IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2019-404-818
[2022] NZHC 418

UNDER	The Declaratory Judgments Act 1908 and Part 18 of the High Court Rules 2016
IN THE MATTER OF	Bianco and the Unit Titles Act 1972
BETWEEN	BODY CORPORATE 406198 Plaintiff
AND	PROPERTY OPPORTUNITIES LIMITED First Defendant
	SHIRAZ HOLIDAY LIMITED Second Defendant
	BIANCO LIMITED Third Defendant
	AVONDALE PROPERTIES LIMITED Fourth Defendant

Hearing:	26 and 28 October 2021 (by VMR)
Appearances:	D Bigio QC and I J Stephenson for the plaintiff C J Pendleton for the first defendant T J Rainey for the second defendant
Judgment:	10 March 2022

JUDGMENT OF CAMPBELL J

This judgment was delivered by me on 10 March 2022 at 11:00 am pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Introduction

[1] The plaintiff, Body Corporate 406198 (the **Body Corporate**), is the body corporate of a unit title development, known as Bianco Off Queen, in central Auckland.

[2] In December 2008, when the developer of Bianco Off Queen was the sole owner of all the units in the development, it caused the Body Corporate to enter into an agreement under which the Body Corporate would pay a building manager to provide building management services (the **Management Agreement**). The developer also arranged for the building manager to enter into a lease of a unit in the development and for the Body Corporate to guarantee the building manager's obligations under that lease. In addition, the Management Agreement obliges the Body Corporate to reimburse the building manager for the rent payable under that lease.

[3] The Management Agreement was for a term of ten years with the building manager having two options to require the Body Corporate to enter into new agreements, each of ten years. The second defendant, Shiraz Holiday Ltd (**Shiraz**), became the building manager in 2014 and exercised its option for a new agreement in 2018. If that option is exercised again in 2028, there will be an agreement in place until 2038.

[4] The Body Corporate challenges the validity of the Management Agreement. It says it was entered into ultra vires the Unit Titles Act 1972 (**UTA 1972**) and is accordingly void and of no effect. Alternatively, the Body Corporate says the provision obliging it to reimburse the building manager for the rent payable under the lease is ultra vires the UTA 1972. The Body Corporate seeks declarations to that effect. It also asks for an order that Shiraz repay money the Body Corporate has spent in paying the rent and outgoings that were payable under the lease.

[5] There are two main issues. Is the Management Agreement, or the provision for reimbursement of rent, ultra vires? Must Shiraz repay rent and outgoings that were paid by the Body Corporate?

Factual background

Overview

[6] Bianco Off Queen contains 157 units in two towers. There are 156 residential units and one commercial unit. Residential unit owners include owner occupiers, investor owners and Kāinga Ora. The one commercial unit, unit 1F/2 (the **Management Unit**), is owned by the first defendant, Property Opportunities Ltd (**POL**).

[7] The second defendant, Shiraz, operates a hotel and serviced apartment business at Bianco Off Queen. A number of residential units are leased to Shiraz for that purpose. Shiraz is also the building manager under the Management Agreement.

[8] As part of its business, Shiraz leases the Management Unit from POL. Shiraz uses the Management Unit as the hotel reception. Shiraz also provides some of the building management services from the Management Unit.

The initial arrangements in 2008

[9] Bianco Off Queen was developed by the third defendant, Bianco Ltd.[1] Timothy Manning was a director of Bianco Ltd.

[10] Completion of the development occurred in late 2008. The unit plan for Bianco Off Queen was deposited on 18 November 2008. On deposit of the plan, the Body Corporate was created.[2] At that point the rules for the Body Corporate were the default rules set out in schs 2 and 3 of the UTA 1972.

[11] In December 2008, the Body Corporate set up arrangements for the operation of a hotel and serviced apartment business and for the provision of building management services at Bianco Off Queen. On 3 December 2008, there was an extraordinary general meeting of the Body Corporate. At that time Bianco Ltd remained the sole owner of all the units. The Body Corporate resolved:

---

1 At the time of the development and entry into the Management Agreement, Bianco Ltd was called Turn and Wave Ltd. It is convenient to use Bianco Ltd's current name.

2 Unit Titles Act 1972 (now repealed), s 12(1).

(a) to delete the default rules in the UTA 1972 and adopt amended rules in substitution (the **Amended Rules**);

(b) to enter into the Management Agreement with the fourth defendant, Avondale Properties Ltd[3] (a company of which Mr Manning was the sole director);

(c) as guarantor, to enter into a lease (by Avondale Properties Ltd) of the Management Unit;

(d) to enter into an assignment of the Management Agreement to VR Management Services Ltd; and

(e) to enter into an assignment of the lease to VR Management Services Ltd.

[12] Mr Manning signed the Body Corporate resolution as director of Bianco Ltd.

[13] On 5 December 2008, the Amended Rules were registered and took effect.[4] The Amended Rules imposed the following obligations on unit owners:

(a) to "not withhold their consent unreasonably to the Manager obtaining licences and other permits and consents desirable for the Land and Building's use as managed and serviced Units" (cl 2.1(n)). "Manager" was defined as the "Manager appointed pursuant to the Management Agreement" and "Management Agreement" was defined as "the agreement in relation to the management control and administration of the Property and operation of a Letting Service and provision of services entered into by the Body Corporate";

(b) to not appoint any other person to provide "management services or Letting Services" (cl 2.1(s)). "Letting Services" were defined as "the

---

3 At the time this company was called Bianco Off Queen Ltd.

4 Unit Titles Act 1972, s 37(7).

offering of the Units for short term/medium term/long term accommodation"; and

(c) where they are the owner of the Management Unit, to lease that unit "to the Manager" (cl 2.1(u)).

[14] The Amended Rules also imposed obligations on the Body Corporate:

(a) to "enter into a Management Agreement with a management company or professional manager for the carrying out and management of all or any of the duties of the Body Corporate for remuneration" (cl 3.1(t)). The Management Agreement was:

(i) to "reserve to the manager the exclusive right to operate a Letting Service from the Property" (cl 3.1(t)(iii));

(ii) to provide "the exclusive right of the Manager to provide additional services to the Proprietors of Units" (cl 3.1(t)(iv));

(b) to "not appoint any other Manager … to provide management services or Letting Services" (cl 3.1(u));

(c) to "pay a contribution to the Manager equivalent to the rent payable under the lease for the Management Unit and Reception and provide a rental guarantee to the lessor of the Management Unit" (cl 3.1(v)). "Reception" was defined as the area in the Management Unit "used as the reception for the operation of the management of the building"; and

(d) to "not amend any Rules to affect in any manner the management rights pursuant to the Management Agreement without the written consent of the Manager" (cl 3.1(w)).

[15] The Amended Rules stated that the Body Corporate had power to guarantee any lease of the Management Unit and Reception (cl 3.2(l)).

[16] On 5 December 2008, the Body Corporate entered into the transactions approved in the 3 December 2008 resolution.

[17] First, the Body Corporate executed, as guarantor, a deed of lease of the Management Unit (the **Lease**). Bianco Ltd was the lessor and Avondale Properties Ltd the lessee. Mr Manning signed the Lease on behalf of all three parties.

[18] The Lease was for a term of ten years with two rights of renewal, each of ten years. The permitted business use was "Reception and Office for the building manager to be used for operation of the complex as serviced apartments". The Lease stated it was collateral to the Management Agreement and any breach of the Management Agreement would be a breach of the Lease. In the event the Management Agreement was terminated, the Lease could be terminated at the option of the lessor (cl 47.1).

[19] Unusually, the Lease provided that Avondale Properties Ltd "assigns the premises to an assignee of the Management Agreement of even date with this lease" (cl 34.1(f)) and that "[f]rom the date of assignment of this lease by [Avondale Properties Ltd], their liability shall cease" (cl 48.1).

[20] Secondly, the Body Corporate entered into the Management Agreement with Avondale Properties Ltd. Mr Manning signed the Management Agreement on behalf of both parties.

[21] The Management Agreement was initially for a term of ten years. The manager had two rights of renewal of ten years each (cl 16). As noted, the current manager, Shiraz, renewed the Management Agreement in 2018.

[22] The Management Agreement includes the following terms:

(a) the manager is to perform the "Duties" set out in cl 3.1. These include performing the "Scheduled Works", which are works (such as cleaning the common property) specified in sch 1 of the Agreement;

(b) the manager may provide other services to individual unit owners (such as food delivery or valet services) and charge individual unit owners for those services (cl 3.2);

(c) as remuneration for performance of the Duties the Body Corporate is to pay the manager an annual management fee (cls 5.1 and 5.5). Initially, the annual management fee was $220,000.00.[5] This was subject to review each year in accordance with increases in the Consumer Price Index (cl 5.6.1);

(d) in addition to the management fee, the Body Corporate is to pay to the manager a contribution equivalent to the rent payable under the Lease for the Management Unit and Reception (cl 5.6.6); and

(e) the Body Corporate grants exclusively to the manager the right to let units on a short- and long-term basis and to provide services to unit owners (cls 2.1, 4.2, 4.4, 12.1, 12.2, 12.4 and 12.5).

[23] The manager is entitled to assign its interest in the Management Agreement with the consent of the Body Corporate (such consent not to be unreasonably withheld) if the proposed assignee executes a deed of covenant agreeing with the Body Corporate to be bound by the agreement (cl 13.1). However, the first manager (Avondale Properties Ltd) was entitled to assign the Management Agreement without meeting that requirement (cl 13.2). Upon that assignment, the liability of Avondale Properties Ltd under the Management Agreement ended (cl 13.2).

Initial assignments

[24] It appears that almost immediately after the Management Agreement and the Lease were entered into, Avondale Properties Ltd assigned its interests under them to VR Management Services Ltd. These assignments were not in evidence before me. However, as noted, the Body Corporate had resolved on 3 December 2008 to enter into such assignments to VR Management Services Ltd, and the Lease recorded that

5 All amounts are exclusive of GST.

it was being assigned to an assignee of the Management Agreement. It was common ground the assignments had taken place. (However, as I explain later, the initial "assignment" of the Management Agreement to VR Management Services Ltd was, in law, a novation.)

Subsequent transfers and assignments

[25] In November 2013, POL became the owner of the Management Unit.

[26] In early 2014, VR Management Services Ltd advertised for sale its business of managing and letting units in Bianco Off Queen. On 11 February 2014, Masoud Bassamtabar (the principal of Shiraz) entered into an agreement to purchase the business. The agreement was conditional on Mr Bassamtabar carrying out due diligence to his satisfaction and on VR Management Services Ltd obtaining the consent of the Body Corporate to the assignment of the Management Agreement to the purchaser.

