG J:

No, only if the owner signs.

ELIAS CJ:

Only if the owner, yes.

GLAZEBROOK J:

But the owner seems to be being required to sign it unless –

WILLIAM YOUNG J:

No I think the proposition is that we're going to have to go Mr Chen's evidence.

GLAZEBROOK J:

Yes we are.

WILLIAM YOUNG J:

That it was either the owner, the owner could sign it or the occupant could sign it.

MR DAVIDSON QC:

That's right, that's right. So before I just go to that, I take you to the submissions at page 24 for the respondents talking about –

ELIAS CJ:

If Mr Wu didn't want to be subject to these obligations, he either had to not be an owner manager, i.e. let –

WILLIAM YOUNG J:

No he just had to let it to an occupant and sign it, that's the proposition.

GLAZEBROOK J:

Well he had to get in first.

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

But the submission is that he could clearly have got in because he'd been offered access to get in.

ELIAS CJ:

Yes.

GLAZEBROOK J:

To find the tenant.

MR DAVIDSON QC:

And that's the absolute heart of it.

GLAZEBROOK J:

It doesn't seem to me to be very convincing but –

MR DAVIDSON QC:

Well I hope your Honour I have the opportunity to convince you.

ELIAS CJ:

Yes carry on convincing.

GLAZEBROOK J:

Well no sorry what we've been taken to so far in terms of allowing a lawyer on very limited terms to show people, arguably to show people round when it wouldn't be the lawyer's job to show people round anyway.

ELIAS CJ:

Well it is rather curious that they asked for what purposes. I mean one would have thought there is only one possible purpose but however.

GLAZEBROOK J:

Well it may not be one purpose for a lawyer because a lawyer might need to inspect the premises for some other purposes.

MR DAVIDSON QC:

Well you don't know what the lawyer's client is thinking about this and what the reason is that they want to go in. The lawyer doesn't act unilaterally. So we don't know what this is about except most importantly from the top, there is no request made by Mr Wu on the evidence or anyone else to say, "Give me a card to go in so I can show people the premises" as such.

GLAZEBROOK J:

Well equally there's no offer on the other side to say, "Of course you can show people through as much as you like but before they get a security key they have to sign the security protocols."

MR DAVIDSON QC:

It's his case he says –

GLAZEBROOK J:

Well it might be his case but there is nothing to suggest that that is ever suggested on the other side. So it's not a matter of proof on that, it's a matter of evidence.

ELIAS CJ:

Well you're going to take us to the evidence now.

MR DAVIDSON QC:

And can I just eclipse paragraph 77 because it's directly on point.

ELIAS CJ:

The Court of Appeal?

MR DAVIDSON QC:

Of our submissions.

ELIAS CJ:

Yes, yes.

MR DAVIDSON QC:

This is the submission that on the unchallenged evidence there was no loss.

GLAZEBROOK J:

Paragraph, oh sorry?

MR DAVIDSON QC:

Paragraph 77 of the submissions for the respondents, the primary submissions.

GLAZEBROOK J:

The cross-appeal submission?

MR DAVIDSON QC:

Yes. So 77(a) we've just dealt with, that's that letter, the email, (b) Mr Wu's agents utilised this arrangement at least twice, this comes out of the case at pages 271 and 273. So in paragraph 10 of the page, at page 271 of the case, May 2008, a few months later, Gary Cassin and Mr Wu's former New Zealand lawyer demanded a surprise inspection of units of various owners they

represented, no prior warning et cetera. Theta arranged it. Now there's a circumstance where there was no impediment to such inspection or access and the second is at page 273 of the case, at paragraph 14(iv), there were arrangements, well this is later, this is a year later, arrangements made for inspection of the plaintiff's units.

WILLIAM YOUNG J:
Well that's after the sort of lock out?

MR DAVIDSON QC:
Yes, yes.

TIPPING J:
Which paragraph were you referring to though there?

MR DAVIDSON QC:
That is from the submission 77(b) and the footnotes which are there Sir. So I rely primarily on the 2008 reference I just made.

GLAZEBROOK J:
One assumes they were suspicious there were tenants in there and they weren't getting the money.

WILLIAM YOUNG J:
I think they were. Isn't that referred to somewhere, that Mr Wu's got –

GLAZEBROOK J:
Yes. Well there obviously were tenants up until the Academic contract finished.

MR DAVIDSON QC:
Until the Academic contract finished yes.

GLAZEBROOK J:
Yes.

MR DAVIDSON QC:
But in a spasmodic way and we don't really know how badly it was handled.

GLAZEBROOK J:
No, no I understand that.

MR DAVIDSON QC:
So although it seems to have not necessarily landed with the impact I'd like but paragraph 77(c) of the submissions is the founding position, there is no evidence of Mr Wu attempting but being unable to show his potential tenant the unit and no evidence of a chance being lost but even if he had, given this in evidence, if he were to give this in evidence, he had to comply with the protocols and would not do so. So I will go to that now.

Mr Wu was cross-examined for a while. It's in the, in section B, the blue volume and he's cross-examined at page 189, and there are quite a few pages there, passages here which have found their way into submissions and are part of the reasoning, in my submission, which the Court of Appeal has adopted. So, I'll just take some of the passages that seem most pertinent.

At page 196, "We see the genesis of the inquiry of Mr Wu why he will not go with the, with the lease to Theta," and that appears at line 15. At line 14, "Whether you think that's true or not, you decided you would not go with Theta and enter a new lease with them instead of Academic because of your previous dealings with Mr Chen, you saw him as caught up with Sanctuary." Now, the evidence of Mr Chen, just to interrupt for a moment, is that he worked in the sales area. He was one of those who promoted the sale of these units, he wasn't Academic and at line 24, "He thought he was the previous manager of Academic, that's what I believe, yep, yeah." Line 25, "So you decide not to lease with Theta and that changed the nature of the investment," "Yes," "You've got to find our own tenants," bottom of the page.

And then over the page 197 at line 8, “Pause there, you’d be reliant from then on, substantially reliant on the performance of the building manager to maintain the building in good shape of the Body Corporate.” Then I took Mr Wu at 198, line 15 and asked him if he accepted what Mr Chen had said in his affirmation about the problems in the building, the affirmation of 2 March, about the problems as they’re identified and I took him through those one by one and there’s a whole series of them including the single trunk for electricity and the telephone systems, meaning that the building manager has to invoice the costs otherwise they land on the Body Corporate. This is the totality unit of purpose and obligation issue and Mr Chen was saying, “Well, how do we get this from people. It’s hard enough – we don’t who, some of them who they are, how do we recover the monies and we simply, our job is to allocate these costs unit by unit.”

At page 199, I asked him about the risk to the building at line 17 about the smoke detector activations and the history of false alarms and vandalisms, and he simply didn't know. He didn't contest it at line 25, the answer to that.

And at page 200, at the top, referred to the very costly problem of fire activations and then the real problem given the overseas owners of recovery, legal recovery of the monies owing at line 10. At 22, the same page, “It would be disaster if you were to lose the insurance on this building, wouldn't it and you know how close it had got,” line 27, “According to the information, yep, that seems to be the case, six approached and one, one agreed to place cover.”

And then I took him to the protocols and, in particular, the warrant that Mr Chen set out at page 201, line 17. Mr Chen’s summation to get the renewals and maintain insurance there had to be a practical ability to reduce the damage.

At 24, 25, “I put it to you you’ve got to vigilant to make the students safe,” and at 28, “They’re vulnerable, these students. Many don’t speak English away from home.”

Then I turned to why he didn't go along with the arrangements that were proposed, available to him and at page 203, we got to McKendricks and at line 17, “Theta was willing to programme and provide access cards subject to the conditions,” and he acknowledged, simply acknowledged the existence of that. I’ll skip a bit and over to 205, I asked him, “Forget law on the topic, Mr Wu, for a moment,” line 5, here is Theta explaining the reasons it’s bringing down the protocols which is fully developed in the material I took him to, security agreement and so forth, “And that’s why the money’s been sought and it’s expressed as being in fairness to all parties, that’s one party, you’ve just seen that, so the consequences don’t land on other owners,” line 17, “Yeah.” And the controls, 20/21, “So you’d accept in principle,” line 25, “this sort of move, forget the specifics, bring controls and recovery, sound,” “Yes.”

