IN THE COURT OF APPEAL OF NEW ZEALAND

CA213/2014
[2015] NZCA 185

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

Hearing:	29 April 2015
Court:	Harrison, Keane and Wylie JJ
Counsel:	J Anderson and T J G Allan for Appellant D Chisholm QC for First Respondent No apperance for Second Respondent
Judgment:	21 May 2015 at 10 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B Judgment is entered in favour of the appellant against the first respondent as receiver of the second respondent (in receivership and in liquidation). The first respondent is personally ordered to pay the body corporate levies outstanding in respect of units 3A to 3E (inclusive) in the Mid City complex, from 9 August 2013 to the date of this judgment.

C The first respondent is personally ordered to pay interest on the outstanding levies, at the rate of 10 per cent per annum, calculated from the last day of each month to the date of judgment. Interest is not to be compounded.

D Leave is reserved to counsel to file memoranda in the High Court, in the event that they are unable to reach agreement as to the amount owing by the first respondent to the appellant.

E The first respondent is ordered to pay to the appellant its reasonable solicitor/client costs, together with disbursements.

F Leave is reserved to counsel to file memoranda in the High Court in the event that there is any disagreement as to the costs or disbursements payable pursuant to this judgment.

REASONS OF THE COURT

(Given byWylie J)

Introduction

[1] Body Corporate 162791 (the body corporate) appeals a decision given in the High Court by Associate Judge Abbott on 25 March 2014.[1]

[2] The Body Corporate initially filed a statement of claim seeking an interim injunction to restrain the first respondent, Mr Gilbert, as receiver of the second respondent, QSM Trustee Limited (QSMTL) from erecting a fence across an arcade comprising common property on level 1 of a strata title development known as the Mid City complex in central Auckland.

[3] The application for an interim injunction was decided in the body corporate's favour and an interim injunction was ordered on 15 April 2013.[2] The matter came back before the Court,[3] and ultimately undertakings were exchanged. The undertaking was signed by Mr Gilbert, both personally and as agent for QSMTL.

[4] The body corporate then filed an amended statement of claim seeking a permanent injunction and raising various additional causes of action. The first cause of action sought a declaration that Mr Gilbert, as receiver, is personally liable to pay levies owing for the five units owned by QSMTL in the Mid City complex as from 9 August 2013 either to the date when the receivership ends, or when QSMTL ceases to use the units. It also sought judgment against Mr Gilbert personally for levies owing from 9 August 2013 until the date of judgment, together with interest thereon at the rate of 10 per cent per annum, and costs. Another of the causes of action sought a declaration that the body corporate is entitled to terminate the provision of services to the levels of the Mid City complex comprising QSMTL's units until all body corporate levies were paid.

[5] In October 2013, the body corporate filed a notice seeking summary judgment in respect of the first cause of action. That application was opposed by Mr Gilbert. QSMTL did not file a notice of opposition.

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1 *Body Corporate 162791 v Gilbert* [2014] NZHC 567.
2 *Body Corporate 162791 v Gilbert* HC Auckland CIV-2013-404-3833, 15 August 2013 (Minute).
3 *Body Corporate 162791 v Gilbert* HC Auckland CIV-2013-404-3833, 4 September 2013 (Minute).

[6] The application for summary judgment came before Associate Judge Abbott. He found that Mr Gilbert had an arguable defence to the body corporate's claim for the unpaid levies and he declined the summary judgment application.

[7] There are two questions for this Court:

(a) is Mr Gilbert personally liable under s 32(5) of the Receiverships Act 1993 (the Act) to pay body corporate levies owed by QSMTL since 9 August 2013 (being the date 14 clear days after Mr Gilbert was appointed a receiver); and

(b) in the event that Mr Gilbert is liable, should his liability be limited or excused under s 32(7) of the Act?

Factual background

The Mid City Complex

[8] QSMTL is the registered proprietor of five units – units 3A to 3E – in the Mid City complex. The complex comprises three distinct areas:

(a) a basement area;

(b) a mid level area comprising two floors which are divided into a number of individually owned units, used as retail premises, together with arcades on each floor; and

(c) a third level area spread over three floors, originally developed as a movie theatre complex, but now comprising the five units owned by QSMTL. There are some 25 to 30 tenants or licensees operating small retail businesses on these three floors. They collectively trade under the name "Queen Street Market".

[9] The appellant is the body corporate for the Mid City complex and it owns all of the common property in the complex. The common property includes an arcade on the ground floor, arcades giving access to units on the higher floors, open void

areas looking down to the ground floor arcade, and stairs and escalators between the various floors. There are 44 units in the complex. The owners of individual units are beneficially entitled to the common property as tenants in common in shares proportional to the ownership interests of their respective units.[4]

[10] The Mid City complex has had a chequered history. It is relevant to Mr Gilbert's reliance on s 32(7).