[27] Mr Bassamtabar was satisfied with his due diligence investigations. He nominated Shiraz as purchaser. The Body Corporate consented to an assignment of the Management Agreement to Shiraz.

[28] Clause 13 of the Management Agreement allowed the Body Corporate to require a proposed assignee to execute a deed of covenant agreeing with the Body Corporate to be bound by the agreement as if the proposed assignee was the manager under the agreement. On 1 June 2014, Shiraz and the Body Corporate executed a deed of covenant in those terms. Around the same date, the Lease was assigned to Shiraz under a deed executed by Shiraz, VR Management Services Ltd, the Body Corporate and POL.

[29] Shiraz's purchase of the business from VR Management Services Ltd settled on 19 June 2014. The assignments of the Management Agreement and the Lease took effect on that date.

Performance and payments since June 2014

[30] Shiraz has been the building manager under the Management Agreement since June 2014. There was no suggestion that the Body Corporate had raised any issue about Shiraz's performance of its duties under that agreement. Shiraz has been paid the management fee provided for by the Management Agreement.

[31] Clause 5.6.6 of the Management Agreement provides that the Body Corporate will pay to Shiraz, in addition to the management fee, a contribution equivalent to the rent payable under the Lease. This contemplates that Shiraz will pay to POL the rent under the Lease and then be reimbursed an equivalent amount by the Body Corporate.

[32] For much of the time that Shiraz has been the building manager, the parties adopted an arrangement that differed from that contemplated by cl 5.6.6. In early July 2014, Shiraz and the Body Corporate agreed it would be easier if the Body Corporate paid POL directly. From then until June 2019, POL issued invoices to the Body Corporate. The invoices were for both rent and outgoings. Under the Lease, Shiraz is liable to pay both rent and outgoings. Clause 5.6.6 of the Management Agreement provides that the Body Corporate will pay to Shiraz a contribution "equivalent to the rent payable" under the Lease. Clause 5.6.6 does not refer explicitly to outgoings. Nonetheless, during this period the Body Corporate paid POL both rent and outgoings.

[33] Since June 2019, Shiraz has paid the rent and outgoings under the Lease to POL, and the Body Corporate has reimbursed Shiraz for the rent but not the outgoings.

Renewal of Management Agreement in 2018

[34] Clause 16 of the Management Agreement provides that the building manager may require the Body Corporate to enter into a new agreement subject to the same provisions, except that the new agreement is to have only "one further right of renewal for a new agreement of 10 years".

[35] Shiraz exercised its right to require a new agreement in 2018.

Renewal and variation of Lease in 2020

[36] The first term of the Lease expired on 5 December 2018. Before that date Shiraz exercised its right to renew the Lease for a further ten years.

[37] There was a delay in documenting the renewal. It was documented in a deed of renewal and variation dated 18 March 2020. By that time Shiraz (and it seems POL) accepted that the Body Corporate did not have the power to guarantee the lease. Accordingly, the deed was executed by POL, Shiraz and Mr Bassamtabar, and provided that Mr Bassamtabar was guarantor in place of the Body Corporate.

New Body Corporate operational rules

[38] During the course of the events I have outlined, the UTA 1972 was repealed and replaced by the Unit Titles Act 2010 (**UTA 2010**). The UTA 2010 provides for bodies corporate to have default operational rules. In March 2013, the Body Corporate revoked the default operational rules and adopted new rules. It adopted a further set of operational rules on 22 May 2017.

The Body Corporate's proceeding and (earlier) summary judgment application

[39] The Body Corporate commenced this proceeding in May 2019. It challenged the validity of the Amended Rules that related to the Lease of the Management Unit, the validity of aspects of the Management Agreement and the validity of the Lease. It sought declaratory relief only.

[40] The Body Corporate applied for summary judgment on parts of its claim. The declarations that it sought by way of summary judgment were:[6]

(a) A declaration that rr 3.1(v) and 3.2(l) of the Amended Rules were ultra vires the UTA 1972 and therefore were, from inception, void and of no effect. Rule 3.1(v) required the Body Corporate to pay a contribution to the building manager equivalent to the rent payable under the Lease and to provide a rental guarantee to the lessor under the Lease.

6 *Body Corporate 406198 v Property Opportunities Ltd* [2020] NZHC 926 at [5].

Rule 3.2(l) empowered the Body Corporate to guarantee any lease of the Management Unit.

(b) A declaration that the Lease was entered into ultra vires the UTA 1972 and was therefore, from inception, void and of no effect.

[41] Associate Judge Sargisson delivered a decision on the summary judgment application on 7 May 2020. Her Honour found that:[7]

(a) Rules 3.1(v) and 3.2(1) of the Amended Rules were ultra vires the UTA 1972 and therefore void and of no effect; and

(b) The guarantee of the Lease was ultra vires the UTA 1972.

[42] Her Honour declined to determine, at a summary stage, whether the Lease itself was void and of no effect.[8]

The Body Corporate's amended (and then narrowed) claim

[43] After obtaining summary judgment on part of its claim, the Body Corporate filed an amended statement of claim in July 2020. In addition to challenging the Lease and Management Agreement as ultra vires, the Body Corporate claimed that Shiraz had been unjustly enriched by the Body Corporate's payment of management fees and payment of rent and outgoings under the Lease. The Body Corporate therefore sought not only declaratory relief but also orders that Shiraz make monetary restitution to the Body Corporate.

[44] In opening submissions filed in advance of the hearing before me, the Body Corporate narrowed its claim. It did not pursue its claim that the Lease itself is ultra vires. Nor did it pursue its claim that Shiraz was unjustly enriched by the Body Corporate's payment of management fees.

[45] The claims that the Body Corporate pursued at the hearing were that:

---

7 *Body Corporate 406198 v Property Opportunities Ltd* [2020] NZHC 926 at [50].
8 At [50(b)].

(a) The Management Agreement as a whole is void and of no effect because it is ultra vires the UTA 1972 and/or the UTA 2010;

(b) Clause 5.6.6 of the Management Agreement is void and of no effect because it is ultra vires the UTA 1972 and/or the UTA 2010; and

(c) Shiraz has been unjustly enriched by the Body Corporate's payment of rent and outgoings under the Lease and should pay those amounts to the Body Corporate, with interest.

The defendants' positions

[46] Shiraz is the defendant primarily affected by the Body Corporate's claim. Its position, as pleaded and developed at the hearing, was:

(a) The validity of the Management Agreement and of cl 5.6.6 is governed by the UTA 2010, not the UTA 1972. This is because, Shiraz contends, the "assignment" of the Management Agreement to Shiraz in June 2014 was, in law, a novation, and/or because the "renewal" of the Management Agreement in December 2018 created a new agreement.

(b) Neither cl 5.6.6 nor the Management Agreement as a whole is ultra vires the UTA 2010 (or, if it is applicable, the UTA 1972).

(c) Even if the Court were to find that cl 5.6.6 or the Management Agreement as a whole is ultra vires:

(i) The Court has no jurisdiction to determine the Body Corporate's unjust enrichment claim, because of the procedure adopted by the Body Corporate in commencing this proceeding.

(ii) Alternatively, Shiraz was not unjustly enriched by the Body Corporate's payment of rent and outgoings under the Lease.

(iii) Alternatively, if Shiraz was unjustly enriched, it would be inequitable to require Shiraz to reimburse the Body Corporate.

[47] Once the Body Corporate decided not to pursue its claim that the Lease was ultra vires, the first defendant, POL, was only indirectly affected by the Body Corporate's claims. POL's indirect interest was in its lessee, Shiraz, still having the benefit of cl 5.6.6. In its pleading POL denied the Body Corporate's claim that cl 5.6.6 was ultra vires. However, at the hearing Ms Pendleton, counsel for POL, advised me that POL would abide the Court's decision. Ms Pendleton nonetheless appeared throughout the hearing, though she did not cross-examine any witnesses or make any submissions.

[48] The third and fourth defendants, Bianco Ltd and Avondale Properties Ltd, were placed into liquidation in May 2021 and October 2021 respectively. The proceeding against them is stayed and they took no part in the hearing.

The issues

[49] The issues are:

(a) Is the validity of the Management Agreement and of cl 5.6.6 governed by the UTA 1972 or the UTA 2010? That includes two sub-issues:

(i) Was the "assignment" of the Management Agreement to Shiraz in June 2014 a novation?

(ii) Did the "renewal" of the Management Agreement in December 2018 create a new agreement?

(b) Is the Management Agreement as a whole ultra vires the applicable UTA?

(c) Is cl 5.6.6 ultra vires the applicable UTA?

(d) Does the Court have jurisdiction to determine the Body Corporate's unjust enrichment claim?

(e) If the Court has jurisdiction to determine the Body Corporate's unjust enrichment claim, was Shiraz unjustly enriched by the Body Corporate's payment of rent and outgoings under the Lease?

(f) If Shiraz was unjustly enriched, would it be inequitable to require Shiraz to reimburse the Body Corporate?

The evidence

[50] The trial directions provided for the parties to serve briefs of evidence. The plaintiff chose to serve its evidence in the form of unsworn affidavits.

[51] The trial proceeded remotely. Each witness, except one, gave evidence by video link. Each witness confirmed the accuracy of his or her brief and was then available for cross-examination. The exception was POL's witness, Gail Turner. No party wished to cross-examine Ms Turner, and so by consent her brief was taken as read.

[52] One of the plaintiff's witnesses was Bernard Wright. Mr Wright provided expert evidence on the roles of a building manager in the operation of apartment complexes, the market history of building management rights in the development of unit title complexes, and building management fees charged under building management agreements for comparable apartment complexes. His expert evidence also included an assessment of whether the building management arrangements at Bianco Off Queen were fair and reasonable.

[53] The day before the trial was scheduled to start, Mr Rainey, counsel for Shiraz, filed and served a memorandum signalling his concern over the admissibility of Mr Wright's evidence. Shiraz had not previously served a notice of objection to any aspect of Mr Wright's evidence (as required by r 9.11 of the High Court Rules 2016).

[54] Further memoranda were exchanged. Mr Rainey's objection became focussed on Mr Wright's evidence that the management fee for Bianco Off Queen was excessive when compared to management fees paid under management agreements for comparable apartment complexes in Auckland. Mr Rainey pointed to s 25(3) of the Evidence Act 2006. This section provides that if an opinion by an expert is based on a fact outside the general body of knowledge that makes up the expertise of the expert, "the opinion may be relied on by the fact-finder only if that fact is or will be proved or judicially noticed in the proceeding". Mr Rainey said that the terms of those other management agreements were not in evidence. Mr Wright's evidence of those other management agreements was therefore hearsay. None of the exceptions to the rule that hearsay evidence is inadmissible applied.