At page 206, I took him through the whole question of cards and at line 24, I said, “The fact is you’re one of those parties who chose not to go down the track of a lease to Theta. If you had you realise that Theta imposes this cost on these protocols on the occupiers, you understand that?” “That ...” two lines later, “... this is not designed to pick you off as an owner of the managed unit. Theta sought to impose these standards and this cost on each unit, the occupiers of each unit.” He says at the bottom, “Do I understand you’re saying this protocol is only owned at Theta’s tenants?” “I’m saying the opposite and Mr Chen came to you said this is the deal,” over the page 207, “These are the reasons we want you to do this.” And at line 9, eight and nine, “What Mr Chen – what Theta was doing was saying for each unit whether Theta, the lessee or you, the lessor, the same deal applied,” should be lessor, “Exactly the same thing, no discrimination.”

Then I took, went specifically to the application of the protocol and at line 20, put to him, “If you want to come in here this is the deal. You sign all these things up. This is what you say to the occupiers, the occupiers and you put up

the money, 2675, split that between the occupiers and that arrangement was put to you in 2007, it's updated now," quite a few "mhms" in here. "It's put in place for every single Theta unit otherwise they'd be no tenants." "Yes, I understand that, great discipline?" "Yes.

And over the page, the point that we touched, I touched this morning, 208, line 4, so, "Right, so good discipline. Now, the trouble is, of course, that Theta could not do the same with tenants on your unit because it wasn't actually leasing the unit, you understand that?" And he agrees, "It relied on you, only you as the person with the contract to put up the money to achieve the same result, you understand that and that's not discrimination?" "Yep," and he agreed. He seems to jib at the question of the amount of money at line 18, the rule's fair but the amount of money would be different in some cases. And then he goes on to say, "Yep, it works," he agrees it works at line 25. Now, this building, by the time it go to the Court, had a four-star Qualmark endorsement was pretty remarkable on the evidence that Mr Chen, having regard to the position just a couple of years before and that's at page 209, line 14.

TIPPING J:
Was he asked any questions as to whether he considered himself impeded in relation to seeking tenants and, if so, on what premise?

MR DAVIDSON QC:
No, because he didn't say he was. He didn't assert anywhere that he was.

TIPPING J:
You say he, in his evidence-in-chief, he had not asserted that the conduct of the other side was impeding him in getting tenants.

MR DAVIDSON QC:
No, he didn't say that. The Court of Appeal has applied the twist of this because it is said, well, if it goes back to the High Court, it could be that there is, they find, the Court will find on new evidence that that situation might apply.

TIPPING J:

But surely when he was giving evidence about what he claimed to be his loss, it would have to be on the premise that he couldn't get tenants. I find that rather hard to understand, Mr Davidson, that he, that he wasn't asserting that.

GLAZEBROOK J:

At page 2014, he says that what he'd understood is that he had to put the money up first before he could get the key. It was put to him that he could have got the money from the tenants –

MR DAVIDSON QC:

Yes.

GLAZEBROOK J:

– and he said, "But, no, I understood I had to put the money up first before I could get the key."

MR DAVIDSON QC:

Yes, but that's for the tenants.

GLAZEBROOK J:

Well, he's saying –

MR DAVIDSON QC:

That's for the tenants, not to get in to show –

GLAZEBROOK J:

– he couldn't get tenants because he had to put the money up first to get the key personally, so it wasn't a choice of tenant or him because he, he understood and that might have been a misunderstanding, but it seems to have been his understanding that until he'd signed the protocol and put up the money he couldn't get tenants.

TIPPING J:

Well, his claim for loss of rent would make no sense if he didn't think that he couldn't get tenants.

WILLIAM YOUNG J:

But he wasn't – if you put it at different levels of generality and specificity, is it your position that he's simply saying I'm not going to have anything to do with this and I'm not going to require my tenants to put up money and I'm not going to through the business of getting them to sign a protocol.

MR DAVIDSON QC:

I have nothing to do with this and hence -

ELIAS CJ:

Well that's not quite what he's saying. He's saying that he thought he had to – and as a matter of practicality he probably did. If he wanted to put tenants in he may have been able to recover the bond from, or was it a bond? I suppose it was, from the tenants but he was going to have to put it up first.

WILLIAM YOUNG J:

Well the tenant could put it up, the tenant signs the occupancy agreement.

ELIAS CJ:

Well yes I know.

McGRATH J:

But that point was that that would be second. He'd have to get the money first even if he could be repaid later.

GLAZEBROOK J:

And actually that's what Mr Davidson was putting to him. On a practical sense, why didn't you just put the money up and then you could have got it back from the tenant when you got a tenant and he said well he didn't want to do that.

MR DAVIDSON QC:

Well he didn't even have to do that, he could say, well I'm looking for tenants so I've shown some people through, on our case, I've now got some, all right now you've got to actually put the money up. Well what everybody else did was at their own muse, was to get the money from the tenants, just as Theta did.

ELIAS CJ:

Mr Davidson, I'm probably getting confused now, but is the only authority for requiring this bond 13.10, 3.10 sorry?

MR DAVIDSON QC:

That was what was relied, together with section 16, your Honour as the Court of Appeal has noted. Ultimately the Court of Appeal did not have to use section 16.

ELIAS CJ:

It's a pretty long bow really isn't it?

MR DAVIDSON QC:

Well –

GLAZEBROOK J:

Section 16 doesn't, because as I understand that bond, that was to deal with the uninsured amount, it's not going to help with insurance, the bond. The security protocol might but more in terms of just focussing people's mind because most of the provisions were already in the Body Corporate rules, aren't they?

MR DAVIDSON QC:

Most of them are. Most of them.

GLAZEBROOK J:

So what's new in there? The bond's new but that's nothing to do with insurance that's to do with uninsured –

MR DAVIDSON QC:

Oh well no it's – that is new, the cost of the cards is new, that's an impost to encourage them not to lose their cards, that was given in evidence.

GLAZEBROOK J:

No, no I can understand that as well, eminently sensible. Although I think Mr Chen, no sorry Mr Wu said well wouldn't you just cancel the access on the cards like they do in hotels?

MR DAVIDSON QC:

Well they do that but with a building like this, that was the problem. They were losing keys all the time.

GLAZEBROOK J:

Well you just deactivate them though I think is what –

MR DAVIDSON QC:

Start again.

TIPPING J:

Did they ever attempt to call a meeting of the Body Corporate so as to impose these requirements by unanimity or maybe even - I don't know whether the majority would have done something like this or was it just simply unilaterally slapped on them by the management company?

MR DAVIDSON QC:

This one was there from the off.

TIPPING J:

3.10?

MR DAVIDSON QC:

Sorry, no sorry 3.10 was but this was brought down by Theta.

TIPPING J:

But the payment of the bond, was that ever something that was ratified or dealt with by the Body Corporate?

WILLIAM YOUNG J:

Invalidly.

GLAZEBROOK J:

It was invalidly done.

MR DAVIDSON QC:

It didn't cut the mustard.

TIPPING J:

Didn't cut the mustard?

WILLIAM YOUNG J:

No because it was when the amendments were brought, 3.10.

MR DAVIDSON QC:

It was knocked down.

GLAZEBROOK J:

So we've got the payment for the card I understand but most of the – was there anything else in those provisions because the management of the common areas was probably part of the Body Corporate anyway wasn't it?

MR DAVIDSON QC:

It would be, yes. That's an obligation.

GLAZEBROOK J:

So there was virtually nothing, apart from the – because it's just I find difficulty to see what it's to do with insurance actually, the more I think about it because the bond is for the uninsured part, the payment of the security keys maybe and the rest of its all in the Body Corporate rules anyway. It does, there's no doubt if you sign something and pay a bond, it focuses your mind, I can understand that argument.

MR DAVIDSON QC:

Yes I think –

GLAZEBROOK J:

As a tenant I mean.

MR DAVIDSON QC:

Yes. It does focus the mind. These are young people who come and go, two semesters and they were in and out, where they went to and recovery of monies from them, on the evidence of Mr Chen, was virtually impossible. So that's what that was for. There's a bond for insurance, it is the discipline on them. You want to get your money back, it was about $800 a room I think was the way it worked at the beginning, you play by the rules. We don't want washing on the smoke detectors. We don't want all the things that Mr Chen referred to occurring here. They are ultimately for students, big disciplines, financial and it worked.

GLAZEBROOK J:

And I totally understand.

