IN THE SUPREME COURT OF NEW ZEALAND

SC 59/2015
[2016] NZSC 61

BETWEEN	JOHN GILBERT First Appellant	
	QSM TRUSTEES LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION) Second Appellant	
AND	BODY CORPORATE 162791 Respondent	

Hearing: 8 December 2015

Court: Elias CJ, William Young, Glazebrook and O'Regan JJ

Counsel: D J Chisholm QC and S M Jass for First Appellant
J F Anderson and T J G Allan for Respondent

Judgment: 2 June 2016

JUDGMENT OF THE COURT

A The judgment of the Court of Appeal is affirmed.

B There is no order for costs.

REASONS

WILLIAM YOUNG AND GLAZEBROOK JJ

(Given by William Young J)

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Introduction

[1] QSM Trustees Ltd (in liquidation and receivership) (QSMTL) owns five units (units 3A–3E) in a building at 239 Queen Street, Auckland, known as the Mid City complex. Mr John Gilbert is its receiver. Mr Gilbert and QSMTL are the appellants. Under s 80(1)(f) of the Unit Titles Act 2010 (the 2010 Act) unit owners are required to pay body corporate levies as fixed by the body corporate. By reason of s 32(5) of the Receiverships Act 1993, receivers are personally liable:[1]

> for rent and any other payments becoming due under an *agreement* subsisting at the date of the appointment of the receiver relating to the use, possession, or occupation by the grantor of property in receivership.

Under s 32(6) such liability does not commence until 14 days after a receiver is appointed.

[2] The respondent is the body corporate of the Mid City complex. It claims that Mr Gilbert is personally liable for body corporate levies from 9 August 2013, being 14 days after his appointment as receiver. A summary judgment application was rejected by Associate Judge Abbott in the High Court.[2] His judgment was reversed by the Court of Appeal which:[3]

(a) held that Mr Gilbert was liable for the levies and interest;

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1 Emphasis added.
2 *Body Corporate 162791 v Gilbert* [2014] NZHC 567 (Associate Judge Abbott) [*Gilbert* (HC)].
3 *Body Corporate 162791 v Gilbert* [2015] NZCA 185, [2015] 3 NZLR 601 (Harrison, Keane and Wylie JJ) [*Gilbert* (CA)].

(b) rejected an application by him for relief against that liability;

(c) entered summary judgment accordingly; and

(d) ordered him to pay the body corporate "its reasonable solicitor/client" costs.

Mr Gilbert and QSMTL appeal against the Court of Appeal decision.

The commercial background to the dispute

[3] The Mid City complex was built in the 1980s. In 1994 it was redeveloped by its then owner, Mission Developments (Auckland) Ltd (Mission), into its current unit title structure and now consists of:

(a) a basement;

(b) a mid level of two floors divided into individually owned units which are used as retail premises; and

(c) an upper level spread over three floors, in which the five units owned by QSMTL are located.

[4] A cinema complex was located on the upper level. This venture was unsuccessful and stopped operating in 1998. More to the present point, there is a land covenant providing for redevelopment of the upper level and the airspace above. This is registered on the supplementary record sheet comprising part of the unit plan. Mission was both grantor and, in its capacity as the then owner of the five upper level units, also the grantee. In litigation in 2006, Venning J held that the then owner of units 3A–3E could enforce the land covenant against the other unit holders and the body corporate.[4] In the event, however, the redevelopment proposed did not proceed.

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4 *Myers Park Apartments Ltd v Sea Horse Investments Ltd* (2006) 7 NZCPR 454 (HC).

[5] On 9 September 2010 Messrs Alan Copeman and Kerry Finnigan settled a trust known as the 239 Queen Street Trust. The original trustee was 239 Queen Street Trustees Ltd (239QSTL). The trust was interested in acquiring the five units on the upper level of the complex with a view to redevelopment. There were associated negotiations between the trust and the body corporate. These negotiations resulted in a letter of 24 November 2010 from the solicitors for the trust to the body corporate which the latter executed. This letter recorded a bargain as to the proposed redevelopment under which, inter alia, the trust was to replace the roof of the building and make a small payment towards the levy arrears and the body corporate was to write-off the balance of the levy arrears once the roof was completed. Its liabilities in relation to historic body corporate levies thus having been conditionally addressed, 239QSTL took a transfer of the five units. The trust has subsequently redeveloped, to some extent, the upper level of the building and, by early 2012, a market (known as Queen Street Market) consisting of 25–30 retailers was operating there.

[6] There is no direct evidence from Mr Gilbert in the present proceedings as to the legal basis upon which the market operates. It appears, however, from what we were told by counsel (based on affidavits filed in relation to stay proceedings and not strictly before us) that under a lease of the five units of 1 March 2012 between 239QSTL[5] and a company associated with Mr Finnigan, the lessee (that is Mr Finnigan's company which operates the market) is not required to pay rent to 239QSTL (now, we deduce QSMTL)[6] unless the rental it derives exceeds $1,100,000 per annum. We will come back to this evidence later. It was not before the Court of Appeal when it heard the appeal from the Associate Judge's decision.

[7] There has been substantial disagreement between the body corporate and the trust as to the implementation of the 24 November 2010 agreement and more generally as to the trust's rights under the redevelopment covenant. In the result, relations between the trust and the body corporate broke down. The roof of the

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5 The respondent's submissions refer to QSMTL being the party in question. QSMTL did not exist on 1 March 2012, as it was not incorporated until 21 December 2012.

6 The respondents note in their submissions: "The respondent has not seen evidence that the lease was assigned to QSTML (the lease is between the first corporate trustee and Queen Street Markets)."

building has not been replaced and 239QSTL did not pay current body corporate levies.

[8] The body corporate issued a statutory demand for payment of the outstanding body corporate levies and, when this was not complied with, applied to put 239QSTL into liquidation. The trust did not engage directly with this process. Rather units 3A–3E were transferred to QSMTL on 23 January 2013 and no opposition was offered to the making of an order for the liquidation of 239QSTL two days later.[7]

[9] In March 2013, QSMTL commenced civil proceedings seeking to enforce the 24 November 2010 agreement and the redevelopment covenant. QSMTL also applied to set aside a statutory demand which the body corporate had issued in February; this was on the basis that it had a counterclaim against the body corporate for an amount exceeding the amount of the demand.

[10] It appears that in July 2013, the trust decided not to contest the proceedings. We say this because:

(a) QSMTL did not comply with an unless order made on 18 July 2013 in the statutory demand proceedings and its application to set the demand aside was thus dismissed.[8]

(b) A company associated with Mr Finnigan which held a mortgage security over the assets of the trust appointed Mr Gilbert as receiver of QSMTL. The following day QSMTL was placed in liquidation and a Mr Young (who works on the same floor of the same building as Mr Gilbert) was appointed as the liquidator.