[55] I did not have time to rule on the objection prior to Mr Wright giving evidence. Mr Rainey was content for me to hear Mr Wright's evidence so long as it that did not mean it was admitted.

[56] When Mr Wright gave evidence, he was asked how he knew the terms of the comparable management agreements (of which there were 15). Mr Wright explained that he held copies of eight of the agreements. For another six he was personally involved in the management of the complexes and so was well aware of the terms of the agreements. He did not hold a copy of the remaining agreement, but had been a member of the body corporate committee for the relevant complex. He said a current body corporate committee member had told him the terms had not changed from the time Mr Wright was on the committee.

[57] An expert is able to give evidence as to the details of any transactions within his personal knowledge, in order to establish them as matters of fact.[9] Such evidence is not hearsay. The details of the management agreements were within Mr Wright's personal knowledge, other than the agreement where he had to rely on what a current committee member told him. I therefore reject Mr Rainey's objection, except in respect of that last agreement. This has no bearing on Mr Wright's overall opinion, as

---

[9] *English Exporters (London) Ltd v Eldonwall Ltd* [1973] Ch 415 at 423.

he said that that agreement was not one of those that he said provided the most valid comparison to the Bianco Off Queen Management Agreement.

Is the validity of the Management Agreement and of cl 5.6.6 governed by the UTA 1972 or the UTA 2010?

The ultra vires doctrine

[58] As a creature of statute, a body corporate of a unit title development has only those powers conferred on it by the statute under which it is incorporated. If the body corporate acts beyond those powers (that is, ultra vires), the body corporate's act is void (of no legal effect) from the beginning.[10] This is the ultra vires doctrine.

[59] The ultra vires doctrine applies to contracts entered into by a body corporate.[11] The Body Corporate and Shiraz both submitted that the validity of such a contract depends on the powers that a body corporate possessed at the time it entered into the contract. I agree with that proposition.[12]

[60] The Body Corporate and Shiraz disagreed as to when the Body Corporate entered into the Management Agreement. The Body Corporate says it entered into the Management Agreement on 5 December 2008. At that date the UTA 1972 was still in force and was the statute under which the Body Corporate was incorporated. The Body Corporate says the validity of the Management Agreement therefore depends on the UTA 1972.

[61] Shiraz acknowledges the Management Agreement was originally entered into on 5 December 2008. But it says the "assignment" of the agreement in June 2014 was a novation. Shiraz says that, if I do not accept there was a novation, the "renewal" of

---

10 *Humphries v The Proprietors "Surfers Palms North" Group Titles Plan 1955* (1994) 179 CLR 597; *Low v Body Corporate 384911* [2011] 2 NZLR 263 (HC) at [28]–[30]; *Body Corporate 401803 v Vermillion Wagener Ltd* [2015] NZHC 285, (2015) 15 NZCPR 758 at [64]; and *Vermillion Wagener Ltd v Body Corporate 401803* [2015] NZCA 313, (2015) 16 NZCPR 483 at [24].

11 *Humphries v The Proprietors "Surfers Palms North" Group Titles Plan 1955* (1994) 179 CLR 597; *Low v Body Corporate 384911* [2011] 2 NZLR 263 (HC); *Body Corporate 396711 v Sentinel Management Ltd* [2012] NZHC 1957, (2012) 13 NZCPR 418; and *Body Corporate 401803* v *Vermillion Wagener Ltd* [2015] NZHC 285, (2015) 15 NZCPR 758 at [62], upheld on appeal in *Vermillion Wagener Ltd v Body Corporate 401803* [2015] NZCA 313, (2015) 16 NZCPR 483.

12 See *Body Corporate 401803 v Vermillion Wagener Ltd* [2015] NZHC 285, (2015) 15 NZCPR 758 at [64].

the Management Agreement in December 2018 was a new agreement. On each of those dates the UTA 2010 was in force and was the statute under which the Body Corporate was incorporated.[13] Shiraz says the validity of the Management Agreement therefore depends on the Body Corporate's powers under the UTA 2010, which (Shiraz says) are broader than the powers it had under the UTA 1972.

Was the "assignment" of the Management Agreement to Shiraz in June 2014 a novation?

[62] Clause 13.1 of the Management Agreement permits the building manager to assign its interest in the agreement with the consent of the Body Corporate. Mr Rainey, relying on the Supreme Court's decision in *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd*,[14] submitted that, although cl 13.1 uses the language of assignment, properly construed it provides for a novation. It followed, he submitted, that when the Body Corporate agreed to the "assignment" of the Management Agreement from VR Management Services Ltd to Shiraz, a new contract was formed between the Body Corporate and Shiraz.

[63] In *Savvy Vineyards* both the majority and minority judges affirmed the conventional distinction between an assignment and a novation.[15] If there has been a contract between A and B, and then a mere assignment from B to C, the rights but not the obligations of B are transferred to C. C may enforce those rights against A, B remains liable on the contract to A, and A and C are not otherwise in contract. An assignment from B to C does not transfer B's obligations to C because the burden of a contract cannot be shifted from the obligor (B) to the assignee (C) without the consent of the obligee (A).[16] By contrast, where A *does* consent to the burden being shifted from B to C, there is a novation. Novation takes place where A and B agree that C, who must also agree, is to take the place of B — in the sense that B is released from its obligations so that A can enforce those obligations only against C.

---

[13] Unit Titles Act 2010, s 219(2).

[14] *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2014] NZSC 121, [2015] 1 NZLR 281.

[15] At [24]–[25] per Elias CJ and McGrath J (dissenting, but not on this point) and at [57] and [85]–[93] per William Young, Glazebrook and Arnold JJ.

[16] *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 (CA) at 668 per Lord Collins MR, cited in *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2014] NZSC 121, [2015] 1 NZLR 281 at [85].

[64] Because a novation requires the agreement of A, B and C, it involves the formation of a new contract.[17] The majority in *Savvy Vineyards* recognised that it was conceptually possible for a contract between A and B to confer on B the right to novate the contract in favour of a third party C.[18] Whether an agreement conferred that right was a matter of interpretation.[19]

[65] The grape supply and vineyard management agreements before the Court in *Savvy Vineyards* provided that B could not assign its "interest in the agreement" to any party that was not a related company without first obtaining the consent of A. The agreements also provided that A could, as a condition of any consent, require the assignee to sign a deed of covenant with A agreeing to perform B's obligations under the agreements. B had "assigned" its interest in the agreements to a related company (C) and therefore had not required A's consent to the "assignment". B nonetheless had presented A with a deed of "assignment" that provided for C to be substituted for B. A had not executed the deed, though A had subsequently dealt with C as if it was the contracting party.

[66] The majority interpreted the "assignment" provisions of the agreements as conferring on B the right to novate the agreements to a related company.[20] The key reason was that, in the case of an "assignment" to a related company, there was no requirement for the "assignee" to covenant with A to adhere to B's contractual obligations.[21] Given the long-term nature of the agreements, it was unlikely the parties envisaged the management services would be provided by an "assignee" with no contractual obligations to A. This suggested that the right of "assignment" to a related company was envisaged as being by way of novation. This interpretation was consistent with other aspects of the agreements. These included that the agreements provided for the assignment by A of its "rights and obligations" under the agreements. This, the majority said, was the language of novation rather than assignment.[22]

---

17 *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2014] NZSC 121, [2015] 1 NZLR 281 at [26].
18 At [93], relying on the English Court of Appeal decision *British Gas Trading Ltd v Eastern Electricity Plc* unreported, 18 December 1996.
19 At [57], [59], [80]–[84], [94]–[97].
20 At [96], [99] and [105].
21 At [96] and [105].
22 At [97], relying on the English Court of Appeal decision *British Gas Trading Ltd v Eastern Electricity Plc* unreported, 18 December 1996.

[67] The majority's reasons for interpreting the agreements as conferring a right to novate were obiter, as they allowed the appeal on a different ground (that A had by its conduct consented to a novation to C).[23] Regardless, it is clear that a contract can confer on a party a right to novate the contract in favour of a third party. In determining whether cl 13.1 of the Management Agreement, properly interpreted, conferred such a right, the majority's reasons are highly persuasive.

[68] I now turn to the interpretation of cl 13.1. It is necessary to set cl 13 out in full:

> **13 ASSIGNMENT**
>
> 13.1 (a) The Manager may assign its interest in this agreement with the consent of the Body Corporate such consent not to be unreasonably or arbitrarily withheld, if, before the proposed assignment takes effect:
>
> (i) The Manager notifies the Body Corporate of its intention to assign;
>
> (ii) The Manager provides evidence to the Body Corporate to show that the proposed assignee is a respectable and responsible assignee with appropriate experience to undertake the role of manager;
>
> (iii) The proposed assignee executes a deed of covenant (if required by the Body Corporate) agreeing with the Body Corporate to be bound by this agreement as if the proposed assignee was the Manager;
>
> (iv) The Manager concurrently assigns or transfers the Management Unit and reception to the assignee;
>
> 13.2 The first Manager may assign this Agreement and its rights and obligations to any person or entity to which the first Manager reasonably determines meets the requirements of clause 13.1 and the first Manager may dispense with a part or all of those requirements and the first Manager's liability upon the assignment shall determine whether or not the requirements of clause 13.1 have been met.

[69] I begin with cl 13.2. This allowed the first manager to assign the Management Agreement "and its rights and obligations" without the assignee having to execute a deed of covenant agreeing with the Body Corporate to be bound by the agreement. Upon such an "assignment" the first manager's liability would end. Despite the use of the words "assign" and "assignment", cl 13.2 plainly conferred on

---

23 At [100] and [106].

the first manager a right to novate. This is because obligations as well as rights were to be transferred; as in *Savvy Vineyards*, there was no requirement for the "assignee" to covenant with the Body Corporate; and upon the "assignment" the first manager's liability would end.

[70] By contrast, under cl 13.1:

(a) The manager has the right to assign its "interest" in the Management Agreement. An "interest" is analogous to a "right". It does not encompass an obligation.[24]

(b) Unlike cl 13.2, and unlike the agreements in *Savvy Vineyards*, the Body Corporate can require a covenant from the "assignee". In *Savvy Vineyards*, the absence of such a requirement was the key reason for the majority's interpretation.

(c) There is no express provision for the assignor's liability to come to an end.

[71] These contrasts are plain. They strongly indicate that cl 13.1 confers only a right to assign (with the consent of the Body Corporate) rather than a right to novate.