MR DAVIDSON QC:

And the Court of Appeal endorsed them in the sense that they saw them as reasonable and understandable.

TIPPING J:

What I'm having difficulty with Mr Davidson, and no doubt it's me, is if they were not contractually or otherwise in law required to put up the bond, how can a management company come along, however good an idea it might appear to be and say you've got to do it?

MR DAVIDSON QC:

That goes back to power Sir. They are agents of the Body Corporate.

TIPPING J:

So it all comes back to this 16 plus 3.10?

MR DAVIDSON QC:

That's the way the case was run but crucially, for the argument for the respondents, it doesn't answer the point you made with regard to empowerment but the –

TIPPING J:

I'm not so troubled about the reasonableness, I'm not expressing a conclusion, I'm more troubled about the power than the reasonableness.

GLAZEBROOK J:

But you argue it's some kind of advance levy. I'm sorry I'm – or a section 34 advanced payment in respect of that, that I would've thought that if you were going to argue that, thinking aloud, I'm sorry thinking aloud, that it might have to be in some measure in the Body Corporate rules explicitly as against implicitly because one can understand the difficulties of actually chasing up these sums which could be relatively small sums from people who are there relatively – in a relatively transient manner and from overseas owners. All the sort of things that you were putting to Mr Wu and he was agreeing with.

MR DAVIDSON QC:

Yes, in a sense it really is an advance on prospective liability.

TIPPING J:
It's a bond.

MR DAVIDSON QC:
That's the nature of a bond.

TIPPING J:
Yes, it's nothing short of a bond. If the argument is that it's justified under section 16 of the Act, coupled with 3.10 and that's all we have to focus on, that's fine, we focus on it and we make a call but what I want to be sure about is there anything else that you say justified this impost?

MR DAVIDSON QC:
Well they're the empowerment provisions that we relied on Sir.

TIPPING J:
And what happens if one happened to be of the view, Mr Davidson, it wasn't good enough?

MR DAVIDSON QC:
I think that's –

TIPPING J:
That's a bit problematical for your clients.

MR DAVIDSON QC:
It's really rhetorical Sir.

TIPPING J:
Well it is rhetorical at the moment but it must have the consequence, mustn't it, that there has been unlawful denial of access and the question then is what has been lost by the man who was denied access and then we come into damages.

MR DAVIDSON QC:

Yes and I'll just track that through to a conclusion. If in fact there was no power to do this at all, the evidence which was not contested by the respondents was that Mr Wu would have had tenants, as everybody else did, on the averaging out that was done, and that's how the – why there was no contest with the damages claimed for loss of rent.

TIPPING J:

Yes.

MR DAVIDSON QC:

So he would have got that and there was just no argument at all in the Court about it. There was a bit of issue about when that could have happened because Academic, they had to display releases and that was the date.

TIPPING J:

It was argued, wasn't it, as part of that, that there were some duty to mitigate which he had failed to do.

MR DAVIDSON QC:

Yes.

TIPPING J:

Now is that still alive?

MR DAVIDSON QC:

It is still alive, for this reason, it was put Mr Wu expressly at page 212, if you have that evidence still in front of you Sir.

TIPPING J:

Yes.

MR DAVIDSON QC:

At the top of the page 212, “All you actually had to do was to agree to apply the provisions that Mr Chen told you about which you agree was sensible, that doesn’t mean empowered, with regard to registration of occupiers and pay the money? Yes, the amount’s got to be reasonable.” And then I put to him how it could all be explained and indeed the words at line 15, “It remains a bond.” So at line 17, “2007 to 2009 you had the ability to say I don't like it, I’m going to spend a fortune on litigation to prove I’m right but there’s my money. It’s my money and provided there’s no impost to me I’m going to get it back, that’s the truth. Well that’s not true, getting nowhere. Knew the Court judgment asked them to hand the keys, we’re getting nowhere. We were willing to pay the money but we demand to get access.” So my point really was simply that he could put up the money and I repeated this at 213 more precisely at line –

TIPPING J:

Sorry Mr Davidson, can I help to encapsulate this perhaps?

MR DAVIDSON QC:

Yes.

TIPPING J:

Is the conduct that he should have done to mitigate, reasonable step in mitigation, one putting up the $1000 without prejudice and two, signing the protocol willy-nilly because that wasn’t without prejudice?

MR DAVIDSON QC:

Yes, or had his occupant sign it. And I put that, with regard to the occupants putting up the money, at page 213, line 21.

GLAZEBROOK J:

Yes, and in 214 he understood he put it up first. Can I just – I’m just going back to the Court of Appeal finding, because wasn’t their finding effectively, which actually initially I had terrible trouble with so I’m just trying to put it in a different way to see, because it doesn’t seem quite as unsubstantiated as it

appeared at first. Isn't the point the Court of Appeal was making is that they should not have required Mr Wu to sign anything of the sort before giving him an access key, but that it was reasonable to require the tenants to sign up to that and to pay a bond for all of the reasons that we're talking about?

MR DAVIDSON QC:
Yes.

GLAZEBROOK J:
So that what they should have done is given him an access key, then he would have had total ability to show tenants around, and if the tenants were prepared to sign the protocol then he would have had tenants?

MR DAVIDSON QC:
That's so, but he was not prepared to accede to the protocol at all.

GLAZEBROOK J:
Well, he was not prepared to accede to the protocol, but can we imagine that he would be so silly as to say, "I'm not going to have my tenants accede to the protocol because I don't mind if they burn the building down, I'll just take my proportionate share of that myself"?

MR DAVIDSON QC:
I think his position on the evidence, which I didn't quite finish but your Honours can read the last couple of pages, was he –

GLAZEBROOK J:
Well, he didn't like the money going to Theta –

MR DAVIDSON QC:
– just said no –

GLAZEBROOK J:

– one can understand that, because it wasn't a trust account arrangement, that's what he said.

MR DAVIDSON QC:

So the specific answer is, as 213, "You could have enquired, Mr Wu" – line 21 – "All you had to say was, 'I'll put up the money or get it from the tenants, I'll put up the money, I'll get access, I just want to know where the money's been placed'," that's the point your Honour's just made, and I said, "You've run on litigation for several, some years." At line 30, "It does make sense," I said it didn't make sense to do that, "because I think I have the right to let other people not to be tricked into this dirty business, as particularly to an overseas investor." He took a moral position here. He thought the circumstance of academics collapse and what it meant was a dirty business, he would have nothing to do with this proposal because of it. And that is why the Court, the Court of Appeal, held as it did both, as his Honour Justice Young and Justice – as referred in the judgments of Justices Arnold and Heath and Justice Hammond, they reached the view, on the evidence, some of which I've just taken you through, was that he wasn't going to do it. You see –

GLAZEBROOK J:

Well, would he have done it if the money had been in a trust account, for instance? One can understand that, even if it's not a dirty business in that sense, that one wouldn't want money to go into an undifferentiated account, especially bond money.

MR DAVIDSON QC:

Well, it was held to separate account, Ma'am, that was the evidence.

GLAZEBROOK J:

I'm not sure that he knew that though.

MR DAVIDSON QC:

No.

GLAZEBROOK J:
He said it wasn't a trust account.

MR DAVIDSON QC:
But provided in fact that's what did happen, provided it – forget the empowerment, provided this was a reasonable response, as the Court of Appeal held, and as submitting here, then if so, what we know on the evidence is that he may have had questions, and lots of people may have had some questions about it, but it was a response which was reasonable, so held, and which worked. He couldn't see the point, because he felt aggrieved by what had occurred, blaming –

ELIAS CJ:
Why could he be compelled, that's – why could he be compelled? That's where the –

WILLIAM YOUNG J:
Well, I think this is a slightly suggestion, that instead of having two years' litigation he should have paid $2600 under protest and sued to recover in the small claims tribunal.

MR DAVIDSON QC:
Correct. And got it from his tenants in the meantime.

ELIAS CJ:
Yes, but we still have to consider why he –

WILLIAM YOUNG J:
But that's a mitigation issue.

ELIAS CJ:
But –

GLAZEBROOK J:

Well, it's very difficult to say mitigation –

ELIAS CJ:

– this is a mitigation issue.

WILLIAM YOUNG J:

Yes.

ELIAS CJ:

I understand.

GLAZEBROOK J:

– you have to do something that you're not lawfully required to do to mitigate.