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7 *Body Corporate 162791 v 239 Queen Street Trustees Ltd* HC Auckland CIV-2012-404-6854, 25 January 2013.

8 *QSM Trustees Ltd v Body Corporate 162791* HC Auckland CIV-2013-404-1053, 18 July 2013 (Minute of Venning J).

(c) QSMTL did not comply with an order for security for costs made on 11 July 2013[9] in the proceedings against the body corporate with the result that these proceedings were dismissed on 24 October 2013.[10]

[11] Beyond what might be inferred from the dismissal for non-compliance with procedural orders of the claims made on behalf of the trust, we do not have a view of the merits of the dispute between the trust and body corporate. Indeed, we understand that there is now further litigation between the parties as to the redevelopment covenant which is before the High Court. One thing that is obvious, however, is that the structure through which the five units are owned and operated is well-designed to avoid payment of levies. This structure enabled the trust to render the liquidation proceedings against 239QSTL pointless by the simple expedient of substituting QSMTL as trustee. Then when QSMTL became involved in proceedings likely to result in its liquidation, Mr Gilbert was appointed as its receiver by Mr Finnigan's company and Mr Young, who works in close physical proximity to Mr Gilbert, was appointed as liquidator. The lease to which we have alluded in [6] can be seen as a further cut-out interposed between the body corporate and the assets of the trust.

The general position as to the priority of body corporate fees

[12] Under s 75 of the 2010 Act, the deposit of a unit plan creates a body corporate, the members of which are the owners of the units. The body corporate is the legal owner, and the unit holders (in shares proportional to their ownership interests) the beneficial owners of the common property.[11] Further, under s 121, a body corporate may impose levies for certain purposes. These are payable by the owners of the units in the development. Section 124 of the 2010 Act provides:

> **124 Recovery of levy**
>
> (1) A body corporate must fix the date on or before which payments of levies are due.

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9 *QSM Trustees Ltd v Body Corporate 162791* [2013] NZHC 1762.

10 *QSM Trustees Ltd v Body Corporate 162791* HC Auckland ClV-2013-404-1286, 24 October 2013.

11 Section 54.

(2) The amount of any unpaid levy, together with any reasonable costs incurred in collecting the levy, is recoverable as a debt due to the body corporate by the person who was the unit owner at the time the levy became payable or by the person who is the unit owner at the time the proceedings are instituted.

[13] Section 124 imposes the liability for unpaid levies on the person "who is the unit owner at the time the proceedings are instituted". In ordinary circumstances, unpaid levies will be priced into the purchase price of a unit. In this practical sense, unpaid levies have priority over:

(a) the general indebtedness of a unit owner who is bankrupt or in liquidation; and

(b) the amount secured by a mortgage over a unit where the mortgagee is selling the unit.

This priority is reinforced by s 147 of the 2010 Act which provides:

147 Pre-settlement disclosure to buyer

(1) This section applies if a buyer and a seller have entered into an agreement for sale and purchase.

(2) No later than the fifth working day before the settlement date, the seller must provide a disclosure statement (a **pre-settlement disclosure statement**) to the buyer.

(3) The pre-settlement disclosure statement—

(a) must contain the prescribed information; and

(b) must contain a certificate given by the body corporate certifying that the information in the statement is correct.

(4) A body corporate may withhold a certificate referred to in subsection (3)(b) if any debt that is due to the body corporate by the unit owner is unpaid.

[14] The position under the Unit Titles Act 1972 (the 1972 Act) was the same save that the 1972 Act did not contain a provision equivalent to s 147(4) of the 2010 Act. Instead, s 36 of the 1972 Act provided for those interested in the sale of a unit to obtain a certificate from the body corporate as to, inter alia, the indebtedness (or otherwise) of the owner of the unit to the body corporate. In practical terms,

s 147(4) of the 2010 Act does little to strengthen the legal position of a body corporate in relation to unpaid levies. It is, however, of some interest in terms of the legislative history, as we will shortly explain.

[15] The practical position under the 1972 Act was that a mortgagee was not in a position to realise a security over a unit without ensuring that outstanding body corporate fees were paid. But the priority in favour of unpaid levies thus created operated only where it was the mortgagee that was seeking to sell a mortgaged unit. This is because the 1972 Act did not provide any direct mechanism for a body corporate to force the sale of a unit and there was no mechanism for requiring a mortgagee to discharge a security over a unit for less than the amount secured. Thus, if a body corporate was seeking to recover unpaid levies from the sale of a unit effected by execution on a judgment against the owner, it would have no choice but to allow priority for the amount secured over the unit. The 1972 Act thus created the potential for a stand-off between a body corporate and secured creditors.

[16] This stand-off was addressed in two contexts.

[17] The first was in the course of the Law Commission's consideration of shared ownership of land.[12] In its 1999 preliminary paper, the Law Commission noted the problems in relation to the recovery of unpaid levies and suggested three possible solutions:

> 34 The first is to ensure that at least the body corporate will be paid if a dealing is registered against a particular unit. The way to do this is to require production to the District Land Registrar of a s 36 certificate on registration of any dealing and to empower the body corporate to withhold such certificate if there are arrears.
>
> …
>
> Appropriate provisions to effect this are the following:
>
> **16A Certificate of proprietor's liability to be produced to Registrar**
>
> No Registrar may enter a memorial on a certificate of title issued under this Act if

[12] Law Commission *Shared Ownership of Land* (NZLC PP35, 1999).

(a) the memorial relates to a mortgage, charge, transfer, or other dealing affecting the title; and

(b) a certificate under section 36 was not included with that mortgage, charge, transfer, or other dealing when the instrument was presented for registration.

Amend s 36 by adding *subsection (2)*:

(2) The body corporate may refuse to provide a certificate under subsection (1) in respect of a proprietor if there are moneys due from that proprietor to the body corporate and those moneys are unpaid.

35 The second is to make first mortgagees liable for levies by analogy with the Rating Powers Act 1988 s 139. To achieve this we recommend a new *section 15A* be inserted into the Unit Titles Act:

15A Recovery of contributions from first mortgagee

(1) If a proprietor defaults in the payment of a contribution levied under section 15(2)(c), the body corporate may recover that amount from any person who is a first mortgagee of the unit in respect of which the amount is payable.

(2) If a first mortgagee pays a contribution under subsection (1), the amount so paid, until it is repaid to the mortgagee, must be treated as forming part of the money secured by the mortgage and bears interest at the same rate, or, if the mortgagee so decides, is recoverable by him or her from the mortgagor or proprietor.

36 The Commission also gave some thought to recommending the insertion in the statute of a provision entitling the body corporate to exercise a power of sale in the event of a continuing default. An analogy might be the power in Article 12 of Table A to the Companies Act 1955 for a company to sell shares over which it had a lien. There would need to be adequate provision for notice and other safeguards comparable to the duties imposed on a mortgagee.