[72] I acknowledge there are other features of the Management Agreement that could provide commercial rationales for the manager having a right to novate. A conventional assignment of rights but not obligations is, as the majority in *Savvy Vineyards* observed, not well-suited to circumstances (such as here) where the rights that are assigned are conditional on contractual performance that remains the obligation of the assignor, particularly where the contract has a long term.[25] But the existence of that commercial rationale cannot overcome the plain language of cl 13.1 and its contrasts with cl 13.2.

---

24 Compare *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2014] NZSC 121, [2015] 1 NZLR 281 at [97], where the majority observed the agreements envisaged assignment by B "not just of its rights but rather of its 'interest' in the agreements".

25 *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2014] NZSC 121, [2015] 1 NZLR 281 at [95].

[73] I conclude that cl 13.1 did not confer on the building manager a right to novate. It merely conferred a right, with the consent of the Body Corporate, to assign the Management Agreement. That right arose only if, among other things, the proposed assignee executed a deed of covenant with the Body Corporate agreeing to be bound by the Management Agreement.

[74] The transfer, to use a neutral term, of the Management Agreement to Shiraz in June 2014 occurred in accordance with cl 13.1. VR Management Services Ltd sought and obtained the Body Corporate's consent to an assignment. The Body Corporate required Shiraz to execute a deed of covenant with the Body Corporate. In the deed the Body Corporate confirmed that it consented to the assignment and Shiraz agreed it would be bound by the Management Agreement. That was the extent of the deed. VR Management Services Ltd was not a party to the deed and the deed did not purport to release VR Management Services Ltd from its obligations. The transfer was therefore merely an assignment. There is, again, a contrast with *Savvy Vineyards*. There the deed was to be executed by A, B and C, and it expressly provided that C would be substituted for B — that is, a novation.[26]

[75] In summary, I find that in June 2014 the Management Agreement was assigned, rather than novated, to Shiraz.

Did the "renewal" of the Management Agreement in December 2018 create a new agreement?

[76] Mr Rainey submitted that, even if he was wrong on his novation submission, there was a new agreement between Shiraz and the Body Corporate when Shiraz, in December 2018, exercised its right of renewal under cl 16 of the Management Agreement. It was the validity of this new agreement that was in issue in this proceeding and its validity had to be determined by the legislation in force when it was entered into.

---

26 *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2014] NZSC 121, [2015] 1 NZLR 281 at [5]–[6] and [74]. The majority held that A, though not executing the deed, had by conduct consented to a novation on the terms set out in the deed: at [109]–[111].

[77] I accept that Shiraz exercised its right of renewal and that consequently there was a "new agreement" from December 2018. But to say that there was a "new agreement" is not, of itself, relevant. That may or may not be a useful label for some purposes. For the purposes of the ultra vires doctrine, the question is not whether there was a "new agreement". The question is whether the Body Corporate, when entering into a contract, acted in excess of its powers.

[78] The renewal was a unilateral act by Shiraz. Despite some of the language in cl 16 (which contemplates that the Body Corporate will be required "to enter into a new agreement") the renewal did not involve the Body Corporate doing anything or purporting to exercise any power. There was, therefore, no relevant act by the Body Corporate in December 2018 that engaged the ultra vires doctrine. The relevant act occurred in December 2008 when the Body Corporate entered into a Management Agreement conferring on the building manager a unilateral right of renewal.

[79] In summary, although it may be correct to say there was a "new agreement" from December 2018, that does not affect the operation of the ultra vires doctrine. The validity of the Management Agreement and of cl 5.6.6 is governed by the UTA 1972. It is therefore unnecessary for me to consider Mr Rainey's submission that the UTA 2010 confers broader powers on a body corporate than were conferred by the UTA 1972.

Is the Management Agreement as a whole ultra vires the UTA 1972?

The Body Corporate's position

[80] The Body Corporate's pleaded position is that the Management Agreement as a whole is ultra vires the UTA 1972 because entry into "a Management Agreement that is in substance a subsidy for a hotel business is not related to the carrying out of powers or duties of the Body Corporate".[27]

---

[27] Amended statement of claim, [15(b)]. To the same effect is [26(a)(i)].

[81] Mr Bigio QC, counsel for the Body Corporate, submitted that the Management Agreement was part of an interconnected suite of documents that also included the Amended Rules and the Lease. These documents formed a vehicle by which the building manager obtained the exclusive ability to provide hotel services (the services referred to in cl 3.2, such as food delivery or valet services) and letting services (the services referred to in cl 12) to unit owners. Mr Bigio submitted that the provisions of the Management Agreement that purported to grant exclusive rights to the building manager to provide the hotel and letting services were clearly ultra vires (a position that Shiraz largely accepted).

[82] Mr Bigio submitted that the economic value of the building manager's business lay almost entirely in the exclusive ability to provide the hotel and letting services. He said this was evident from the turnover warranty that VR Management Services Ltd provided to Shiraz when selling the business. The turnover was warranted at almost $3 million. The management fee was less than ten per cent of that figure.

[83] Mr Bigio said that Shiraz wore "two hats" — one as building manager (performing the building management duties set out in cl 3.1 of the Management Agreement) and one as hotel manager (providing the hotel services and letting services). Mr Bigio submitted that no line existed between these two roles in terms of Shiraz's costs of performing the building management duties and costs of providing the hotel and letting services.

[84] For example, Shiraz employed an on-site manager who both managed the building and provided hotel and letting services. Shiraz occupied the Management Unit under the Lease and was reimbursed for the rent payable under the Lease. But, Mr Bigio said, that unit was primarily used for the provision of hotel and letting services. Only a few of the building management duties were performed from the Management Unit. Mr Bigio said this was reflected in the permitted business use of the unit under the Lease: "Reception and Office for the building manager to be used for the operation of the complex as serviced apartments".

[85] Mr Bigio submitted that Mr Wright's evidence supported the Body Corporate's position that the economic value of the building manager's business lay in the

exclusive ability to provide the hotel and letting services. Mr Wright's evidence that the management fee was above market also countered any suggestion Shiraz might have made that the management fee had been discounted to reflect the value of the exclusive ability to provide the hotel and letting services.

[86] Finally, Mr Bigio said it was not possible to sever the ultra vires provisions of the Management Agreement (such as cl 12, which Shiraz accepts is ultra vires) from the rest of the agreement. This was because the economic value of the business lay in the exclusive rights that cl 12 and other provisions purported to confer. Those ultra vires provisions could not be disentangled from the agreement as a whole. Further, severance would in practical terms be ineffective, as Shiraz would still be in a monopoly position for hotel and letting services by virtue of its occupation of the Management Unit under the Lease. In arguing against severance, Mr Bigio relied on a decision of the High Court of Australia, *Humphries v The Proprietors "Surfers Palms North" Group Titles Plan 1955*,[28] and a decision of the Court of Appeal, *Atrium Management Ltd v Quayside Trustee Ltd*.[29]

Shiraz's position

[87] Shiraz says that the Management Agreement is an orthodox exercise of the Body Corporate's power, in sch 2 of the UTA 1972, to employ servants or agents to provide services in connection with the control, management and administration of the common property and the exercise and performance of the powers and duties of the Body Corporate. Mr Rainey submitted that the courts have construed this power as allowing a body corporate to engage a building manager to perform the duties such as those set out in the Management Agreement. He relied on this Court's decision *Low v Body Corporate 384911*.[30]

[88] Mr Rainey characterised as misconceived the Body Corporate's argument that the Management Agreement operates as a subsidy to the hotel operation. The management fee is paid for the performance of the building management duties.

---

28 *Humphries v The Proprietors "Surfers Palms North" Group Titles Plan 1955* (1994) 179 CLR 597.
29 *Atrium Management Ltd v Quayside Trustee Ltd* [2012] NZCA 26, (2012) 7 NZ ConvC 96-001.
30 *Low v Body Corporate 384911* [2011] 2 NZLR 263 (HC).

Shiraz is paid separately (by the unit owners) for the provision of any hotel or letting services. Further, the "subsidy" argument is not a challenge to the vires of the Management Agreement. It is an argument that the Body Corporate pays too much for the duties. That is an attempt to have the Court inquire into the adequacy of consideration, which the Court will not do, except on application under s 140 of the UTA 2010, or on an analogous application in equity. The Body Corporate has not made any such applications.

[89] Shiraz accepts that cl 12, which purports to provide the building manager with the exclusive right to provide letting services to unit owners, is ultra vires. But Mr Rainey submitted this clause, and any other clauses that might be ultra vires, could be severed from the valid parts of the Management Agreement.

The sub-issues that arise

[90] I will consider the parties' competing positions by addressing the following sub-issues:

(a) Are any of the provisions of the Management Agreement ultra vires (leaving to one side for the moment the Body Corporate's argument that the agreement was entered into to provide a subsidy to the hotel business)?

(b) If so, can the ultra vires provisions be severed from the valid provisions?

(c) If the Management Agreement was entered into to provide a subsidy to the hotel business, is that a ground for finding the agreement as a whole ultra vires?

Are any of the provisions of the Management Agreement ultra vires?

[91] Under s 16 of the UTA 1972, a body corporate had all powers as were reasonably necessary to enable it to carry out the duties imposed by the UTA 1972 and by its rules. A body corporate's duties included keeping the common property in a

state of good repair, controlling, managing and administering the common property, and doing all things reasonably necessary for the enforcement of the rules.[31] Default r 11(b) (in sch 2) entitled a body corporate committee to employ agents and servants in connection with "the control, management, and administration of the common property and the exercise and performance of the powers and duties of the body corporate".

[92] Given those provisions, under the UTA 1972 a body corporate had the power to enter into contracts with third parties for the provision of services for the management and maintenance of the common property. This Court so held in *Low* and in *Body Corporate 396711 v Sentinel Management Ltd*.[32]

[93] The Amended Rules that the Body Corporate adopted in December 2008 did not limit its power to enter into such contracts.[33] The Body Corporate was therefore empowered to enter into a contract engaging a building manager to provide services for the management and maintenance of the common property.

[94] Clause 3.1 of the Management Agreement obliges the building manager to perform various building management duties. These are for the management and maintenance of the common property. The Body Corporate was empowered to enter into a contract engaging a building manager to perform these duties.

[95] Many of the other clauses of the Management Agreement are supplemental to cl 3.1 (for example, the clauses relating to the amount and payment of the management fee). Other clauses are machinery provisions (for example, clauses dealing with the term of the agreement, termination, renewal and dispute resolution). It was within the Body Corporate's power to engage a building manager on such terms.