MR DAVIDSON QC:

Well that's what the Court of Appeal so held, and Justice Asher so held. Even in cases where there's been theft, as you'll see from the judgment of Justice Asher, the Courts have recognised the imperative of people doing, taking steps to mitigate their looses.

GLAZEBROOK J:

No, no, I'm sorry, I wasn't suggesting you don't mitigate your losses, it's just odd to say you mitigate your loss by doing the very thing that you…

WILLIAM YOUNG J:

Are there not cases – and I was trying to think of just where income assets have been repaired and the repairer's claimed a lien and there's been a dispute over, say, two or $3000, everyone gets cross and three years later it comes to trial, and there's a claim for damages for $300,000 or whatever and aren't there cases there that say that the plaintiff should basically suck it up, pay them out and dispute under protest and sue to recovery?

MR DAVIDSON QC:

Yes and they were submissions that we put to the Court of Appeal.

WILLIAM YOUNG J:

Are there cases on mechanic liens? Can you – were there any of those? I didn't see any in the cases.

MR DAVIDSON QC:

Not on the, not on mechanics liens, that wasn't one we found but you'll see the full reference to the authorities in the Court of Appeal judgment. But right on point with regard to the response looked at in a context of mitigation, at 293 of the case, which is the blue volume. This is Mr Chen's affirmation of 2 March 2011, at paragraph 90, "Theta was not a party to the 2008 proceedings, but I'm aware the Body Corporate did try to reach an agreement interim by which they could gain access to the units and commence using renting them. Offers were made March/May '08 offering access payment of $1000 to the Body Corporate, not Theta, with a payment expressly have made under protest and preserving the ability to challenge."

ELIAS CJ:

But this, this was the one that, the letter doesn't quite match this paragraph. We've already been taken to this. Is there anything to be said about that?

WILLIAM YOUNG J:

Is there anything apart from the letter that citing the Court of Appeal judgment which doesn't go as far as that?

MR DAVIDSON QC:

Yes. No, I can't go past the fact it was simply put up that way and it wasn't contested.

WILLIAM YOUNG J:

Was there oral evidence about it?

MR DAVIDSON QC:

No, it was not challenged.

WILLIAM YOUNG J:

There's a reference he admits in evidence in cross-examination that he could have paid the money under protest –

MR DAVIDSON QC:

Yes.

WILLIAM YOUNG J:

– may be a reference to that.

MR DAVIDSON QC:

Yes, that's in that section of the cross-examination I just referred to, Sir.

TIPPING J:

Is there two dimensions to this? There's the payment of the money under protest, but he was required as part of the so called mitigatory steps to sign the protocol which was his very case he didn't have to.

WILLIAM YOUNG J:

I think the response is that he didn't have to sign, the tenants had to sign.

TIPPING J:

Yes, well, I – that's part of the case.

MR DAVIDSON QC:

But he did, he did not have to, he did not have to.

TIPPING J:

Yes, well, I know that's your argument.

MR DAVIDSON QC:

Well, the documents themselves, Sir, in my submission, lead to that inevitable conclusion.

WILLIAM YOUNG J:

What was the evidence that we were taken to that suggested he was being required to sign the protocol? There was something in Mr Chen's evidence.

GLAZEBROOK J:

Mr Chen's evidence.

MR DAVIDSON QC:

Mr Chen is, yes, one of his, several –

GLAZEBROOK J:

He said that Mr Wu certainly understood that he had to.

MR DAVIDSON QC:

Yes. But if he had –

ELIAS CJ:

Mr Chen thought he had to.

GLAZEBROOK J:

Yes.

MR DAVIDSON QC:

Yes, Mr Chen thought he had, that's probably a better way to put it.

ELIAS CJ:

No, both of them thought they –

GLAZEBROOK J:

Both of them thought they had –

MR DAVIDSON QC:

But it was only one of the two things that could be done. He could sign it and assume the responsibilities associated with it. He still then had to find, give the names of the occupiers because those forms required all those details, that's what they were about or he could do as I put to him in cross-examination, he could get, as everybody else did, the tenant to put up the money and that's when the tenants in all the other cases, OMUs, put up the money, I think $800 each I think was the figure referred to at the time for each room and get it back when they left, so he wasn't being asked to do anything that other occupiers were not being asked to do or Theta was requiring on behalf of the owners.

ELIAS CJ:

Mr Davidson, we think we'll take a short adjournment. How – you've been very much interrupted, but how do you think you're going? We have read your submissions of course.

MR DAVIDSON QC:

I want to go back to section 11, but to make that an easier course in the supplementary submissions we've just filed, you will see a direct response to the matters raised by the Court with Mr Rooney today. We don't see section 11 having any impact on your reasoning in this case at all. There's no impediment to what occurred. I discern the real issue which I'm going to have to think about in the next 15 minutes is the one we've kept wheeling back to and that is that the Court of Appeal found that rule 3.10 was in the factual circumstances sufficient, where does the authority for 3.10, why is it empowering in itself, and Mr Rooney has raised a question, which really does go to the vires of 3.10 itself. But, assuming for a moment it is lawful, then I think it – I feel as though we've tracked, I've tracked back to the question of saying I must look once again, finally, at why that does not permit what occurred here. And I'm focusing now on occupants, because I'm certainly asking the Court to accept that there is no evidence that Mr Wu was declined access for the purpose of showing his tenants, prospective tenants, through.

GLAZEBROOK J:

Can you actually look at the letter in paragraph 49, perhaps over the break –

MR DAVIDSON QC:

Yes.

GLAZEBROOK J:

– and come – of the Court of Appeal judgment?

MR DAVIDSON QC:

Yes, I'll do –

GLAZEBROOK J:

Because it actually seems to be requiring amounts from the owners and it does require the owner to sign security protocols –

MR DAVIDSON QC:

Yes.

GLAZEBROOK J:

– and then the alternative is only if they given management to Theta, in which case Theta will get the occupants to sign.

MR DAVIDSON QC:

I'll do that.

ELIAS CJ:

We'll take the adjournment now.

COURT ADJOURNS: 3.31 PM

COURT RESUMES: 2.46 PM

ELIAS CJ:

Mr Davidson can you just, don't take us to it but can you just tell me where the Body Corporate rules are to be found? Is that – oh that's a later one.

MR DAVIDSON QC:

All the references we've got are contained in the body of the documents. The first document.

ELIAS CJ:

Oh thank you, thanks. That's fine don't take time on that.

MR DAVIDSON QC:

The point that your Honour Justice Glazebrook asked related to paragraph 49, page 114 of this case. This is a letter.

WILLIAM YOUNG J:

It must have been a letter from the Body Corporate rather than Theta isn't it? Despite what the Court of Appeal says.

MR DAVIDSON QC:

Yes it says, "Theta through its counsel made a without prejudice offer".

WILLIAM YOUNG J:

But I don't think Theta was a party then was it?

MR DAVIDSON QC:

No.

WILLIAM YOUNG J:

Or was it?

GLAZEBROOK J:

Oh so they do say it was without prejudice.

MR DAVIDSON QC:

No it was in existence. Yes it must have been because in paragraph 2 your Honour, of that –

WILLIAM YOUNG J:

Oh I see yes, right okay sorry.

MR DAVIDSON QC:

So here is the attempt to, and it certainly does say, "Here's an offer to settle, accept $1000 from each of your client owners rather than the $2650 because by now the contest is joined with the client owners and my cover, my client will cover the remainder of the security deposit and then access will be given to each of your client owners conditional upon the protocol and so forth. So they're still requiring the protocol to be signed on a reduced financial basis. But the C3 is important because it's the undertaking that the owners will secure the undertaking of the occupant tenant to agree to abide by the Empire rules and regulations.

WILLIAM YOUNG J:

It does say that the client is required to sign the security access protocol.

MR DAVIDSON QC:

Yes, I can't get past that. It has to do so, even though in the months preceding, particularly October, the document that was to be signed, this is in the context of the settlement offer, that in the months preceding and in October in particular, the documents that were passing made it plain in my submission that either party could sign it and when I cross-examined Mr Wu, I was putting to him that very proposition that he was able to secure these occupants to undertake the obligations contained there.

WILLIAM YOUNG J:

Was there any other – I mean is this all the evidence there is? There's what Mr Chen said, there's the little bit of cross-examination of Mr Wu and there's this letter that's set out in the –

GLAZEBROOK J:

And Mr Wu didn't accept that, he said he thought he had to sign it. Where was - I can't remember where the cross-examination of Mr Chen was.