[18] The Law Commission returned to its three suggestions in its final paper:[13]

48 These proposed solutions were welcomed by some and viewed with dubiety by others. It was said of the first that it was wrong to subject every transaction to the proposed procedure when a result that was better (because it lacked the element of delay) was obtainable by the usual processes of judgment and of execution. It was said further, that it could mean that a proprietor in dispute with his body corporate but anxious to have a dealing finalised could be held to ransom. It was said (correctly) of the second, that it was incomplete because it did not extend to liabilities under section 33 (relating to

[13] Law Commission *Shared Ownership of Land* (NZLC R59, 1999).

> works not for the benefit of all units equally) and that in any event the liability was too open-ended for the proposal to be fair. It was said of the third that it was excessively heavy-handed when measured against the amounts likely to be involved. We think that the problems are really just another unfortunate consequence of the unwise abandonment in the District Court Rules of the default summons procedure that once provided a relatively swift and inexpensive method of recovering unpaid and uncontested debts. Our view is that it is important to pursue reform in the area of debt collection procedure. Since publication of our preliminary paper there has been decided the case of *Godoy v Body Corporate No 164980* (14 June 1999) unreported, High Court, Auckland, M Nos 1904–1906/98. Fisher J in that case held that the effect of section 34 was to impose liability on the proprietor for solicitor-and-client costs and other consequential expenses in circumstances analogous to non-payment of levies and amounts due under section 33. We were told by one practitioner that even before this case courts if asked to do so have been in practice prepared to award to body [corporate's] solicitor-and-client costs (that is, complete costs incurred, not just a proportion). It remains the case however that the body corporate has no security for moneys due. For this reason, in this report we endorse the first two proposals suggested in our preliminary paper and referred to above. If problems arise in practice as a result of bodies corporate withholding section 36 certificates from desperate sellers to procure payment of disputed amounts, we would expect such disputes to be susceptible of swift resolution. The grant of an injunction requiring issue of the certificate subject to the dispute moneys being paid to a stakeholder is one obvious solution.

[19] It will be observed that s 147(4) of the 2010 Act is similar in language and purpose to the Law Commission's proposed s 36(2). The proposed s 16A did not find its way into the 2010 Act but this is of limited if any significance given the protections available to a body corporate on the sale of a unit initiated by a mortgagee. Much more significantly, there is nothing in the 2010 Act corresponding to the proposed s 15A under which unpaid levies could be recovered directly from mortgagees.

[20] The other context in which this question arose was provided by schemes under s 48 of the 1972 Act addressing the cost of remediation of leaky buildings. In two cases, schemes were proposed which contained provisions intended to give body corporate costs priority over the interests of secured creditors of unit owners. In both cases, approval of these provisions was withheld, essentially on the basis that the

liability to the mortgagees had priority to the liability to the body corporate for unpaid levies or charges.[14]

[21] Leaving aside for the moment the particular position of a mortgagee in possession to which we will revert shortly, the potential for a stand-off between a body corporate and a mortgagee remains. Where this occurs we accept that a body corporate has no legal mechanism for insisting on a sale of the unit in question on a basis which gives it priority over the charge of the mortgagee.

[22] The present case does not involve a stand-off of the kind just postulated, that is between a body corporate and a passive mortgagee. Rather it arises in a context in which the units have been used on behalf of the mortgagee for economic gain in the course of which services provided by the body corporate which are funded by levies have been accepted and utilised.

The basis of the claim against Mr Gilbert

[23] Section 32 of the Receiverships Act relevantly provides:

> **32 Liabilities of receiver**
>
> (1) Subject to subsections (2) and (3), a receiver is personally liable—
>
> (a) on a contract entered into by the receiver in the exercise of any of the receiver's powers; and
>
> (b) for payment of wages or salary that, during the receivership, accrue under a contract of employment relating to the property in receivership and entered into before the appointment of the receiver if notice of the termination of the contract is not lawfully given within 14 days after the date of appointment; and
>
> (c) for payment of remuneration under any contract with—
>
> (i) a director of a grantor that is a body corporate; or
>
> (ii) a person who, in relation to a grantor that is not a body corporate, occupies a position equivalent to that of a director of a body corporate—
>
> if the receiver has expressly confirmed the contract.

[14] See *Body Corporate 322588 v K Mitchell Investments Ltd* (2009) 10 NZCPR 611 (HC) and *Body Corporate 198072 v Bank of New Zealand* [2011] 3 NZLR 249 (HC).

(2) The terms of a contract referred to in paragraph (a) of subsection (1) may exclude or limit the personal liability of a receiver other than a receiver appointed by the court.

…

(5) Subject to subsection (7), a receiver is personally liable, to the extent specified in subsection (6), for rent and any other payments becoming due under an agreement subsisting at the date of the appointment of the receiver relating to the use, possession, or occupation by the grantor of property in receivership.

(6) The liability of a receiver under subsection (5) is limited to that portion of the rent or other payments which accrue in the period commencing 14 days after the date of the appointment of the receiver and ending on—

(a) the date on which the receivership ends; or

(b) the date on which the grantor ceases to use, possess, or occupy the property,—

whichever is the earlier.

(7) The court may, on the application of a receiver,—

(a) limit the liability of the receiver to a greater extent than that specified in subsection (6):

(b) excuse the receiver from liability under subsection (5).

(8) Nothing in subsection (5) or subsection (6)—

(a) is to be taken as giving rise to an adoption by a receiver of an agreement referred to in subsection (5); or

(b) renders a receiver liable to perform any other obligation under the agreement.

…

[24] Section 32(5) of the Receiverships Act imposes personal liability on receivers for rent and other payments accruing due under a pre-receivership agreement in respect of property in receivership that the company continues to use. The purpose of the provision is to ensure that a receiver does not obtain a benefit for the debtor company or secured creditor without paying for it. Such liability ends when either the company ceases to use, possess or occupy the property, or the receivership is concluded.

[25] Section 32(5) appears to have been based on an Australian model.[15] It was plainly intended to apply in circumstances where a receiver continued to use property leased from a third party although in such circumstances, a lessor would usually be in a position to terminate the lease on the receivership of the lessee/grantor. In this instance, the "property in receivership" would be the grantor's interest as lessee under the lease. Maintenance and like obligations under an easement might also come under s 32(5). To be noted is that s 32(1) refers to liabilities "on a contract" whereas s 32(5) refers to payments "due under an agreement". As we will see, this is a distinction which the Court of Appeal fastened on.

[26] Two issues arise as to Mr Gilbert's personal liability: first, whether the levies are due under an agreement; and, secondly, if so, whether the agreement relates to the use, possession or occupation by QSMTL of property in receivership.

Are the levies due under an agreement?

The bases upon which it might be said that the levies are due under an agreement

[27] There are two bases upon which it might be concluded that the levies are due under an agreement.