---

31 Section 15(1).

32 *Low v Body Corporate 384911* [2011] 2 NZLR 263 (HC) at [59]–[66]; and *Body Corporate 396711 v Sentinel Management Ltd* [2012] NZHC 1957, (2012) 13 NZCPR 418 at [104]–[113].

33 If anything, the Amended Rules purported to extend the Body Corporate's power. It is not necessary to determine whether any extensions were ultra vires (because, even if they were, the Body Corporate would have been empowered by virtue of ss 15 and 16 and default r 11(b) in sch 2).

[96] On the other hand, the Body Corporate had no power to agree to some parts of the Management Agreement. Clause 12 purports to grant to the building manager the exclusive right to provide a letting service to unit owners. A body corporate has no power to grant such a right.[34] As noted, Mr Rainey accepted cl 12 is ultra vires. Clause 4.2 provides that the Body Corporate must not employ or contract with any other person to provide any service that the manager is entitled to provide under the Management Agreement. Similarly, cl 4.4 provides that the Body Corporate shall not procure any other person to provide the hotel services. Clauses 4.2 and 4.4 both purport to provide the manager with the exclusive right to provide the hotel services. Conferral of such a right was not, in terms of s 16 of the UTA 1972, reasonably necessary to enable the Body Corporate to carry out any duties under the UTA 1972 or under its rules. Clauses 4.2 and 4.4 are therefore ultra vires.[35]

[97] The Body Corporate claimed that cl 5.6.6 is also ultra vires. I address this below, concluding that clause 5.6.6 is intra vires.

Can the ultra vires provisions be severed from the valid provisions?

[98] The invalidity of one or more provisions of a contract does not necessarily render the entire contract invalid.[36] The invalid provisions can sometimes be severed from the valid provisions, leaving the valid provisions enforceable. In *Carr v Gallaway Cook Allan*,[37] the Supreme Court reviewed leading decisions on the principles of severability. The Court concluded its review with this summary:

> [62] The overall approach to severability that emerges from these decisions is one that is founded on core contractual principles. The significance of severance of an invalid contractual provision is evaluated in the course of examination of what the parties are to be taken to have agreed in the words they used. This is an issue of construction of the contract. It is likely to be permissible to sever an invalid promise which is subsidiary to the main purpose of the contract, but severance may not destroy the main purpose and substance of what has been agreed. Severance cannot be permitted to alter the nature of a contract.

---

34 *Russell Management Ltd v Body Corporate No 341073* (2008) 10 NZCPR 136 (HC); *Low v Body Corporate 384911* [2011] 2 NZLR 263 (HC); and *Body Corporate 396711 v Sentinel Management Ltd* [2012] NZHC 1957, (2012) 13 NZCPR 418 at [97].

35 The same conclusion was reached in reference to similar provisions in *Body Corporate 396711 v Sentinel Management Ltd* [2012] NZHC 1957, (2012) 13 NZCPR 418 at [102].

36 *Carr v Gallaway Cook Allan* [2014] NZSC 75, [2014] 1 NZLR 792 at [48].

37 *Carr v Gallaway Cook Allan* [2014] NZSC 75, [2014] 1 NZLR 792.

[99] The key point is that severability involves construction of the contract. That is an objective exercise. I regard the following matters as significant. First, the Management Agreement is structured in such a way that the provisions relating to the letting and hotel services are easily severed from the rest of the provisions. The Management Agreement does not oblige the Body Corporate to pay the manager anything for these services. The unit owners or occupiers, not the Body Corporate, pay the manager for any letting and hotel services: cl 3.2. The management fee paid by the Body Corporate represents remuneration for the manager's performance of the building management duties: cls 5.1 and 5.5. The valid provisions in the agreement will operate perfectly well if the ultra vires provisions are severed. Severance will not alter the nature of the agreement.

[100] Secondly, I regard the ultra vires provisions as being subsidiary to the main purpose of the Management Agreement, which was engaging a manager to perform building management duties. In ascertaining that purpose, I look to the terms of the agreement and the context in which it was entered into in December 2008. The introductory or recital provisions record that the Body Corporate has resolved to appoint the manager "to perform certain duties and provide certain services for the management and maintenance of the Property". In cl 2.1, the Body Corporate grants "exclusively to the Manager … the Management Rights and Letting Service Rights and appoints the Manager to perform the Duties and provide the Services". These provisions may suggest that the exclusive right to provide letting and hotel services was just as important as, rather than subsidiary to, the engagement of the manager to perform building management duties. But the context indicates otherwise:

(a) The Body Corporate had a duty to manage the common property. Given the size of Bianco Off Queen, there was a practical necessity for the Body Corporate to engage a third party to perform building management duties. There was no such necessity for the Body Corporate to grant exclusive rights to provide letting or hotel services.

(b) The Management Agreement was the only basis on which the manager could become entitled to perform the building management duties and

be paid for doing so. The manager could contract with unit owners to provide them with the letting and hotel services, regardless of whether the manager was party to the Management Agreement.

(c) While the Management Agreement was the only basis on which the manager could be granted an exclusive right to provide the letting and hotel services (assuming for a moment the Body Corporate had the power to grant such a right), the Management Agreement was not the only way that the manager was obtaining a competitive advantage over other potential providers of those services. By occupying the Management Unit under the Lease, the manager had a very significant competitive advantage over other providers. Seen in that light, the exclusivity provisions in the Management Agreement are less significant than they might at first appear.

[101] Thirdly, cl 29.1 of the Management Agreement provides:

> If any provision of this agreement or the application thereof to any person or circumstance is or becomes invalid or unenforceable, the remaining provisions shall not be effected [sic] by that event and each provision shall be valid and enforceable to the fullest extent permitted by law.

[102] Through cl 29.1 the parties have agreed that any invalid provisions can (indeed should) be severed.

[103] These three matters clearly point towards the ultra vires provisions being severable. I am of the view that those provisions can and should be severed from the Management Agreement. The same view was reached, in respect of similar clauses, in *Low* and *Sentinel*.[38] In *Sentinel*, Woolford J reached that view for much the same reasons I have expressed.

[104] In reaching this view, I have put to one side some matters that do not bear on the construction of the Management Agreement. Mr Bigio referred to Mr Bassamtabar's evidence that he would not have agreed to purchase the business in

---

[38] *Low v Body Corporate 384911* [2011] 2 NZLR 263 (HC) at [95]; and *Body Corporate 396711 v Sentinel Management Ltd* [2012] NZHC 1957, (2012) 13 NZCPR 418 at [115]–[120].

2014 if the Body Corporate had raised any issue about the validity of the Management Agreement. Mr Rainey referred to evidence that Shiraz had not for many years enforced the exclusive right to let the units. Neither of those matters provides relevant context for the interpretation of an agreement entered into in 2008.

[105] The authorities on which Mr Bigio relied in arguing against severance are distinguishable. In *Humphries*,[39] the management fee was paid for the provision of all the services in the agreement, including the manager providing the letting service. The High Court of Australia held that the provisions relating to the letting service were ultra vires. Those provisions could not be severed from the rest of the agreement. That was because the promise to pay the management fee was not divisible between the intra vires and ultra vires purposes.[40] As I have explained, in the present case the Body Corporate was not obliged to pay the manager anything for the letting and hotel services. That is an important distinguishing factor.[41]

[106] In *Atrium*,[42] Quayside was a developer of a unit title development. Atrium entered into an agreement to purchase from Quayside the management rights for the development. The sale and purchase agreement (**SPA**) required Quayside to procure the body corporate to execute a management agreement on the terms set out in a draft management agreement annexed to the SPA. Clause 12 of the draft management agreement provided that the body corporate would grant Atrium the exclusive right to operate an on-site holiday service.

[107] Before settlement, Atrium gave notice to Quayside cancelling the SPA. Atrium contended that the body corporate would be acting ultra vires if it granted the exclusive rights set out in cl 12 of the draft management agreement. Atrium's cancellation notice relied on Quayside's anticipatory breach of contract, on the basis Quayside would never be able to perform its obligation under the SPA to procure the body corporate to execute a management agreement in the terms set out in the SPA.

---

39 *Humphries v The Proprietors "Surfers Palms North" Group Titles Plan 1955* (1994) 179 CLR 597.

40 At 606 per Brennan and Toohey JJ, at 609 per Deane and Gaudron JJ, and at 622 per McHugh J.

41 *Humphries* was distinguished on this ground in *Russell Management Ltd v Body Corporate No 341073* (2008) 10 NZCPR 136 (HC) at [65] and *Body Corporate 396711 v Sentinel Management Ltd* [2012] NZHC 1957, (2012) 13 NZCPR 418 at [115].

42 *Atrium Management Ltd v Quayside Trustee Ltd* [2012] NZCA 26, (2012) 7 NZ ConvC 96-001.

[108] The Court of Appeal held that Atrium's cancellation was valid. Quayside was in anticipatory breach of a term that was essential. Quayside had argued that the ultra vires cl 12 could be severed from the draft management agreement. As part of that argument, Quayside relied on a clause in the draft agreement that was in identical terms to cl 29.1 of the Management Agreement. The Court rejected the argument. Relying on *Humphries*, the Court held that the right to exclusivity was essential and fundamental to Atrium.[43]

[109] Mr Bigio submitted that the Court of Appeal's reasons for rejecting Quayside's severability argument were applicable here. He said the Court was satisfied that the amount Atrium agreed to pay for the management rights was substantially attributable to the exclusive right in cl 12.[44] The Court rejected severability notwithstanding a clause in identical terms to cl 29.1.

[110] I do not accept that submission. In *Atrium*, the Court of Appeal was concerned with whether the promise *by Quayside* to procure a management agreement with exclusive rights was an essential term *of the SPA*. As to severability, the Court's reasons were directed at whether Quayside's promise to procure an agreement with exclusive rights was severable from the other provisions *of the SPA*. The Court was not concerned with whether cl 12 could have been severed from the valid provisions of the management agreement, which is the question before this Court. For example, the Court said that Quayside's reliance on the equivalent to cl 29.1 was of no assistance because "the clause is a provision in the draft management agreement which is irrelevant to the obligation under [the SPA] which Quayside admits it was unable to perform".[45]

If the Management Agreement was entered into to provide a subsidy to the hotel business, is that a ground for finding the agreement as a whole ultra vires?

[111] I have left this question last because, in my view, it is useful to address it in the context of my findings, above, that the clauses providing exclusive rights, although ultra vires, can be severed from the Management Agreement.

---

43 At [43–[48].
44 Referring to [34] of *Atrium*.
45 At [46].

[112] The Body Corporate's pleading that the Management Agreement was entered into to provide a subsidy, as developed in submissions, contained several points.