MR DAVIDSON QC:

Mr Chen.

WILLIAM YOUNG J:

Was he cross-examined on this or not?

MR DAVIDSON QC:

Mr Chen was crossed. It's at page 310 in volume B, blue volume.

WILLIAM YOUNG J:

Was he cross-examined on this settlement offer.

MR DAVIDSON QC:

I don't think he was.

GLAZEBROOK J:

Well it's page 290, he says there was another version and that required the owners paid the security deposit.

MR DAVIDSON QC:

Which paragraph your Honour?

GLAZEBROOK J:

Well paragraph 77.

MR DAVIDSON QC:

I think that's what your friend relied on in terms of saying that there was – there were two versions.

MR DAVIDSON QC:

Yes, yes.

GLAZEBROOK J:

So what do you say that means? Is it explained anywhere else other than that there were two versions and one was required to be signed by the owner/occupier, owner/manager, owner/self manager?

MR DAVIDSON QC:

Well I have to accept that the way that's worded it was that that is, on the face of it, bears one meaning because it records, "A version was prepared for signing by the owners, requiring them to pay the deposit. They could obtain money from their own tenants to cover the events if they chose to do so. That's really what I put to Mr Wu, exactly that.

WILLIAM YOUNG J:

Is there any other version of this document than the one we were taken to? The owner/occupant, owner/managed unit document, around 435?

MR DAVIDSON QC:

May I just speak to Mr Burgess Sir.

GLAZEBROOK J:

Well actually the following page there's a difference between the tenants and the OMUs.

MR DAVIDSON QC:

Yes.

GLAZEBROOK J:

So he makes a distinction between tenants who sign the security and access protocol or OMUs who sign the security and access protocol.

MR DAVIDSON QC:

Yes.

GLAZEBROOK J:

But can you really get away from the fact that they were requiring the OMUs to sign these things on – actually not your own client's evidence because you're not Theta anymore but –

MR DAVIDSON QC:

No, in fact I'm not probably seen as ducking for cover but it may be that Mr Price can answer that. If you can nod affirmatively.

MR PRICE:

I think it's actually at paragraph 81 of that same affidavit on that same page where it talks about the and unfortunately I've given my bundle to Burgess who passed it to Mr Davidson but I think that same paragraph refers to more the occupiers not having signed it.

ELIAS CJ:

Well it does, that's right, except that that seems to contradict what 77 and on 82, so obviously an occupant can sign it where it's not an owner/occupier and it's not an OMU.

MR DAVIDSON QC:

However although these paragraphs point one way, the document, refer to paragraph 81, the McKendrick email of 22 October, does point the other way. That's the actual evidence.

WILLIAM YOUNG J:

That's the offer, is there any other evidence of an offer?

MR DAVIDSON QC:

No.

GLAZEBROOK J:

Well I thought the McKendrick offer said the owner had to sign it.

MR DAVIDSON QC:

435.

WILLIAM YOUNG J:

"Any person who is given such access to the building must enter into and comply with our security and access protocol agreement."

MR DAVIDSON QC:

That was my recollection of the document. "Any person given access must enter and comply with the protocols." Not just the owner. "For Theta to provide owners or occupants access they need to read and comply." "Owners or occupants."

GLAZEBROOK J:

Well, but the owner has to have access, doesn't he? The owner's agent, especially in these arrangements, is always going to want to have access himself or his agent have access. I mean you'd be insane not to, wouldn't you?

MR DAVIDSON QC:

Yes you'd have to have access for the purpose of – I think there's a distinction to be drawn between access for the purpose of simply inspecting and potentially showing someone your premises. You don't need to have keys going out to people for that purpose, you're simply taking them through, escorting them through and then provision of something.

GLAZEBROOK J:

No, but if you're an owner/manager, you are going to want to have a key at any time to go in and check on your licensees, aren't you?

MR DAVIDSON QC:

Yes, you are, you are, and as –

GLAZEBROOK J:

And from the way I read this, in order to get that key you have to sign that SAPA.

MR DAVIDSON QC:

But if you're in that position, to go and check on your licensees, the occupants, you will have secured the position in terms of the SAPA to actually have them in place, already the requirements of the protocol will be met, so there's absolutely no –

GLAZEBROOK J:

Well, that's just not the way I read this, I'm sorry, so…

MR DAVIDSON QC:

Well, there's no reason for that person you're postulating, your Honour, not to have a card in circumstances where the protocol has been entered.

TIPPING J:

But, Mr Davidson, assuming that the owner has to sign, or it was put that the owner has to sign, he had to sign and pay up this thousand, are you still saying that for his failure to do so it was a failure to mitigate?

MR DAVIDSON QC:

Yes.

TIPPING J:

So it would have been reasonable in all the circumstances for people in Mr Wu's situation to pay a thousand dollars under protest and openly sign the protocol, because there was no reservation of the right to challenge the protocol.

MR DAVIDSON QC:

But he simply could have said, “I reserve my right.”

TIPPING J:

Well, that is not what he was offered, as a compromise.

WILLIAM YOUNG J:

Well, it depends on whether what Mr Chen says is right.

TIPPING J:

Well, I’m simply going on the terms of the written offer and the findings –

MR DAVIDSON QC:

I understand.

TIPPING J:

– of both Courts below.

MR DAVIDSON QC:

Yes, I understand.

TIPPING J:

I think your argument would have some –

MR DAVIDSON QC:

Our primary submission is –

TIPPING J:

– interest in force if it was just coughing up a thousand dollars under protest.

MR DAVIDSON QC:

Well, Sir, that's –

TIPPING J:

But, frankly –

MR DAVIDSON QC:

– in the context of a reduced monetary proposal.

TIPPING J:

Yes.

MR DAVIDSON QC:

He was perfectly entitled to say, as I put to him, "All right, I object to this for – dirty business or otherwise – I will do what everybody else does and get the money from the tenants and put it up," this is $2650, "and I will sign or I'll have the tenants sign the protocols. I'll get my money from those tenants." Now, in the context of mitigation, that really is not a big ask, because he can achieve what he wants without any monetary outlay by himself at all and meet obligations he otherwise accepts are entirely sensible.

TIPPING J:

So you're really saying that, despite what was offered to him, he had a duty actively to come up with this sort of idea?

MR DAVIDSON QC:

It's – he had a duty actively to put himself in the position, if he correctly was being wronged as, this is before the Court –

TIPPING J:

Yes, if he was in fact being wrong.

MR DAVIDSON QC:

If he was in fact being wronged, to say, "Well, I don't accept this and I'm going to take my relief and get whatever…

TIPPING J:

"But to limit my damages I'm going to do –

MR DAVIDSON QC:

Yes.

TIPPING J:

– this and this"?

MR DAVIDSON QC:

Yes.

TIPPING J:

All right.

MR DAVIDSON QC:

"And it's not going to cost me a penny.

TIPPING J:

Thank you, I just wanted to be absolutely clear what the argument was.

MR DAVIDSON QC:

And says, "I just wanted to finish with that repetition, it doesn't cost me anything."

TIPPING J:

Well, that's assuming he can get it off the tenant.

MR DAVIDSON QC:

Well, the evidence is that that's how the bonds were paid, and there was no contest with that at all.

TIPPING J:

Right, I understand the argument completely.

MR DAVIDSON QC:
So, no big deal.

Your Honours, I asked or suggested that the reference to section 11 was best addressed through the supplementary submissions. I regret they came as late as they did, but the response to what you heard this morning from Mr Rooney is set out at page 6 of the supplementary submissions. And I'm starting with the proposition from Mr Rooney's submissions that the Court gave no weight to section 11 of the Act, something that's, it's fresh in this Court, that allegation. The Court did hear submissions on section 11, and the judgment at paragraph 83 refers to its conclusions in that regard. The judgment records that the first point involves consideration of section 11(2)(a) and the rules of the Body Corporate that reflect rules 1 and 2 as the final schedule 2, as set out in those provisions there.

ELIAS CJ:
Was anything said though about section 11? This just really recites it doesn't it? Does it go on to – I can't remember.