[28] The first of these is as follows. Both before and after receivership, QSMTL was the beneficiary of services provided by the body corporate, including: insurance, fire alarm monitoring, obtaining annual building warrants of fitness, repairs and maintenance, building cleaning, air conditioning maintenance, rubbish removal, security, water rates and electricity. It might be thought that the receipt and utilisation of those services implies an agreement to meet the costs of their provision.

[29] The second basis arises in this way. The relationship between unit owners and a body corporate and thus their rights and duties are affected not only by the Act but also by the operational rules which the body corporate adopts. Such rules are provided for by s 105(1) of the 2010 Act. A default (and surprisingly skeletal) set of

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[15] See *Brookers Insolvency Law & Practice* (online looseleaf ed, Thomson Reuters) at [RA32.04(2)].

rules is provided for in the Unit Titles Regulations 2011. These may be altered either on the deposit of the plan or later by the body corporate. Under s 105(3), such rules are binding on:

(a) the body corporate; and

(b) the owners of principal units; and

(c) any person who occupies a principal unit; and

(d) any mortgagee who is in possession of a principal unit.

[30] The rules of the body corporate in this case do not explicitly address payment of levies. Rule 31(b), however, provides as follows:

> An Owner must comply with all Acts, (including the noise control provisions of the Resource Management Act 1991, bylaws, and regulations) for the time being in force in the area in which its unit is situated, as they relate to the use, occupation or enjoyment of the unit, accessory unit or common property.

[31] The courts have enforced the constitutional documents and rules of incorporated and unincorporated societies on the basis that they have contractual effect as between the society (where it is incorporated) and its members and as between the members in the case of an unincorporated association. Illustrative cases include *Henderson v Kane*[16] and *Turner v Pickering*[17] (in relation to incorporated societies) and *Peters v Collinge*[18] (in relation to unincorporated associations). On this approach, anyone who becomes a member of the association in question becomes contractually bound to comply with the rules and has a corresponding right to insist on compliance by others with those rules. It does not matter whether the membership application form is explicitly contractual in nature and most commonly it will not be.[19] Nor does it matter whether the rules are promissory in nature (which in practice, they seldom are).

[32] As well, under the Companies Act 1955 and earlier New Zealand companies legislation, corresponding in this respect to the United Kingdom legislation on which

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16 *Henderson v Kane* [1924] NZLR 1073 (SC).

17 *Turner v Pickering* [1976] 1 NZLR 129 (SC).

18 *Peters v Collinge* [1993] 2 NZLR 554 (HC).

19 Membership applications do not normally incorporate promises by both the new member and association to comply with the rules.

they were modelled, the memorandum and articles of association of a company had contractual effect. Thus, s 34 of the 1955 Act provided that such documents, when registered:

> … bind the company and the members thereof to the same extent as if they … had been executed as a deed by each member and contained covenants on the part of each member to observe all [of their] provisions.

[33] Against this background, it is unsurprising that courts have assumed that body corporate rules constitute a contract between unit owners. Thus in *Tisch v Body Corporate No 318596*, the Court of Appeal referred to the owners of unit titled properties in this way:[20]

> They purchase … knowing they are subject to the Body Corporate Rules. Those Rules are a contract between the unit holders.

And in *St John's College Trust Board v Body Corporate No 197230*, the Court of Appeal observed:[21]

> [W]hen buying into a unit title development owners acquire contractual rights with a consequential expectation that legal relationships between them will be governed accordingly. We would add that they also assume contractual liabilities giving rise to the same expectation. Certainty is a central theme of the statutory and contractual regime.

The approach of the High Court and Court of Appeal to the agreement issue

[34] In the High Court, Associate Judge Abbott held that the liability to pay body corporate levies is purely statutory, that is under s 121, with the result that such levies do not become "due under an agreement".[22] So he dismissed the claim against Mr Gilbert.[23]

[35] The Court of Appeal took a different view. It commented:[24]

> The ordinary meaning of the word "agreement" extends to a mutual understanding, or arrangement entered into between parties as to a course of action. It should not receive a narrow and legalistic construction. Our view

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

21 *St John's College Trust Board v Body Corporate No 197230* [2013] NZCA 35, (2013) 14 NZCPR 56 at [20].

22 *Gilbert* (HC), above n 2, at [41]–[43].

23 At [54].

24 *Gilbert* (CA), above n 3, at [42] (footnotes omitted).

> is reinforced by reference to s 32(1) and (2). Those subsections use the word "contract". Parliament must have intended that the word "agreement" in s 32(5) has a different meaning than the word "contract". In our judgment the word "agreement" is of wide import.

[36] The Court of Appeal was also of the view that there was a contract between QSMTL and other unit owners in the Mid City complex for the payment of levies:[25]

> [44] It has been held, in a variety of contexts, that a person joining a group or club thereby becomes party to a contract with existing members, to the effect that the rules to which all existing members of the group or club are subject, will bind them. Thus the rules of an incorporated society constitute a contract between the society's members, and rights arising under these contracts can be enforced by the Court in the same way as any other contract, and the constitution of a company is binding between the shareholders and between the company and each shareholder.
>
> [45] Similarly when a person purchases a unit in a unit title development, that person thereby becomes subject to the body corporate rules. Those rules constitute a contract between the purchaser and the other unit holders.

[37] The Court also observed:

> [48] In any event we consider that when a purchaser enters into an agreement to buy a unit in a unit title development he or she also implicitly agrees to abide by the obligations imposed on unit owners by the Unit Titles Act. Owners acquire not only the contractual rights created by the rules, but also the benefit of the obligations imposed on unit holders under the Unit Titles Act. As noted one of those obligations requires owners to pay body corporate levies and unpaid levies are recoverable as a debt due to the body corporate.

[38] In finding for the body corporate, the Court of Appeal addressed the question whether the chargeholders would become liable for levies if in possession of the five units:[26]

> There is no statutory provision to the effect that mortgagees in possession are not liable for the payment of body corporate levies. Rather pursuant to s 105(3) of the Unit Titles Act, body corporate operational rules are binding on the body corporate, the owners of principal units, any person who occupies a principal unit, and any mortgagee who is in possession of a principal unit. If the operational rules of a body corporate provide that unit holders must pay body corporate levies, then clearly there will be an obligation on a mortgagee in possession to pay those levies. If the body corporate's operational rules require all owners to abide by Acts in force in relation to the use, occupation or possession of the unit, as they do in this case, then again a mortgagee in possession will be liable to pay levies,

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25 Footnotes omitted.

26 At [60].

> because the obligation to do so is contained in s 80(1)(f) of the Unit Titles Act.