[113] First, it was said to be significant that Shiraz could not provide a clear split between the costs that it incurred in performing the building management duties for the Body Corporate and the costs it incurred in providing the letting and hotel services to individual unit owners. I regard this as irrelevant. The vires of a Management Agreement entered into in 2008 cannot depend on the extent to which Shiraz, the present building manager, is able to identify and allocate its costs to different tasks. Likewise, Shiraz's ability to make cost allocations does not say anything about whether the Management Agreement was entered into in 2008 to provide a subsidy.[46]

[114] Secondly, much emphasis was placed on the "economic package" by which the exclusive ability to provide the hotel and letting services was conferred on the building manager, that package consisting of the Management Agreement, the Amended Rules and the Lease. It was submitted that the economic value of the building manager's business lay almost entirely in this exclusive ability to provide the hotel and letting services.

[115] I do not overlook that the Management Agreement, the Amended Rules and the Lease were part of a connected package. It is also clear — from the documents themselves, and from their having been created when the developer owned all the units — that one of the reasons for the package as a whole was to create a bundle of rights that the developer could on-sell. But this does not mean that the Management Agreement was intended to be a "subsidy" for the hotel business. The Body Corporate's own case was that it is the exclusive ability to provide letting and hotel services — rather than, say, the size of the management fee — that is the main driver of the economic value of the manager's business.

[116] As I have explained, that exclusivity derives primarily from the competitive advantage the building manager obtains from occupying the Management Unit under

[46] To be clear, it was not suggested that Shiraz's cost accounting was inadequate, and I make no criticism of it.

the Lease. There was nothing invalid or improper about the creation of that competitive advantage. There was an invalid aspect of the Lease (the guarantee by the Body Corporate) but no other basis has been put forward to challenge the validity of the Lease. The developer attempted to bolster the competitive advantage through provisions in the Management Agreement (and in the Amended Rules) purporting to grant exclusive rights to the building manager. Those provisions are ultra vires. The "economic package" point was, in substance, an argument against severability of those ultra vires provisions. I have rejected that argument and found that the provisions can be severed from the Management Agreement.

[117] Thirdly, the Body Corporate emphasised that the Management Unit was used primarily as a hotel reception rather than for providing building management services. Mr Bigio submitted that the only building management service performed from the Management Unit was security (there being some CCTV screens within the unit). I do not accept that the evidence went that far. Mr Yu, a member of the Body Corporate committee, gave evidence that there was a CCTV system operated by Shiraz with screens within the Management Unit (as well as another CCTV system operated by the Body Corporate). He did not say that that was the only building management service provided from the Management Unit. He said that the manager of Shiraz's hotel business "doubles as the building manager". Mr Bassamtabar's evidence, under cross-examination, was that the Management Unit was used both for hotel purposes and building management purposes.

[118] This dual purpose is reflected in the approved business use of the Management Unit in the Lease: "Reception and Office for the building manager to be used for operation of the complex as serviced apartments". Mr Bigio emphasised the words "serviced apartments" and submitted they indicated the only approved use was for hotel purposes. I regard the business use description as sufficiently wide to encompass use of the Management Unit for providing building management services. A "complex" cannot be operated as serviced apartments without, for example, cleaning of the common property.

[119] In any event, the fact that the Management Unit is used in part, or even primarily, for a hotel reception does not mean that the Management Agreement as a

whole is ultra vires. At best for the Body Corporate it may raise a question as to the vires of cl 5.6.6, under which the Body Corporate is obliged to reimburse the building manager for the rent payable for the Management Unit. I address that below.

[120] Finally, the Body Corporate relied on Mr Wright's evidence that the management fee payable under the Management Agreement was above market rates. In closing submissions, Mr Bigio said that this evidence performed a limited but important purpose: it countered any argument Shiraz may have put forward that the management fee was discounted to reflect the value of the exclusive rights conferred by the Management Agreement. Mr Bigio repeated that the value in the manager's business lay in the exclusive rights.

[121] Shiraz did not make any such argument. So, on the limited purpose on which Mr Wright's evidence was put forward, it is not strictly necessary for me to engage with Mr Bigio's submission. But, to be clear, Mr Wright's evidence that the management fee is above market does not establish that the agreement as a whole is ultra vires. A body corporate has the power to decide the fee payable under a management agreement. If the fee is above market, that does not mean the clause setting the fee, let alone the agreement as a whole, is ultra vires.[47]

Conclusion

[122] For the above reasons I reject the Body Corporate's claim that the Management Agreement as a whole is ultra vires the UTA 1972.

Is cl 5.6.6 ultra vires the UTA 1972?

[123] For convenience, I repeat cl 5.6.6:

> The Body Corporate will throughout the term of this management agreement pay (in addition to the management fee) to the Manager a contribution equivalent to the rent payable under the lease for the Management Unit and Reception.

[124] Rule 3.1(v) of the Amended Rules contained similar wording, though it also purported to empower the Body Corporate to provide a rental guarantee:

---

47 *Low v Body Corporate 384911* [2011] 2 NZLR 263 (HC) at [64].

> The Body Corporate shall … pay a contribution to the Manager equivalent to the rent payable under the lease for the Management Unit and Reception and provide a rental guarantee to the lessor of the Management Unit throughout the term of that lease agreement and any renewal thereof;

[125] In the summary judgment application made earlier in this proceeding, Associate Judge Sargisson held that r 3.1(v) was ultra vires the UTA 1972 and void.[48] Her Honour was not, however, asked to determine whether cl 5.6.6 of the Management Agreement was ultra vires.

The Body Corporate's position

[126] Mr Bigio said that, there being no valid rule in the Amended Rules justifying cl 5.6.6, the issue was whether the Body Corporate had power under the UTA 1972 to agree to cl 5.6.6. By reason of s 16 of the UTA 1972, that issue depended on whether agreeing to cl 5.6.6 was reasonably necessary to enable the Body Corporate to carry out the duties imposed on it. He submitted that agreeing to pay a contribution to the rent of a unit used as a hotel reception and office was not referable to any duty imposed on the Body Corporate under the UTA 1972. He said Associate Judge Sargisson's reasoning for finding r 3.1(v) ultra vires was equally applicable to cl 5.6.6:[49]

> Under [r 3.1(v)], the Body Corporate is empowered, indeed obliged, to pay a contribution to the Manager equivalent to the rent payable under the Lease for the Management Unit. Nothing in the UTA 1972 could possibly be construed as authorising the Body Corporate to make replacement rules authorising or obliging it to assume a responsibility to contribute to the rent of the lessee for the Management Unit which must, in terms of the lease, be used for a reception and office for the serviced apartments.

[127] To be clear, Mr Bigio said he was not suggesting that an issue estoppel on this question arose from the earlier judgment. He merely submitted that the Associate Judge's reasoning was correct and applicable also to the vires of cl 5.6.6.

[128] Mr Bigio acknowledged that in *Vermillion Wagener* the Court of Appeal said that, while a body corporate had no power to provide a rental guarantee, "[i]n the normal course any arrangement between the members of the Body Corporate and the manager to meet or subsidise rental would be met by a contractual provision for

---

48 *Body Corporate 406198 v Property Opportunities Ltd* [2020] NZHC 926 at [38] and [50].
49 At [37].

reimbursement of the rental component or part of it".[50] But Mr Bigio said that decision related to a manager's private accommodation. The Court of Appeal was not saying that a body corporate had power to agree to pay the rent of a unit used as a hotel reception and office.

Shiraz's position

[129] Mr Rainey submitted that the Body Corporate had the power to contract a building manager under default r 11(b) of sch 2 of the UTA 1972. This included the power to pay the building manager. The payment could include a contribution towards costs incurred by the building manager in renting the Management Unit.

[130] Mr Rainey submitted that a body corporate's power to agree to such a contribution was recognised by the Court of Appeal in *Vermillion Wagener*. He said Mr Bigio's attempt to distinguish that case should not be accepted. There was no relevant distinction between agreeing to pay the rent of the manager's private accommodation and agreeing to pay the rent of a management unit. This was especially so given that the effect of cls 5.3 and 13.1 of the Management Agreement was that the building manager was required to occupy the Management Unit under the Lease.

Is the clause ultra vires?

[131] Under the UTA 1972 a body corporate had the power to contract a building manager to provide building management services.[51] This included, obviously, the power to agree to make payments to the building manager for the provision of those services.[52]

[132] Clause 5.6.6 is a promise by the Body Corporate to make a payment to the building manager. The payments made under cl 5.6.6 are payments (or more correctly part of the payments) for the provision of building management services. They are no

---

[50] *Vermillion Wagener Limited v Body Corporate 401803* [2015] NZCA 313, (2015) 16 NZCPR 483 at [33].

[51] That is, services in connection with the control, management and administration of the common property and the exercise and performance of the powers and duties of the body corporate.

[52] *Low v Body Corporate 384911* [2011] 2 NZLR 263 (HC) at [35], [55] and [64].

different in that respect from the payments of the management fee under cl 5.1. They are each part of the consideration that the Body Corporate agreed to pay to the building manager in exchange for the provision of building management services.

[133] That the payment obligation in cl 5.6.6 is quantified by reference to the rental payable for the Management Unit does not mean that the Body Corporate lacked power to agree to the clause. Contracting parties are normally at liberty to agree the amount that is to be paid for services (or goods) under a contract. This includes being at liberty to agree a formula for calculating the amount to be paid. There is nothing in the UTA 1972 to suggest that a body corporate's power to agree to pay building managers did not include that usual liberty.

[134] Nor does the fact that the Management Unit is used primarily for hotel services mean that cl 5.6.6 is invalid. Effectively, Mr Bigio was submitting that a body corporate had power to agree a payment obligation only if the payment was referable to a cost the building manager was incurring in providing building management services. I disagree. I refer again to the usual liberty that contracting parties have to agree the amount to be paid for services. Mr Bigio's submission, if correct, would mean a body corporate could challenge the vires of a fixed fee, or part of it, on the basis that some of the fixed fee exceeded the costs incurred by the building manager in providing building management services. In short, and as Mr Rainey said, the submission invites the Court to inquire into the adequacy of consideration. This the Court will not do.[53]

[135] Even if I am wrong in that view, the formula in cl 5.6.6 is in any event referable to a cost the building manager incurs in providing building management services. As I have said,[54] the Management Unit is used, in part, to provide those services. Further, the effect of cls 5.3 and 13.1 is that the building manager is obliged to occupy the Management Unit under the Lease for the purpose of providing the building management services (as well as for the purpose of providing hotel services).[55]

---

53 Jeremy Finn, Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) at [4.4].

54 See [117][118] above.

55 I note that cl 5.5(f) says the management fee "does not include … [a]ny contribution towards the rent of the Management Unit and Reception". This merely avoids any argument that the obligation in cl 5.6.6 to contribute to the payment of the rent has not already been discharged, partly or in

[136] The Court of Appeal's dictum in *Vermillion Wagener* provides firm support for the view that cl 5.6.6 is valid. The Court would hardly have called a contractual provision for reimbursement the "normal course" if it had had any doubts about the validity of such a provision. The Court rightly distinguished such a payment provision from a guarantee (in which a body corporate would be exposed to liability, including a potential damages liability, to the third-party lessor).