MR DAVIDSON QC:
At paragraph – there's reference at paragraph 88, there was no, in terms of rule 11(b), sorry I beg your pardon this is the rule 11(b) that doesn't help. I'll go back to the submission, paragraph 26 of the submission is that Mr Wu's case is that you can't interfere with the so-called absolute right to access common property and that's despite the obligation to manage and control the common property to meet the statutory duties and that inherently must mean a measure of control of that area. There cannot be an absolute, the common area is my kingdom approach to common property as seemingly contended. And the argument is developed through paragraph 26(a). The duties on a Body Corporate to control the common property necessarily contemplate some steps being taken which may have an effect on an owner or an occupier. Section 37(5) over the page allows rules as to control administration use, including the common property and then 16 backs this up

with regard to the powers which may be exercised to meet these duties and I know it didn't seem to resonate with the Court when I made the submission an hour ago, but if you have an obligation of the import that section 15 brings down, with regard to insurance, which is entirely now the responsibility of the Body Corporate subject to any delegation or agency it enters, to say we can't find a way in which we can do something which is a practical and necessary response, reasonably necessary for the purposes of section 16 of the Act, we can't do it because we can't find the specific power, in my submission does a great injustice to recognising that this is a working statute, a working body of rules, where there are some incredibly onerous obligations on foot. That's why section 16 was brought to account by the respondents in the case, to say that which is reasonably necessary, this was, as the Court of Appeal held on the facts, reasonably necessary, under section – without having to go to section 16. They saw the lawfulness in terms of the test under section – under rule 3.10.

TIPPING J:

Is this in an invitation and this not a pejorative Mr Davidson, that we should read section 11 and particularly subsection (2) as if it said subject to this Act and the Body Corporate rules? In other words you're saying that it's got to be harmonised with expressed powers and duties.

MR DAVIDSON QC:

Yes, yes I prefer that question the way you've just put it Sir in terms of harmonisation.

TIPPING J:

Yes.

McGRATH J:

Section 16 is subject to the Act, isn't it? So it's subject to 6 and 11, section 16 is subject to section 11.

MR DAVIDSON QC:

Yes but it's very broadly expressed, section 16. So I just want to go to paragraph 28 of the supplementary submissions. The argument for, the case for the respondents is that section 11 is otherwise not relevant. Mr Wu, through counsel, provided a part reference to subsection (11)(2) admitting key text and the Court of Appeal was told this and there is the text. The common property in each unit on a unit plan, so we're talking about property, we're talking about property shall by virtue of this section have appurtenance thereto, a right to the access as described and use of light for any windows, doors and apertures, openings and enjoyed at that date. So that's the tie between the property, the link between the property and those windows, doors or apertures. So it's to do with an opening and the right to maintain overhanging eaves. This is what goes with the, if you own the property and the common property as the result, then you have these things that go with it. This does not say that you cannot restrict through management, the way some of those things are enjoyed. For example a door is not left open. This does not say those things, appurtenance or apertures, will be left for access in all circumstances no matter what, for example, the security issues are. This just makes sure that everyone who has a unit and entitlement to common property gets to these things. It doesn't say unconditionally, it just makes sure that the property carries that right. And the words "enjoyed at that date" are submitted to prevent the proprietor from claiming greater rights of access than original existed. We looked at a case which is not before the Court here of Justice Ellis in *Chang* as protecting pre-existing appurtenances and we do see that it could have some bearing if the rule had been implemented to remove a right that Mr Wu previously held but that's not the case here.

So the absolute right of access, turning over the page, top of page 8, with Mr Wu's acknowledgement that he expected the Empire to have some sort of security protocols which would relate to doors, lifts and so forth, the absolute right of access, free from control by the Body Corporate now demanded by Mr Wu never existed. He can't take this and expand an entitlement beyond what are obviously legitimate controls which the Court can recognise have to apply to restrict any unfettered use or unfettered right of access in this case.

So section 11 doesn't knock this out. It doesn't assist me further though with the fundamental issue to which I return which is where we are left. In my submission the point we discussed five minutes ago remains crucial. It's the one that the Court of Appeal effectively found as the basis for determining this action was lawful, having looked at the obligations with regards to insurance, having looked at the problem on the facts because they are entirely contextual determinations, it looked then to see what rule 3.10 should be taken to mean. It recognised it was to do with security, it recognised that inherent in it there was an element of restriction because you could give security access cards against the restriction. So you've got a restriction to which the access card applies and logically, in our submission, the Court then concluded that that rule was intended in part to control the way access was conducted. If it wasn't that then the respondents say section 16 has application and if it doesn't mean that then the answer is any –

ELIAS CJ:

Sorry but if section 16 has application, that's only – that – what you'd say that 3.10 is made validly pursuant to section 16? It's only that argument is it?

MR DAVIDSON QC:

It's consistent with section 16 but throughout the last few hours I've been repeatedly on a hook of where is the basis upon 3.10 stands, where does it come from? And although the Court of Appeal made the very, I think, very worthwhile point to say it doesn't really behove people to come along and say, "We bought our property on the basis of a rule such as that," and then later say, "Well, we don't, it doesn't work." The fact is that if you go back to the duties, there has to be a means of implementing them and if you have to reach for something as broad as section 16, 15 and 16, obviously duties of the Body Corporate, 15 and 16, subject to the provisions of the Act, the Body Corporate have all powers, all such powers as are reasonably necessary to enable to carry out the duties imposed by this Act and by its rules. But if the answer is, "Well, no that doesn't work," and 3.10 doesn't carry so far, then the Court is effectively having to acknowledge perhaps wistfully that there is a crisis.

ELIAS CJ:

Well, hold on, just a comment because I'm not sure that I'm quite understanding this argument. To the extent that you're relying on section 16, the Body Corporate hasn't acted except through the rules, has it?

MR DAVIDSON QC:

No, it has worked through the rules.

ELIAS CJ:

So you have to, you're still – all you're looking to section 16 for is authority for, for the one rule you're able to point to which is 3.10, is that right?

MR DAVIDSON QC:

No, sorry, I appreciate you asking the question.

ELIAS CJ:

Sorry.

MR DAVIDSON QC:

Section 16, does not, is not tied to the rules. What I'm submitting is that if a circumstance arises –

ELIAS CJ:

And the Body Corporate can act –

MR DAVIDSON QC:

– and the Body Corporate –

ELIAS CJ:

– I can understand that argument, but we haven't got the Body Corporate acting here except through the rules.

MR DAVIDSON QC:

Well, the Body Corporate, no –

ELIAS CJ:

Because Mr Chen's not the Body Corporate –

MR DAVIDSON QC:

No, he's the agent, he's the agent.

ELIAS CJ:

He's their agent, mhm.

GLAZEBROOK J:

Well, that's, that isn't quite what was being said in front of Judge Hole but and, or in front of Justice Lang because it was said, "Well, we don't have any control over Theta," but ...

MR DAVIDSON QC:

That was another time. Through this superior Court procedure, we have been making this submission, so it's not, it does not dictate the rules. The rules are not drawn from section 16 of themselves.

ELIAS CJ:

No.

MR DAVIDSON QC:

It's – there's nothing to qualify this except subject the provisions of the Act. Now, if section 11's to read it down that, of course, that would be an impact but I, I don't accept for a moment section 11 has any impact on this matter. I come back to this proposition that the duties are incredibly onerous and you have before you one of the most striking examples you have, you could get of a factual setting where the duties are incre – are going to be imperilled, it is a duty. What do you do? And if the answer is you look at rule 3.10 and decide

that doesn't get you there, well, the Court of Appeal thought it did. Section 16 is not trammelled by any qualification.

GLAZEBROOK J:

Can I just check – get you where because I would have thought that you would need authority to levy a bond because that's the money being paid, because these are owners, these people own their own property.

MR DAVIDSON QC:

Yes.

GLAZEBROOK J:

Now, there's a power in the Act to levy and I would have thought what would normally happen is that you would levy to make sure that any undeductables or excesses were covered if they happened and then you would recover those in the, in the normal way from the individual tenants who may have caused that. That's what would normally happen, so you would have enough on your levies and you have a power to levy explicitly in the Act, and for legitimate common property issues but where does the power to require a bond of people who own their own property come from? You would have thought – now you have the power to levy, you could levy to, to have effectively a bond system if you've had the sort of problems that have been had.

MR DAVIDSON QC:

Well, the question seems to me to turn on an acknowledged ability to levy which we're all familiar with in a Body Corporate setting. That may be in advance and it may be after the fact, so the sinking fund is the obvious example of that. This was for a specific purpose to meet a particular cost that could come down with regard to an excess or a charge.