Our approach

[39] We recognise that contractual theories as to the enforceability of the constitutional documents and rules of incorporated and unincorporated associations have come under challenge. Thus:

(a) In its preliminary paper on company law, the Law Commission expressed reservations as to whether s 34 of the 1955 Act should be retained[27] and, in its final report, the Commission recommended that:[28]

> The standard constitution, and any modification of it, should confer rights directly and not, as the 1955 Act provides, by deeming the constitutional documents to be a contract.

This recommendation was adopted by the legislature in enacting the Companies Act 1993, s 31(2) of which provides:

> Subject to this Act, the constitution of a company is binding as between—
>
> (a) the company and each shareholder; and
>
> (b) each shareholder—
>
> in accordance with its terms.

(b) In its report on incorporated societies, the Law Commission has made similar recommendations, albeit that these have not been adopted.[29]

[40] That said, it is not unrealistic, or simply tailored to the present dispute, to see the unit owners in a unit-titled property as participants in a joint venture which they envisage will be carried forward in the terms provided for by the statute and operational rules which they collectively adopt or subscribe to when they become

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27 Law Commission *Company Law* (NZLC PP5, 1987) at [144].

28 Law Commission *Company Law: Reform and Restatement* (NZLC R9, 1999) at [81].

29 Law Commission *Reforming the Incorporated Societies Act 1908* (NZLC IP24, 2011) at [5.3]–[5.9]; and Law Commission *A New Act for Incorporated Societies* (NZLC R129, 2013) at [9.5], [9.13] and [9.19].

owners. For this reason, it is not unrealistic to see the members and body corporate as at least implicitly agreeing with each other to meet their obligations, in the present case, the obligations of the body corporate to provide services to the unit owners and the corresponding obligations of the unit owners to pay for those services. Against this background r 31(b) of the body corporate's Rules is a statement of the obvious.

[41] The 2010 Act imposes obligations and gives effect to operational rules in respects which go beyond what might have been possible under a purely contractual approach. Thus under s 124, the liability to pay body corporate levies falls on the owner for the time being of the unit in question. And under s 105(3), the operational rules are binding not just on the body corporate and members but also occupiers and mortgagees in possession.

[42] There is the further consideration that the provisions of the 2010 Act are not expressed in the manner which might be expected if the purpose was to create a statutory code to the exclusion of all other rights and obligations. Most relevantly, the Act makes no provision for the remedies available for breach of the rules, for instance as to injunctive relief, perhaps of a mandatory nature, or damages. This could be explained on the basis that the legislature just expected the courts to fashion remedies around the statutory regime. Usually, however, when a purely statutory regime is created under which rights and obligations come into existence, the legislature does specify, often with considerable specificity, the remedies which are available where duties are breached or rights are infringed. For this reason, a more likely explanation for the absence of reference to remedies is the assumption of an underlying regime in terms of which the usual contractual remedies of damages and injunctions would be available.

[43] Viewed in this light the statutory obligation to pay levies may be read as supplementing, and not excluding, a concurrent contractual liability to do so.

[44] A comment as to mortgagees in possession is warranted. As we have noted, we consider that a body corporate is not entitled to recover levies against a mortgagee and, unless it is the mortgagee who is selling the unit, does not have an entitlement to be paid unpaid body corporate levies in priority to the amount

necessary to secure a discharge of the mortgage. The Court of Appeal was plainly of the view that this did not apply to a mortgagee in possession. Given our conclusions, it is not necessary for us to address this question, which we see as turning on (a) whether there is an implied agreement along the lines suggested in [28] and/or (b) the effect of s 105(3) of the 2010 Act. It is, however, appropriate to sound a note of warning. The courts are likely to attempt to avoid an outcome in which a mortgagee in possession derives an economic return from a unit without, at the same time, meeting operating costs.

Does the agreement relate to the use, possession, or occupation by QSMTL of property in receivership?

[45] There was a good deal of argument addressed to this issue and in the High Court the Associate Judge concluded that, assuming there was an agreement as alleged by the body corporate, it did not relate to the use, possession, or occupation by QSMTL of property in receivership.[30]

[46] As counsel for the body corporate accurately pointed out, the submissions of the appellants on this issue were directed more to legislative history and explanatory material than statutory text. The property of QSMTL, which is relevantly subject to levies, consists of the five principal units and its associated interest in the common property. It is true that the liability for the body corporate levies is an incident of ownership, rather than use, possession or occupation, of the five units. This, however, is not inconsistent with the underlying agreement to pay being broadly referable, and thus relating to, their use, possession and occupation. This is all the more so when it is recognised that such expressions naturally encompass rights of use, possession and occupation and that ownership of the units in question would not be much use without the ability to use the common property.

[47] We do not see this interpretation as being commercially unfair or unreasonable. A receiver who is not prepared to accept the on-going costs associated with a unit should not accept appointment. It is always open to a mortgagee to sell a unit or to go into possession (albeit that on the approach of the Court of Appeal, the

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30 *Gilbert* (HC), above n 2, at [50]–[51].

latter course would also carry an obligation to pay body corporate levies).[31] What is not consistent with the spirit of, and thus policy underlying, s 32(5) is for a receiver to make use of a unit but not meet the associated costs.

Relief under s 32(7)

[48] The Court of Appeal refused to exercise the s 32(7) discretion to relieve Mr Gilbert of liability. It explained why in these terms:

> [67] Mr Gilbert is asserting that QSMTL has a dispute with the body corporate in relation to the development agreement and the letter of understanding. He asserts that QSMTL has a claim against the body corporate for an amount which exceeds the unpaid levies.
>
> [68] There is a fundamental difficulty in this argument. The effect of our judgment is that Mr Gilbert is personally liable for the levies. This precludes any suggestion that his liability should be limited by the fact that he is, in law, the agent of QSMTL. If there is a bona fide dispute between QSMTL and the body corporate, there is no mutuality between the body corporate and Mr Gilbert, which would entitle Mr Gilbert to set off his personal liability against any damages payable by the body corporate to QSMTL. There is no set off available at common law.
>
> [69] Where mutuality is lacking, it is, in some circumstances, possible to maintain an equitable set off, but only provided that there is a necessary relationship between claim and cross-claim.[32] The cross-claim must so affect the plaintiff's claim that it would be unjust to allow the plaintiff to have judgment without bringing the cross-claim to account. The link must be such that the two are in effect interdependent.[33]
>
> [70] Here there is an insufficient nexus between any claim which Mr Gilbert says QSMTL may be able to make against the body corporate, and the body corporate's claim for levies. Any liability the body corporate may be under is not interdependent with Mr Gilbert's obligation to pay the levies. The issues relating to the redevelopment rights and the letter of understanding dated 24 November 2010 have no bearing on the issue of whether or not the body corporate levies are due and payable.
>
> [71] We also note that QSMTL failed to prosecute the proceedings earlier advanced by it in this regard.
>
> [72] We are satisfied that there are no factors disclosed in the affidavits that have been filed which could arguably lead the Court to exercise its discretion under s 32(7) to limit or excuse Mr Gilbert's personal liability. The obligation to pay the body corporate levies is plainly due. Mr Gilbert has been aware of that obligation from the outset. He has continued to

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31 See *Gilbert* (CA), above n 3, at [60].