[137] As noted, Mr Bigio submitted that *Vermillion Wagener* was distinguishable, in that it related to a manager's private accommodation, not a management unit used as a hotel reception and office. I do not see that as a distinguishing factor. First, the Court of Appeal had, immediately before its dictum, held that the body corporate had no power to provide private accommodation for the manager. It is therefore difficult to see how it could make any difference that the leased premises were used as a hotel reception and office. Secondly, as I have just said, the Management Unit is used, in part, to provide building management services, and the building manager has to occupy the Unit for the purpose of providing those services.

[138] For these reasons, in my view cl 5.6.6 is not ultra vires the UTA 1972.

[139] I add these comments. My references to the usual liberty that contracting parties enjoy to agree consideration may seem artificial here, given that the "agreement" was the product of a decision by the developer, Mr Manning, wearing two hats. His dual role calls into question whether the substance of what was agreed was in the Body Corporate's interests. There are controls on the exercise by developers of the powers of bodies corporate in such circumstances. The first control is practical. As Heath J said in *Low*:[56]

> Subsequent proprietors cannot, in my view, now complain about the terms of the management agreement into which the Body Corporate entered, at [the developer's] instigation. Each subsequent purchaser had the right to call for any building management agreement to consider its terms. If, after taking advice, intended purchasers elected to proceed, they were bound by its terms. Their remedy, if they did not like the terms of the agreement, lay in their own hands: there was no compulsion for them to buy a unit.

---

full, by the payment of the management fee. Clause 5.6.6 reinforces this by saying that the rent contribution is in addition to the management fee. This is simply a belts and braces approach to drafting.

56 *Low v Body Corporate 384911* [2011] 2 NZLR 263 (HC) at [64].

[140] The other controls are legal. There are avenues by which a body corporate can challenge the substance of a management agreement that has been entered into while the developer is still in control of the body corporate. The agreement might be challenged as having been entered into in breach of fiduciary duty, as being an unconscionable bargain, or as being harsh or unconscionable under s 140 of the UTA 2010.[57]

[141] The Body Corporate did not challenge the Management Agreement on any of those bases.[58] Its challenge was based solely on ultra vires. However, that Mr Manning had a dual role did not affect the Body Corporate's power to engage a building manager or to agree the consideration to be paid to the manager.

Does the Court have jurisdiction to determine the Body Corporate's unjust enrichment claim?

[142] Mr Rainey said that when the Body Corporate commenced this claim it sought only declaratory relief under the Declaratory Judgments Act 1908 and for that reason proceeded under Part 18 of the High Court Rules. The Body Corporate then amended its claim, adding a new claim in unjust enrichment. Rule 18.1 governs the types of proceeding that can be brought under Part 18. Mr Rainey submitted that r 18.1 does not include a proceeding in which a plaintiff claims in unjust enrichment. He therefore submitted that, given that the proceeding has remained under Part 18, the Court has no jurisdiction to determine the Body Corporate's unjust enrichment claim.

[143] There is no dispute that the Body Corporate's proceeding was, as initially framed, properly brought under Part 18. The Body Corporate then amended its claim, adding a new claim in unjust enrichment. Even assuming that Mr Rainey is correct that a party initially claiming in unjust enrichment cannot proceed under Part 18 (a point on which I make no comment), it does not follow that, where a proceeding has been commenced under Part 18 and the statement of claim is subsequently amended to include an unjust enrichment claim, the Court lacks *jurisdiction* to determine that new claim. The only relevance of the new claim being (possibly) outside r 18.1 is that

---

57 See *Body Corporate 396711 v Sentinel Management Ltd* [2012] NZHC 1957, (2012) 13 NZCPR 418.

58 This is simply an observation, not a criticism.

the Court could, if one or both parties requested, have directed that the proceeding thereafter proceed as an ordinary proceeding rather than a proceeding under Part 18.

[144] Neither party made such a request. Mr Rainey raised his Part 18 argument shortly before the hearing commenced. He did not suggest that the nature of the claims before the Court meant that the procedure that had been followed was in any way inappropriate.

[145] In short, r 18.1 merely forms a gateway to a particular type of procedure. The rule does not limit the jurisdiction of the Court hearing a proceeding before it.

Was Shiraz unjustly enriched by the Body Corporate's payment of rent and outgoings under the Lease?

[146] Clause 5.6.6 of the Management Agreement obliges the Body Corporate to pay to Shiraz a contribution equivalent to the "rent" payable under the Lease for the Management Unit. It was common ground before me that cl 5.6.6 did not oblige the Body Corporate to reimburse Shiraz for outgoings that were payable under the Lease.[59]

[147] As explained earlier, for many years the parties followed an arrangement that did not reflect cl 5.6.6. From soon after Shiraz became the building manager in June 2014, the Body Corporate paid POL directly instead of reimbursing Shiraz. Moreover, the Body Corporate paid POL both the rent and outgoings payable by Shiraz under the Lease. This arrangement lasted until June 2019. Since that time, the Body Corporate has reimbursed Shiraz rather than paying POL directly, and it has reimbursed only the rent, not outgoings.

[148] The Body Corporate paid rent totalling $218,895.15 and outgoings totalling $64,400.22 directly to POL. Since June 2019, the Body Corporate has reimbursed Shiraz for about $107,000 for rent that Shiraz has paid to POL under the Lease.[60]

---

59 This was presumably on the basis that "rent" did not include outgoings. At least as between lessor and lessee, outgoings are not normally considered rent: *Rosinis Restaurant Ltd v Goldcorp Properties Ltd* (1989) 1 NZ ConvC 190,114 (HC) at 190,115. Given the common ground, it is not necessary for me to decide whether in cl 5.6.6 "rent" included outgoings.

60 I understand the Body Corporate has continued to reimburse Shiraz for the rent. The amount has therefore grown since the hearing.

[149] The Body Corporate claims that Shiraz has been unjustly enriched by these payments. Shiraz disputes that it has been enriched or that, if it was, any enrichment was unjust.

Was Shiraz enriched by the Body Corporate's payments?

[150] Mr Rainey submitted that Shiraz had not been enriched at all by the Body Corporate's payments. His argument was that Shiraz has been required, by cl 5.3 of the Management Agreement, to occupy the Management Unit and incur the liability for rent and outgoings under the Lease. He submits that the only benefit that Shiraz obtained from the Body Corporate's payments was the occupation of the Management Unit which Shiraz believed it was required to occupy under cl 5.3.

[151] That submission, with respect, is not relevant to whether Shiraz was enriched by the Body Corporate's payments. At best for Shiraz, the submission is directed to whether any enrichment was unjust, or if so whether it would be inequitable to require Shiraz to make restitution to the Body Corporate.

[152] The payments that the Body Corporate made directly to POL had the effect of relieving Shiraz from its obligation to pay rent and outgoings to POL. Shiraz was enriched to that extent. The payments that the Body Corporate made to Shiraz clearly enriched Shiraz to the extent of the payments.

Was Shiraz's enrichment unjust?

[153] In assessing whether Shiraz's enrichment was unjust, it is necessary to distinguish between the Body Corporate's payment of rent and payment of outgoings. This is because the basis upon which the Body Corporate claimed that Shiraz's enrichment was unjust differed between the two payments.

Rent

[154] The basis upon which the Body Corporate claimed the payment of rent had unjustly enriched Shiraz was that the payment was made under cl 5.6.6 of the Management Agreement, and that clause is void (either specifically or because the

Management Agreement as a whole is void). I have concluded that cl 5.6.6 is not void. It follows I reject this part of the Body Corporate's unjust enrichment claim.

[155] If I had concluded that cl 5.6.6 was void, I would have had to consider whether that was a sufficient basis for finding that Shiraz's enrichment was unjust and that the Body Corporate was entitled to restitution. I will briefly record my views on that matter.

[156] Mr Bigio submitted that the general common law position is that a party who has paid money under an ineffective transaction is entitled to the return of that money providing there has been a total failure of consideration. He recognised that it was difficult to characterise this situation as involving a total failure of consideration, given that Shiraz had provided the Body Corporate with building management services under the Management Agreement. Mr Bigio submitted, however, that where a contract was ineffective by reason of being ultra vires, restitution was available without showing a total failure of consideration. He relied on a passage from *Laws of New Zealand* for that proposition.[61]

[157] With respect, I do not believe the legal position is as straightforward as Mr Bigio submitted. First, one of the authorities on which the authors of *Laws of New Zealand* rely is *Tauranga Borough v Tauranga Electric-Power Board*.[62] The borough council and the defendant power board had entered into an agreement for the supply of electric power by the borough council to the power board. The contract was ultra vires both parties. For many years the borough council had supplied electricity to the power board and the power board had paid for it. An issue for the Court of Appeal was whether (and what) the borough council could recover from the power board. Myers CJ, on a point all the members of the Court agreed, decided those transactions "should not be reopened".[63] This does not support the proposition that where there is an ultra vires contract a party may obtain restitution without showing a total failure of consideration.

---

61 James Palmer *Laws of New Zealand* Restitution: Ineffective transactions (online ed) at [56].
62 *Tauranga Borough v Tauranga Electric-Power Board* [1944] NZLR 155 (CA).
63 At 229.

[158] Secondly, it is plain that Shiraz, by performing the building management services, conferred benefits on the Body Corporate under the Management Agreement. This raises an issue as to how, if cl 5.6.6 had been void, such benefits are to be taken into account in a claim by the Body Corporate for restitution. For example, is the Body Corporate obliged to provide counter-restitution as a condition of recovery, so that it is limited to a claim for the difference between the payments it made under the Agreement and the value of the services that it received? Or does each party have an independent claim for restitution against the other? This might have had an impact on which party bore the burden of proving the value of the services that Shiraz provided.