GLAZEBROOK J:

But the power to levy must include that, mustn't it?

MR DAVIDSON QC:

Yes but -

GLAZEBROOK J:

You put to Mr Wu that it would be spread among all the owners if it wasn't levied on these people, of course that's right.

MR DAVIDSON QC:

Yes.

GLAZEBROOK J:

So if you can't get the money back off individual people then unfortunately the Body Corporate has to wear it.

MR DAVIDSON QC:

But that doesn't, with respect, resolve the issue here because I think your Honour is putting to me that where is the entitlement to get money from the owners?

GLAZEBROOK J:

Well you need, to get money off anybody I would have thought you need express authority in Act and the express authority comes – just also while I'm at it on page 386 of the yellow volume there are clearly the type of issues about letting people know who the occupiers are and who the licensees are. There are obligation in the rules on Mr Wu to do so under (h) as I read it.

MR DAVIDSON QC:

Yes they are obligations, yes they are. But this protocol, this SAPA was simply a means to effect these obligations as it was a means –

GLAZEBROOK J:

Well the obligations are already there, aren't they, for the owners and actually the occupiers?

MR DAVIDSON QC:

Yes but this is a – it hadn't worked. That's the evidential basis for your consideration. That is why the Court –

GLAZEBROOK J:

So is the focusing of the mind is the –

MR DAVIDSON QC:

Yes. But in my submission there is nothing anywhere to say that you cannot, by imposition of a levy in advance, recovery of something for an event you had not foreseen, after the event.

GLAZEBROOK J:

As a bond, does a bond come within that, is that the submission, sorry?

MR DAVIDSON QC:

My submission is that that is exactly akin to a bond.

GLAZEBROOK J:

All right.

MR DAVIDSON QC:

Body Corporates and I can speak at least with this degree of knowledge having been a part of it.

GLAZEBROOK J:

Well although it didn't go to the Body Corporate did it?

MR DAVIDSON QC:

No but it was held for the purposes which a Body Corporate had an obligation. This was to meet an excess and other imposts on the Body Corporate. So in character it was very much like the levy before or after the event which gives rise to it but I do not depart from the submission in response to your Honour the Chief Justice that we ran our case on the basis of section – of rule 3.10

and we ran our case on the basis of section 16 and if we're wrong, because there is nothing specific in the rules and 3.10 doesn't have the application we say it does, then it means that a duty is not matched with a rule but it is married, does marry with a section and it does marry with the circumstances which were confronted here. So the Court of Appeal didn't reach a view about this, they just observed it.

GLAZEBROOK J:
What does the rules – do the rules say anything about how you get levies? How you make a levy.

MR DAVIDSON QC:
I think they do.

GLAZEBROOK J:
Because I suspect that this isn't a way to get a – make a levy.

MR DAVIDSON QC:
It almost certainly won't be your Honour without me having to go through it.

TIPPING J:
Mr Davidson there's one very short point that I'd just like help on. This may be a wayward thought, rule 3.10 talks about restricting access to common property, it doesn't talk about restricting access to proprietors' units.

MR DAVIDSON QC:
No.

TIPPING J:
Now do you say that by implication or by necessary logic or something, that the restriction to access to common property includes access to individual units?

MR DAVIDSON QC:

It's the gatekeeper. The common property is the gatekeeper.

TIPPING J:

Yes I know well you've got to get through the front door.

MR DAVIDSON QC:

You've got to get to the front door.

TIPPING J:

To the front door and through the hall and so on but I wonder if it isn't significant that the concept here is restricting access to common property rather than to units and you might well say well we're going to restrict access to common property but no one had in mind through this rule that we were going to also restrict access to units.

MR DAVIDSON QC:

It follows really, as night follows day, that if there's a restriction on common property, which is exercised, for a moment assuming reasonably, it will have effect on those who would otherwise simply find their way there, who are –

TIPPING J:

It might only be a part of the common property.

MR DAVIDSON QC:

It could be. It doesn't dictate how the security would be affected. This is to do with security.

TIPPING J:

Well, I just thought I'd ask it, I'm not saying it's necessarily crucial but it's just another slight loose end in my mind.

MR DAVIDSON QC:

I think the only way I could tighten the loose end –

TIPPING J:

The noose –

MR DAVIDSON QC:

– is to point out that this is the gateway provision. Control of access to common property, by that reason, for that reason, controls access to the units.

TIPPING J:

Yes.

MR DAVIDSON QC:

And the discipline is to be on the people, not only who use the common property, but the people who occupy.

TIPPING J:

Well, I thought that would be your argument, but it necessarily implies controlling access to units. But I just wondered if there was anything else that you needed to…

MR DAVIDSON QC:

No, well, I have to accept it does, it has that effect.

Now, your Honours, there's a vast amount of material we submitted which, in writing, which I haven't developed, and I'm conscious that there are replies and so forth to go.

ELIAS CJ:

Yes.

MR DAVIDSON QC:

The position we brought to this Court was that it has a factual base, we had succeeded in the Court of Appeal on the basis that the reason Mr Wu would not get judgment in respect of his loss of rents as he had originally claimed

them and been awarded, was that he would not be bound by the SAPAs, They were lawfully imposed and he would not be bound by them. The Court's contemplation, expressed a little differently, was, well, that doesn't, that was the focus of the case in the High Court and the Court of Appeal, but after some reflection there may be some other way in which Mr Wu's been affected, at a personal level, namely his personal use, that's how it's referred to in the judgments, or through his inability to secure tenants, so it's the loss of a chance. And that was why, with this never having been raised in the Court, never part of the evidence, Mr Wu never said, "I have lost any person use," his whole case, and our submissions set this out carefully, the pleading, his leave, his prepared evidence, was all about his letting, it's all it was. Hence, if he would be part – he would not go with the SAPAs, however they were to be brought down, then access through, to his unit, with tenants meant nothing. He could show hundreds of tenant through, but if he's not going to go with the SAPA, then he can have lost nothing. And that's why we could not understand what the Court of Appeal, still only contemplating the position, meant. Loss of a chance, loss of a chance to secure a tenant? The tenants were always there, that's the evidence, that's why he's got the agreement that if he could let he would have got X amount from them. But, if he's not going to with it, as Justice Hammond said, well, you know, he hasn't got a lot of chance, Justice Hammond only saw personal use, and that was never the case. That's why we came to this Court by cross-appeal to say, there's no point in going back. The only way the matter would find its way back would be if the, in effect, the steps that were taken were held to be unlawful, full stop, and then that he did not have to mitigate. Well, this is our last port of call –

ELIAS CJ:

Well why would that have to go back, because I didn't understand the calculation of the last…

MR DAVIDSON QC:

The calculation's not in dispute. Yes, no, you're right. If it went back it would not be on the basis that the Court of Appeal contemplated –

ELIAS CJ:

No.

MR DAVIDSON QC:

It wouldn't have to go back, because, just as we said it wouldn't have to go back anyway if we held our position and –

ELIAS CJ:

Yes.

TIPPING J:

It's all or nothing, from your point of view, isn't it? There's no sort of halfway hybrid position. In other words, you'll either succeed in persuading us that there should be no damages, or it'll be the damages affixed by the Judge.

MR DAVIDSON QC:

Yes. No nuisance, no nuisance, no damage. And you can't suffer damage if you, you can't claim to suffer damage if you, one, if you haven't got a nuisance and two, if in fact you are the cause of your own damage.

TIPPING J:

Was it the Court's own idea to send it back or did the present appellant seek to have it sent back?

MR DAVIDSON QC:

No, we had no idea this was coming, Sir.

TIPPING J:

No, I know but –

MR DAVIDSON QC:

No, none of us knew, they just emerge.

TIPPING J:

No, no, I appreciate that.

MR DAVIDSON QC:

There was quite a gap between the hearing and the judgment for quite some months and it just emerged. So we do rest our case on the lawfulness and I do ask you to look at the duties and the response and to recognise that nuisance does require actual proof of damage, not a contemplation, a possibility and on that basis unless your Honours have something further, I do ask you to have regard to the written submissions which do better justice for the case than I've done today.

GLAZEBROOK J:

Can I just ask you quickly about section 27? I think your – which is a restriction on forfeiture, re-entry or distress. I think your answer, which implies that these are owners and you can't take ownership away, your answer would probably be, I assume, that this wasn't an exclusion?

MR DAVIDSON QC:

It wasn't an exclusion, no.