32 *Laws of New Zealand* Set-off and Counterclaim (online ed) at [35].

33 *Grant v NZMC Ltd* [1989] 1 NZLR 8 (CA) at 12–13; *Hamilton Ice Arena Ltd v Perry Developments Ltd* [2002] 1 NZLR 309 (CA) at [3]–[12].

> receive the benefits of the body corporate fulfilling its obligations imposed by the Unit Titles Act, and he has continued to derive benefit from his ongoing occupation of units 3A–3E.

[49] Mr Chisholm QC maintained that the decision not to relieve Mr Gilbert of liability was premature as the "complex factual and legal disputes" as to redevelopment have not been resolved and that, pending such resolution summary judgment ought not to have been granted. As well, Mr Gilbert complains that the body corporate's conduct has compromised his ability to sell the units and that a combination of the dispute with the body corporate, the problems of selling units with outstanding body corporate levies and his duties to the secured creditors and QSMTL have made sale of the units impracticable. He also claims that neither he nor QSMTL have derived any income from the units since his appointment.

[50] We find these arguments unconvincing.

[51] On the basis of the evidence as it was when the case was heard by the Court of Appeal, the only logical inference from the use which was made of the five units was that Mr Gilbert, as receiver, had been paid rent or licence fees.[34] Mr Gilbert did not engage with the evidence and in particular did not deny having received rent. The claim advanced in this Court by Mr Chisholm that Mr Gilbert has not received any money is based on the affidavits sworn after the Court of Appeal judgment in support of a stay. These affidavits disclosed the lease arrangement referred to in [6] above. As explained, this arrangement is very susceptible to the explanation that it was just another element of an ownership and operating structure designed to impair the ability of the body corporate to recover fees. No other explanation was advanced to us.

[52] The body corporate objected to reliance being placed on these affidavits and we uphold that objection. They invite questions which certainly have not been adequately answered and in any event came far too late in the piece to affect the outcome of the case.

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[34] *Gilbert* (CA), above n 3, at [53].

[53] More generally, we see no merit in the arguments advanced on behalf of Mr Gilbert. We see no reason at all why he as receiver should be entitled to the use, possession and occupation of income-producing assets without at the same time bearing the running costs associated with those assets. There is likewise no good reason why the other unit holders should be required to subsidise his use of those assets. As well, in the period which followed his appointment as receiver he has done little to advance the resolution of the underlying disputes on which he now relies.

[54] Accordingly, we see no reason to differ from the approach taken by the Court of Appeal.

Solicitor and own client costs

[55] In seeking solicitor and own client costs in the Court of Appeal, counsel for the body corporate noted that the unit owners had resolved at the body corporate's annual general meeting held on 7 August 2012 that all costs associated with debt recovery by the body corporate should be on-charged to the proprietor in default, in accordance with ss 124(2) and 128 of the 2010 Act.[35] It will be recalled that s 124(2) provides for the recovery of reasonable collection costs when levies are recovered from an owner.

[56] We agree with the Court of Appeal that the reference to "reasonable costs incurred in collecting [a] levy" in s 124(2) means that actual costs of collection, providing they are reasonable, are recoverable and that this encompasses solicitor and own client costs.[36] We have some reservations at least whether, in the context of the present case, this entitles the body corporate, as of right, to an order for solicitor and own client costs against Mr Gilbert; this given that he is not the owner of the unit. As well, we do not see the issue of costs as controlled by the body corporate's resolution. That said, we are not disposed to interfere with the award of costs made.

[57] Section 124, while probably not controlling, is of considerable relevance. It indicates that those who default in the payment of levies are responsible for the costs

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35 *Gilbert* (CA), above n 3, at [74].
36 At [78].

of collection. The alternative would be to impose some or all of those costs on the other unit owners. As well, Mr Gilbert has actively aided and abetted the trust in adopting a completely unreasonable commercial strategy under which it has made use of the five units for economic gain but has required the running costs of those units to be met by the other unit holders.

[58] These considerations warrant the award of costs made by the Court of Appeal. We would make a similar order.

An equally divided Court

[59] The Court being equally divided, the judgment of the Court of Appeal is affirmed.[37] In recognition of the equal division of opinion (and the absence of a majority for an award of costs) there is no order for costs in this Court.

ELIAS CJ AND O'REGAN J
(Given by O'Regan J)

[60] The issue in this appeal is whether the first appellant, Mr Gilbert (the receiver), in his capacity as receiver of the second appellant (QSMTL), is liable to the respondent (the body corporate) for levies relating to the five units in the Mid City complex owned by QSMTL.

[61] The basis on which the body corporate claims the receiver is liable is that s 32(5) of the Receiverships Act 1993 applies. Under that section, a receiver is personally liable "for rent and any other payments becoming due under an agreement subsisting at the date of the appointment of the receiver relating to the use, possession, or occupation by the grantor [in this case, QSMTL] of property in receivership".

[62] There are two aspects to the issue arising on appeal. The first is whether the levies imposed by the body corporate on the owners of the units in the Mid City complex are "payments becoming due under an agreement". If they are, the second

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[37] As required by s 31(2) of the Supreme Court Act 2003.

aspect of the issue is whether that agreement relates to the "use, possession or occupation" by QSMTL of property in receivership.

Our view

[63] We take a different view from that of William Young and Glazebrook JJ on the first aspect of the issue. In our view the levies are obligations that are due under a statute, the Unit Titles Act 2010 (the 2010 Act). That means that we do not need to deal with the second aspect of the issue, though we comment briefly on it later in this judgment.[38]

Statutory liability

[64] Section 32(5) of the Receiverships Act applies only to certain types of obligations. The first of these is rent, and the second is a payment that is "becoming due under an agreement". A payment that becomes due under an agreement is an obligation arising by virtue of the agreement. Its source is contractual. We see no particular significance in the fact that some of the provisions of s 32 refer to a "contract", whereas s 32(5) refers to an "agreement".[39]

[65] The 2010 Act sets out a statutory regime in relation to levies. The relevant provisions are set out in the judgment of William Young and Glazebrook JJ.[40]

[66] As we see it, the regime for the imposition and recovery of levies is entirely statutory. The imposition of a levy arises by virtue of s 121(1) which says that the body corporate "may … impose levies on the owners of principal units". The remainder of s 121 sets out how levies are to be calculated and other details.

[67] Section 124(1) says that the body corporate must fix the date on or before which payment of levies are due.

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38 See below at [87].

39 Contrary to the Court of Appeal: *Body Corporate 162791 v Gilbert* [2015] NZCA 185, [2015] 3 NZLR 601 (Harrison, Keane and Wylie JJ) [*Gilbert* (CA)] at [42], as noted in the judgment of William Young and Glazebrook JJ above at [35].