[159] That is a live and difficult issue in the law of restitution.[64] I did not receive any submissions on the issue. It is not necessary for me to express a view. This is because, at worst for the Body Corporate, it bore the burden of proving the value of the services provided by Shiraz and of thereby showing that the amount it sought to recover from Shiraz was less than the amount by which its payments exceeded the value of those services. If I had found cl 5.6.6 to be void, I would have been satisfied on the basis of Mr Wright's evidence that the Body Corporate had discharged that burden. He analysed market rates for building management services for comparable unit titled serviced apartments complexes. His evidence was that the cost at comparable complexes ranged from $490 to $1,250 per unit per annum, with an average of $665 per unit per annum. By contrast, at Bianco Off Queen the management fee (including the amount payable under cl 5.6.6) is about $2,025 per unit per annum. The difference between the amount paid to Shiraz and the highest of the other comparable complexes is about $125,000 per annum.

[160] Shiraz did not lead any evidence in response. Mr Rainey did cross-examine Mr Wright, but I was easily persuaded by Mr Wright's analysis. It is clear from his evidence that the amount of the rent that the Body Corporate sought to recover from

---

64 See Charles Mitchell and Paul Mitchell *Goff and Jones The Law of Unjust Enrichment* (9th ed, Sweet & Maxwell, London, 2016) at ch 31; and Graham Virgo *The Principles of the Law of Restitution* (3rd ed, Oxford University Press, Oxford, 2015) at 367–378. For a recent survey of the English authorities and academic writings on the way in which counter-restitution might apply in the context of restitution in void transactions, see *School Facility Management Ltd & Ors v Governing Body of Christ The King College* [2021] EWCA Civ 1053, [2021] 1 WLR 6129.

Shiraz is much less than the amount by which the payments made by the Body Corporate exceed the value of the services provided by Shiraz.

Outgoings

[161] It was common ground that, even if cl 5.6.6 was valid, it did not oblige the Body Corporate to pay outgoings. The Body Corporate therefore was not relying on the invalidity of that clause to claim that its payment of outgoings had unjustly enriched Shiraz.

[162] The Body Corporate pleaded, at [16] of its amended statement of claim, that Shiraz had been enriched by receiving benefits, including the payment of outgoings, "at the expense of the Body Corporate and without right, including but not limited to the unlawful arrangements at paragraph 8 above". Those unlawful arrangements were alleged to be the Amended Rules, the Management Agreement, and the Body Corporate's entry into the Lease as guarantor.

[163] This pleading could have been clearer as to the basis upon which it was alleged Shiraz had been unjustly enriched by the payments of outgoings. However, of the unlawful arrangements alleged by the Body Corporate, only the guarantee of the Lease could have purported to oblige the Body Corporate to pay outgoings to POL.[65]

[164] I therefore regard the pleaded claim as being that Shiraz's enrichment was unjust because the payment of outgoings was made under a void guarantee.

[165] There was no dispute that the Body Corporate lacked power to enter into the guarantee and that it was therefore void. That had already been decided by Associate Judge Sargisson. Nor was there any dispute that, subject to any counter-restitution principle (not in issue here[66]) and to defences such as change of position (considered below), a party receiving the benefit of payments made under a void contract is unjustly enriched by those payments.

65 As is usual, the guarantee was of the performance by the lessee of all covenants in the Lease.

66 Shiraz accepted that the Body Corporate never had any obligation to pay the outgoings. Shiraz was therefore not able to say that it provided the building management services in exchange for the Body Corporate paying the outgoings.

[166] What was in issue was whether the Body Corporate paid the outgoings under the guarantee or whether there was some other reason for the payments. The Body Corporate's position was that the payment was made under the guarantee. Shiraz's position was that there had never been any demand under the guarantee and the payments were the result of an arrangement established at the request of the Body Corporate. Shiraz said that the proper analysis was that the payments had been made under a mistake of law or fact.

[167] It was clear that there was never any formal demand by POL on the Body Corporate under the guarantee. Beyond that, the evidence on why the Body Corporate paid the outgoings to POL was limited.

[168] On 20 June 2014, soon after Shiraz became the building manager and the lessee under the Lease, Brian Turner of POL emailed Sajad Bassam of Shiraz. Mr Turner asked Mr Bassam to set up an automatic payment for the monthly rent and to immediately pay an outstanding rates invoice (rates being part of the outgoings payable by Shiraz under the lease). Mr Bassam responded by email on 7 July 2014. This email included:

> I was just talking to Sue Rubanand from Body Corporate Administration and we decided that its easier for them to pay you directly. From here after and for any outstandings can you please raise invoices to the BC directly.

[169] Mr Bassam's email was copied to Ms Rubanand and to another employee at Body Corporate Administration, which provided administrative and secretarial services to the Body Corporate.

[170] The reference to "outstandings" in Mr Bassam's email was, in context, a reference to any outstanding rates or other outgoings payable under the Lease. In accordance with this email, POL thereafter invoiced the Body Corporate for both rent and outgoings, and the Body Corporate paid both to POL.

[171] Neither Mr Bassam nor Ms Rubanand was called as a witness. In determining why the Body Corporate paid the outgoings, it is helpful to observe that there were two aspects to the arrangement. The first aspect was for the Body Corporate to pay POL directly. It is understandable that, as recorded in Mr Bassam's email, the

Body Corporate and Shiraz regarded this "easier" than the Body Corporate reimbursing Shiraz for a payment that Shiraz had made to POL.

[172] But that does not explain why the Body Corporate agreed to pay the outgoings to POL. The only reason that the Body Corporate could have had for paying the outgoings was that its guarantee to POL covered both rent and outgoings. It is therefore a reasonable inference that the Body Corporate believed that it was obliged, by reason of the guarantee, to pay the outgoings directly to POL. This belief may have been mistaken (given there had not been any default by Shiraz), but it is hardly unusual for laypeople to misunderstand how a guarantee operates.

[173] This inference is supported by what was said when the arrangement came to an end in June 2019. On 14 June 2019, Mr Turner sent an email to Shiraz's Mr Bassamtabar. It began:

> Good to catch up yesterday.
>
> As discussed, up until 31 May last, the Body Corporate has been paying the lease rental and outgoings for the management unit under the lease guarantee provisions.
>
> The Body Corporate committee in their wisdom has decided unilaterally to stop making any further payments under the guarantee as from 1 June 2019.

[174] Mr Turner went on to say that POL required full performance by Shiraz of all obligations under the lease, including payment of rent and outgoings, with or without the support of the lease guarantee provided by the Body Corporate.

[175] Mr Turner was not called as a witness. But it is clear from his email that he perceived that the guarantee was the reason the Body Corporate had been paying the outgoings under the lease.

[176] I therefore conclude that the Body Corporate paid the outgoings under the guarantee. The guarantee being beyond the Body Corporate's powers and void, Shiraz's enrichment from the payment of the outgoings is unjust. The Body Corporate is entitled to restitution, subject only to defences raised by Shiraz.

If Shiraz was unjustly enriched, would it be inequitable to require Shiraz to reimburse the Body Corporate?

[177] Mr Rainey submitted that, if there was any unjust enrichment, it would be inequitable to require Shiraz to repay any amount to the Body Corporate. There were three strands to his submission.

[178] First, he said Shiraz paid $1.46 million to acquire the management rights for Bianco Off Queen. It did so, he said, only after completing due diligence and obtaining the Body Corporate's consent to the assignment of the management rights. In that process the Body Corporate did not disclose any concerns over the validity of the Management Agreement. Shiraz then entered into a deed of covenant with the Body Corporate. It did so, and then performed its obligations under the Management Agreement, in reliance on the validity of the payments that the Body Corporate agreed it would make under the Management Agreement.

[179] This matter does not make it inequitable to require Shiraz to provide restitution in respect of the payments by the Body Corporate of outgoings. That is because it is common ground that the Management Agreement did not oblige the Body Corporate to make those payments. Shiraz therefore cannot have entered into the deed, or performed its obligations under the Management Agreement, in reliance upon any assumption that the Body Corporate would pay the outgoings.

[180] For completeness, I add that if I had found cl 5.6.6 to be void, this matter would not have defeated the Body Corporate's unjust enrichment claim in respect of the payment of rent. Shiraz took a commercial risk in acquiring the management rights. It performed due diligence and exercised its own judgment. The Body Corporate did not make any representation, implicit or explicit, to Shiraz about the validity of the Management Agreement.

[181] Secondly, Mr Rainey submitted that it would be inequitable for the Body Corporate to have the benefit of the services provided by Shiraz under the Management Agreement without paying for those services. This raises the counter-

restitution point that I addressed at [158]–[160] above.[67] The point does not defeat the Body Corporate's claim for reimbursement of the payments of outgoings, because Shiraz did not provide any services in exchange for those payments.

[182] Finally, Mr Rainey said Shiraz had changed its position in reliance on the validity of the agreement. He did not identify any change of position (other than the acquisition of the management rights and the performance of the Management Agreement, which I have already dealt with). Further, it was never suggested that Shiraz assumed that the Body Corporate was obliged to pay the outgoings or that Shiraz relied on such an assumption. I therefore reject this defence.

Summary

[183] I reject the Body Corporate's claim that the Management Agreement as a whole is ultra vires. I also reject the claim that cl 5.6.6 is ultra vires. I therefore reject the Body Corporate's claim for an order that Shiraz reimburse the Body Corporate for the rent that the Body Corporate paid under cl 5.6.6.

[184] I order that Shiraz is to reimburse the Body Corporate for the outgoings of $64,400.22 that the Body Corporate paid to POL.

[185] I received no submissions on the interest that might be payable by Shiraz. If the parties are unable to agree, they may file and serve brief memoranda (no longer than three pages each): the Body Corporate by 6 April 2022, Shiraz by 4 May 2022.

[186] I encourage the parties to agree costs. If agreement cannot be reached, they may file and serve brief memoranda (no longer than three pages each): the Body Corporate by 6 April 2022, Shiraz and POL by 4 May 2022.

[187] In the course of my reasons I have concluded that some clauses of the Management Agreement are ultra vires (those purporting to grant exclusive rights to Shiraz). Mr Bigio asked that, if I reached any such conclusions, I make declarations accordingly. I decline to do so. The Body Corporate did not seek any such

---

[67] As will be clear from those paragraphs, if I had found cl 5.6.6 to be void, this matter would not have defeated the Body Corporate's claim for restitution in respect of its payment of rent.

declarations in its pleading. And, as I understood it, Shiraz does not dispute that the exclusive rights clauses are ultra vires.

Result

[188] I order that Shiraz is to reimburse the Body Corporate for the outgoings of $64,400.22 that the Body Corporate paid to POL.

[189] Any question of interest on that amount is reserved, as are costs. Failing agreement between the parties, memoranda on interest and costs are to be filed and served as set out at [185] and [186].

[190] The Body Corporate's claims are otherwise dismissed.

____

Campbell J