GLAZEBROOK J:

It's just that that makes it fairly clear you shouldn't exclude people from their units, doesn't it?

MR DAVIDSON QC:

Yes, I mean, that's really the framing of the case, Ma'am, the –

GLAZEBROOK J:

I assumed that would be your answer.

MR DAVIDSON QC:

You've identified this that it's so easy to call this a lockout and so on, but when it's viewed as we say it should be as a restriction that is placed there for the

benefit of all and is necessary, then it loses the character of the lockout or the restriction you're referring to.

GLAZEBROOK J:
That's what I assume your answer would be, but I thought in fairness I should ask you to, if there was anything else.

MR DAVIDSON QC:
Thank you. Of what it's worth, 27 is to do with leasehold land.

GLAZEBROOK J:
Sorry?

MR DAVIDSON QC:
Section 27 is to do with leasehold land.

GLAZEBROOK J:
Is it?

MR DAVIDSON QC:
Yes.

ELIAS CJ:
It's about exclusion of forfeiture et cetera.

GLAZEBROOK J:
All right, yes.

MR PRICE:
I was just going to add in case it assists your Honour there that particular part in which section 27 relates is for a subdivision of leasehold land such that the head lessor –

GLAZEBROOK J:

Right, yes, it does, yes, I see that now.

MR PRICE:

Yes and I have nothing else to adopt my learned friend's submissions.

ELIAS CJ:

Yes, Mr Rooney.

MR ROONEY:

A few very brief points, I won't detain your Honours too long hopefully. There was some discussion about the letter at page 435 in the blue bundle and whether that was a requirement for the owners or the occupiers to sign up to –

WILLIAM YOUNG J:

The yellow bundle, isn't it?

MR ROONEY:

Yellow bundle, I'm sorry, yes, page 435. I think the letter is clarified by the later letter at 462 which is from Mr Chen of Theta to the Body Corporate secretary and Mr Chen says in the first paragraph of that letter, "I've already advised the 42 owners involved directly," and he says he's attached the cover letter although those attachments don't appear with this copy of the email and also Paul McKendrick of Glaister Ennor attached letter from Paul McKendrick and my response to him on 18 October 2007. Now, I think that date must refer to Mr McKendrick's letter which was sent on the 18th and Mr Chen's reply went on the 22nd, that's the letter at 435, but he says that, "I can release the cards if they individually sign the security and access protocol agreement and each pay the security deposit," so he's specifically in that letter –

MR ROONEY:

No 462 is the later letter. So although the letter at 435 might be, there might be some basis for saying it's unclear on its face, it seems apparent from the

email at 462 that Mr Chen thought he was saying it's the owners that have to sign up.

McGRATH J:
Because "they" has to refer back to the owners, is that you –

MR ROONEY:
Sorry Sir?

McGRATH J:
Because the word "they" refers to the owners you say?

MR ROONEY:
At 462?

McGRATH J:
Yes.

MR ROONEY:
Yes, yes that's right. The owners he refers to in the first line of the email. There is nobody else referred to in that letter, so – or in that paragraph.

Moving onto another issue, there was some discussion about whether Mr Wu gave evidence that he'd been impeded in finding tenants and my learned friend said Mr Wu wasn't cross-examined on that because he didn't give evidence to that effect. Paragraph 70 at page 178 in the blue bundle, this is the first affidavit Mr Wu filed when the proceedings were commenced. Itself begins at page 169 but the reference is at page 178, paragraph 17, "Neither my wife nor I, nor any other members of our group have been able to have our tenants in our apartments because we have been denied access and swipe cards." Now he says that in the context of what at that time was a suspicion that there may have been somebody in those apartments, of which there has never been any further evidence but nevertheless the evidence is there and he was not questioned at all about that.

But the other point that I would make, there was a lot of discussion about rule 3.10 with both counsel, one factor which hasn't been raised is how the Body Corporate is able to reconcile the granting of access after Justice Lang's decision with reliance on the original version of 3.10 because for all of that period from February 2008 onwards the reliance was on the invalidly amended rule 3.10. So the reliance on the originally amended 3.10 is something that really came as an afterthought. It wasn't the position the Body Corporate was taking at the time.

TIPPING J:
You're not saying they can't do that are you?

MR ROONEY:
Well –

TIPPING J:
If one shot fails, you can always have another shot.

MR ROONEY:
I suppose so, yes. Yes I suppose so.

GLAZEBROOK J:
Well I suppose you'd say they didn't think they were relying on it at the time because they thought they were relying on the other rule.

MR ROONEY:
Yes.

GLAZEBROOK J:
However far that gets you.

MR ROONEY:
All right it probably doesn't get us –

TIPPING J:

They either had the power or they didn't.

MR ROONEY:

Yes, yes okay, well I think that's the issue isn't it?

ELIAS CJ:

They'd have had a better power.

TIPPING J:

Yes it would better for them.

MR ROONEY:

Yes and just the final point that really goes to this issue, if we get to that stage, there's this issue of reasonableness and whether it was reasonable and whether it fitted within section 15 or 16 to require owners to sign up to this agreement for the purpose of making the building insurable or at least more insurable. There's really no – there's certainly no evidence that any insurer required that and logically it's very difficult to see what difference it would make to an insurer requiring somebody who's not going to be in the building, lives in Sydney, is never going to be in a position to damage the building, even if he wanted to, because he's an owner, he's an owner's interest, doesn't want it damaged.

McGRATH J:

There was some evidence, wasn't there, that insurers were not interested because of the claim's history, wasn't there some evidence that –

MR ROONEY:

Well, there wasn't even evidence to that effect. There was evidence that I think five of six had declined to offer –

WILLIAM YOUNG J:

Because of the claim's history, wasn't it?

MR ROONEY:

Well, we don't know that.

WILLIAM YOUNG J:

But I mean it's an indirect connection, that the connection is we think we've got a claim's history problem –

MR ROONEY:

Yes.

WILLIAM YOUNG J:

– only one out of six insurers will quote, we think this is a way to reduce our claims, pattern of claims because it will indirectly encourage those who occupy the building not to damage it.

MR ROONEY:

Yes, well, all of the ones who were seemingly approached were the local mainstream insurers and, yes, insurance is available if you pay a bit extra for it from other sources, there's no question about that but the point I'm making is that the one thing that's unlikely to have had any influence on insurers is an absentee owner signing up to a series of obligations which couldn't possibly have any effect on insurance having –

TIPPING J:

Are you really saying that to require that was not logically going to lessen the risk?

MR ROONEY:

Exactly, yes.

WILLIAM YOUNG J:

But it would only do so because they would expect to be, have back to back arrangements with their licensees?

MR ROONEY:

That's, well, that's exactly right but, of course, that is not the requirement which was stated to Mr Wu. Well, it was but his involvement as a signatory to that agreement in itself couldn't have had any influence on insurance or an insurer.

WILLIAM YOUNG J:

Can I ask you a separate question? This is Mr Chen's evidence of the offer 293, now, as far as I can see there's no response to that at all from Mr Wu. He doesn't deal with it in his – I think he filed one brief of evidence and one affidavit after that.

MR ROONEY:

Yes. That's precisely right.

WILLIAM YOUNG J:

Did Mr Wu give oral evidence on the point other than in the passage Mr Davidson took us to?

MR ROONEY:

I'm reluctant to give an absolute answer to that, but I think he did. I can certainly remember cross-examining. I don't have it immediately to hand.

WILLIAM YOUNG J:

So you think you cross-examined Mr Chen on this?

MR ROONEY:

I think it must have been Mr Chen, and the very fact that there was no response to it was one of the factors why I asked Mr Chen how we could be certain that the letter had ever been sent, because one would have expected

some kind of response. But I can't take it any further than that because there was ...

WILLIAM YOUNG J:

So you think you cross-examined Mr Chen on the absence of any letter other than the one that's reproduced on the Court of Appeal judgment?

MR ROONEY:

Yes. I'm assuming it was Mr Chen but I can't specifically remember that it was him. I recall asking somebody about it and it's unlikely that it would have been somebody other than Mr Chen. The only witnesses were Mr Zhou, who was under subpoena. He was the on-site manager of the building. Mr Wu and Mr Chen, so there were only three witnesses.

Those are my submissions, unless there are any other questions.

ELIAS CJ:

No. Thank you, counsel, for your submissions. We will take time to consider our decision in this matter.

HEARING ADJOURNED