40 Above at [12]–[13].

[68] Section 124(2) provides that that amount of any unpaid levy, together with reasonable costs incurred in collecting it, "is recoverable as a debt due to the body corporate by the person who was the unit owner at the time the levy became payable or by the person who is the unit owner at the time the proceedings are instituted". Ownership at either the time at which the levy became payable or the time at which proceedings are instituted is the basis for liability. It is notable that liability falls not only on the owner at the time the levy was imposed, but also on a subsequent owner if the subsequent owner acquires the unit while the levy remains unpaid. That is precisely the situation in relation to QSMTL, which acquired the legal title to the relevant units from the previous owner while the levy remained outstanding.

[69] Section 80(1)(f) of the 2010 Act creates a specific statutory obligation on the owner of a principal unit to "pay all rates, taxes, charges, body corporate levies, and other outgoings that are from time to time payable in respect of the unit". This is a clear statutory obligation which does not depend on the existence of any actual or implied contract or agreement between the unit owner and the body corporate.

[70] The statutory basis of QSMTL's indebtedness to the body corporate is recited in paragraph 26 of the body corporate's amended statement of claim dated 4 October 2013, which pleads:

> Pursuant to sections 124, 126, 138 of the Unit Titles Act 2010 QSMTL became liable for all levies owing by units 3A – 3E to the [body corporate] by virtue of it being the owner of units 3A – 3E in Mid City.

[71] This seems to us to be an acknowledgment of the statutory basis of the obligation to pay the levy and the fact that it is an incident of ownership rather than arising by virtue of the use, possession or occupation of the relevant units.[41] Both acknowledgments contradict the case the body corporate now pursues.

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[41] Section 126 is a similar provision to s 124(2) relating to the recovery of expenses incurred by the body corporate for repairs benefitting one or more units more than the other units. Section 138 is a similar provision relating to recovery of expenses incurred in maintaining common areas. For simplicity we treat all levies owing by QSMTL as owing under s 124, but the same analysis would apply if they were owed under s 126 or s 138.

The "Levies Agreement"

[72] In its amended statement of claim, the body corporate pleaded that there was a "Levies Agreement" between QSMTL and the body corporate. The pleading was in this form:

> 42. QSMTL agreed with each other owner inter se and with the plaintiff to pay its body corporate levies accruing in respect of its unit(s) ("the agreement").
>
> Particulars
>
> (a) The agreement is an incident of ownership; by virtue of QSMTL becoming owner of units 3A – 3E on 23 January 2013 as described [earlier in the statement of claim], it agreed to abide the body corporate rules, body corporate resolutions and Unit Titles Act 2010.
>
> (b) Additionally, the agreement inter se is specifically recorded in the Body Corporate Rules (operable up to 2 April 2013) and Operational Rules (operable after 2 April 2013) … .

[73] The provisions in the body corporate Rules and Operational Rules to which reference was made were provisions requiring owners to comply with all "statutes, acts, bylaws, regulations and all legal requirements for the time being in force in the area in which his Unit is situated insofar as they relate to the use, occupation or enjoyment of his Unit".[42]

[74] We do not consider that the agreement relied on by the body corporate, which is said to arise on acquisition of a unit, adds anything to the legal framework created by the 2010 Act. The obligations imposed on unit owners by the 2010 Act apply and are binding on unit owners whether they agree to them or not. In particular, the obligation under s 80(1)(f) to pay body corporate levies and the specific provision for the body corporate to recover unpaid body corporate levies as a debt under s 124(2) cover the legal field and do not leave room for any additional obligation arising under an agreement. If the body corporate levies are a debt due under s 124(2), we do not see how they can also be a debt due under an agreement.

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[42] This language is from the body corporate Rules. The provision in the Operating Rules was similar but not exactly the same.

The implied agreement

[75] The agreement found by William Young and Glazebrook JJ is different from that relied on by the body corporate. The body corporate suggests that the agreement is an incident of ownership, arising when QSMTL became owner of the relevant units and agreed to abide by the body corporate rules, body corporate resolutions and the 2010 Act. William Young and Glazebrook JJ say that the agreement is an implied agreement to meet the costs of the provision of services provided by the body corporate, including insurance, maintenance, electricity and other services.[43] Later, they describe the agreement as one under which "the members and body corporate … at least implicitly [agree] with each other to meet their obligations". These obligations are the obligations of the body corporate to provide services and the obligations of the unit owners to pay for them.[44]

[76] We do not see any basis to imply an agreement between a body corporate and unit owners when the 2010 Act imposes the obligation on the body corporate to provide services and the obligation on unit owners to pay for them without the need for recourse to any contractual framework. The essence of the view adopted in the Court of Appeal and by William Young and Glazebrook JJ is that there is an implied agreement sitting alongside the obligations contained in the 2010 Act under which the body corporate and the unit holders agree to comply with the requirements of the 2010 Act. Such agreement would be a fifth wheel given the statutory obligations created by the 2010 Act. In any event, such an implied agreement could not affect the obligations imposed under the 2010 Act. So, in terms of s 32(5) of the Receiverships Act, the levy payment is not "due" under an agreement; it is due under the 2010 Act.

[77] There is no proper basis for the implication of an agreement between parties to comply with obligations that are binding on them whether they agree they are or not. William Young and Glazebrook JJ suggest the statutory obligation supplements the contractual obligation.[45] We see the statutory obligation as standing alone and complete in itself. There are some parallels between the present situation and the

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43 Above at [28].
44 Above at [40].
45 Above at [43].

facts of *Norweb Plc v Dixon*.[46] That case concerned the supply of electricity by a public electricity supplier to a tariff customer. The relevant legislation required the supplier to supply at its tariff rates upon request and, when it did, the terms of supply were imposed on the customer by the legislation. The Court found that the legal compulsion both as to the creation of the relationship and the fixing of its terms was inconsistent with the existence of a contract.[47]

The Rules as an agreement

[78] As the relevant obligations and rights arise under the 2010 Act itself, it is not necessary in this analysis to deal with the issue as to whether the body corporate Rules and Operational Rules are, themselves, an agreement. This is because, on our analysis, the obligations having arisen under the 2010 Act itself, there is no room for any argument that they are in truth obligations arising under the Rules of the body corporate. However, as the Rules are said to be a secondary source of the legal obligation to pay levies and therefore the "agreement" under which the levies are due, we will also consider this aspect of the argument.

[79] The essence of the argument based on the Rules is that the levy is due under an agreement, that agreement being the Rules, because the Rules include an obligation on the part of the unit owners to comply with statutes, and those statutes include the 2010 Act, under which the levy is payable. We see this as essentially circular reasoning. If the levy is payable under the 2010 Act, the fact that the Rules require compliance with the 2010 Act adds nothing to the obligation already applying to the unit owner and the 2010 Act itself. As we have already said, a statutory obligation applies whether the person on whom it is imposed agrees to meet that obligation or not.

[80] Nor do we accept that the Rules constitute an agreement. We do not see the cases relating to the Incorporated Societies Act 1908[48] as applicable in the present context, for the simple reason that the 2010 Act specifically provides that the Rules are binding on the body corporate and all of the owners. This clearly distinguishes

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46 *Norweb Plc v Dixon* [1995] 1 WLR 636 (QB).
47 At 643.
48 See above at [31].

the 2010 Act from the Incorporated Societies Act.[49] Similarly, we do not see the situation that was provided for in the Companies Act 1955 as assisting, because the basis of the contractual treatment of the memorandum and articles of association of companies incorporated under that Act was derived from a specific statutory provision that said that they were binding "as if they had been executed as a deed".[50] We see as far more relevant the treatment of constitutions of companies incorporated under the Companies Act 1993. The legislative history is well summarised in the judgment of William Young and Glazebrook JJ.[51] We do not think there is any doubt that the constitution of a company incorporated under the 1993 Act is binding on the company and each shareholder as a statutory obligation, given the clear wording to that effect in s 31(2) of the Companies Act 1993.[52]

[81] Section 105(3) of the 2010 Act is in essence a replica of s 31(2) of the Companies Act 1993. The latter says that the constitution of the company "is binding" and s 105(3) says that the body corporate rules "are binding". In light of this clear statement, we do not see any room for the importing of a contractual model as applied in the absence of similar statutory provisions and legislation such as the Incorporated Societies Act. Section 105(3) is reinforced by s 79(g), which provides that an owner of a unit "has the right to enforce the body corporate operational rules".

[82] With respect to the Court of Appeal, we consider its analysis of the effect of s 31(2) of the Companies Act 1993 is wrong. It refers to the fact that the rules of an incorporated society constitute a contract, and adds "and the constitution of a company is binding between the shareholders and between the company and each shareholder" as if that is another example of the contractual model in the Incorporated Societies Act.[53] In fact, as pointed out in the judgment of

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49 The exposure draft of the proposed replacement for the Incorporated Societies Act includes a provision making the rules binding as a statutory obligation: Ministry for Business, Innovation and Employment *Incorporated Societies Bill – Exposure Draft* (February 2016) at cl 26(2), available at <www.mbie.govt.nz>.

50 Above at [32], Companies Act 1955, s 34.

51 Above at [39].

52 Lynne Taylor "Company Constitutions" in John Farrar and Susan Watson (eds) *Company and Securities Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2013) 61 at 66 takes the same view.

53 *Gilbert* (CA), above n 39, at [44].

William Young and Glazebrook JJ,[54] the background to s 31(2) of the Companies Act 1993 was that the contractual model was rejected in the context of company constitutions. We agree with counsel for the receiver, Mr Chisholm QC, that s 31(2) of the Companies Act 1993 strongly supports the receiver's case, contrary to the apparent view of the Court of Appeal.

[83] To summarise, the rules of a body corporate are binding on the owners and the body corporate as a matter of statutory obligation, just as the constitution of a company incorporated under the Companies Act 1993 is binding on the company and the shareholders. There is no actual or deemed contractual obligation.

[84] As noted by William Young and Glazebrook JJ, there are a number of Court of Appeal cases where the judgment of the Court has included observations that the rules of a body corporate are a contract.[55] We consider these observations were incorrect for the reasons we have given. They are not supported by authority and no reasons are given. They are obiter and even if they were not, they are not binding on this Court.

Summary of our conclusions

[85] The obligation to pay a levy imposed by a body corporate is a statutory obligation. The body corporate may recover the levy as a debt due, in accordance with s 124(2) of the 2010 Act. We do not see any indication in the 2010 Act that this statutory obligation should be read as supplementing and not excluding a concurrent contractual liability to do so; nor do we see any basis for concluding that an actual or implied contract arises by reason of the statute. As the statutory obligation is self-standing, there is no need to resort to the rules of the body corporate. Even if resort to the rules were appropriate, we do not consider that they constitute an agreement: rather, they give rise to statutory obligations on the same lines as those arising in relation to constitutions of companies incorporated under the Companies Act 1993.

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54 Above at [39].

55 Above at [33], citing *Tisch v Body Corporate No 318596* [2011] NZCA 420, [2011] 3 NZLR 679 at [31] and *St John's College Trust Board v Body Corporate No 197230* [2013] NZCA 35, (2013) 14 NZCPR 56 at [20]. The observation in *Tisch* was cited with apparent approval in *Body Corporate 114424 v L V Trust Holdings Ltd* [2014] NZCA 21, (2014) 15 NZCPR 375 at [31].

[86] In light of this we conclude that the obligation of QSMTL to pay levies imposed by the body corporate is not a liability for a "payment becoming due under an agreement" and therefore falls outside the scope of s 32(5) of the Receiverships Act. We would therefore allow the appeal on this basis and restore the decision of Associate Judge Abbott.

Use, possession or occupation

[87] That conclusion means that it is unnecessary for us to deal with the second aspect of the issue, namely whether the agreement relates to the "use, possession or occupation" of the units owned by QSMTL. But we think there is much in the analysis of Associate Judge Abbott that the obligation to pay levies is one which relates to the ownership of a unit, rather than its use, possession or occupation.[56] Section 121(1) of the 2010 Act refers to levies imposed "on the owners of principal units" and s 80(1)(f) imposes an obligation on an owner to pay (among other things) body corporate levies that are payable in respect of a unit. This is an obligation that is imposed on an owner regardless of whether the owner is using, possessing or occupying the unit. However, as the point does not require a final decision on our approach to the case, we simply make these observations and leave the point for resolution in a case in which it is decisive.

Limited scope of s 32(5)

[88] On our interpretation, the scope of s 32 of the Receiverships Act is limited to rent and similar payments due under leases and similar agreements allowing the use, possession or occupation by the grantor of the property of a third party. We think s 32(6) supports this view. In relation to leases and similar agreements, s 32(6) allows a receiver to avoid personal liability by arranging for the grantor to vacate the premises. If s 32(5) applied to levies, the receiver would have no means of avoiding personal liability: vacating the grantor's unit would not achieve this, because the receiver would still "possess" the unit so still be liable under s 32(5). We do not think that Parliament intended the balanced regime for leases and other similar agreements to be extended to unit title levies where the same balance is absent.

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[56] *Body Corporate 162791 v Gilbert* [2014] NZHC 567 at [51].

Result

[89] For the reasons given we would allow the appeal and set aside the summary judgment and costs award entered in favour of the body corporate in the Court of Appeal. Given that the Court is equally divided, we agree that the outcome is as stated in the judgment of William Young and Glazebrook JJ at [59].

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