[11] The movie theatre complex originally intended to be located on the three floors comprising the third level area was unsuccessful. There were proposals floated to redevelop the complex as a parking facility, and then as residential apartments. There is a land covenant providing for redevelopment registered on the supplementary record sheet comprising part of the unit plan.

[12] In 2006 the then owner of units 3A to 3E wished to redevelop those units together with the air space above them. The body corporate and other unit title holders opposed this plan. On 24 July 2006 Venning J held that the then owner of units 3A to 3E could enforce the redevelopment covenant against each of the other unit holders and the body corporate.[5] However, in the event, the redevelopment then proposed did not proceed.

239 Queen Street Trustees Ltd

[13] In September 2010 a Mr Copeland and a Mr Finnigan settled a trust known as the 239 Queen Street Trust. The intention was that the trust would acquire units 3A to 3E and, presumably, the benefit of the redevelopment covenant.

[14] A company known as 239 Queen Street Trustees Ltd was incorporated and it became the corporate trustee of the trust. In May 2011 it took a transfer of units 3A to 3E pursuant to the exercise of the power of sale contained in a mortgage which had been given by the then registered proprietor in favour of what was then Bridgecorp Finance Ltd. At this point the body corporate levies payable for units 3A to 3E were substantially in arrears. Approximately $939,000 was owing.

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4 Unit Titles Act 2010, ss 47(a) and 54(2).

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

[15] 239 Queen Street Trustees Ltd commenced negotiations with the body corporate for a waiver of the historic levies, and for a licence of the common areas on the three floors of the Mid City complex comprising units 3A to 3E, including the air space above those units. In return, 239 Queen Street Trustees Ltd agreed to replace the roof on the building. Negotiations culminated in a letter of understanding dated 24 November 2010. There was to be a small lump sum payment by 239 Queen Street Ltd on account of the outstanding levies. The balance was to be written off when the roof was replaced. The redevelopment covenant was also to be varied.

[16] During 2012, the body corporate and 239 Queen Street Trustees Ltd, through their respective legal advisors, negotiated, but failed to agree a licence for the common areas. Nor did they agree on a variation to the redevelopment covenant. The roof was not replaced.

[17] On 25 September 2012 the body corporate applied to put 239 Queen Street Trustees Ltd into liquidation because it had not paid the outstanding levies owing in respect of units 3A to 3E.

QSM Trustee Ltd

[18] On 21 November 2012 QSMTL was incorporated. 239 Queen Street Trustees Ltd ceased to be the trustee of the trust, and QSMTL was appointed as trustee in its stead. Units 3A to 3E were transferred to QSMTL on 23 January 2013, two days before the hearing of the body corporate's application for the liquidation of 239 Queen Street Trustees Ltd.

[19] An order was made for the liquidation of 239 Queen Street Trustees Ltd without opposition on 25 January 2013.[6]

[20] In April 2013 the body corporate made time of the essence requiring that the roof be replaced within a period of three months. The body corporate also issued a statutory demand against QSMTL for the unpaid levies.

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

[21] QSMTL applied to set the demand aside, on the basis that it had a counterclaim against the body corporate for an amount exceeding the amount of the demand. The application to set aside was ultimately determined in the body corporate's favour on 18 July 2013, by default, after QSMTL failed to comply with various procedural orders.[7]

[22] The roof was not replaced, and on 5 August 2013, the body corporate gave notice cancelling the 24 November 2010 letter of understanding.

[23] QSMTL commenced civil proceedings seeking to enforce the redevelopment covenant and the 24 November 2010 letter of understanding. The body corporate obtained an order for security for costs.[8] QSMTL failed to pay the security ordered, and ultimately its proceedings were dismissed for want of prosecution.[9]

The receivership

[24] At all relevant times two mortgages were registered against the titles to units 3A to 3E – a first mortgage in favour of Ashton Investments Ltd and a second mortgage in favour of Gartmore Nominees Ltd. Mr Finnigan is the sole director of Gartmore. On 25 July 2013 Gartmore appointed Mr Gilbert as receiver of QSMTL. The following day QSMTL was placed in liquidation and a Mr Young was appointed as the liquidator.

[25] The body corporate, by resolution at its annual general meeting, resolved to levy all unit owners in the Mid City complex for its operating budget of $1,148,200 (excluding GST) for the year from 1 July 2013 to 30 June 2014. The share of the levy attributable to units 3A to 3E is 35.65 per cent. This equates to a monthly figure of $39,205.77 (inclusive of GST). The levies were not paid by QSMTL. Invoices for instalments due since 25 July 2013 have been sent to Mr Gilbert. He has not paid them either.

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7 *QSM Trustees Ltd v Body Corporate 162791* HC Auckland CIV-2013-404-1053, 18 July 2013.
8 *QSM Trustees Ltd v Body Corporate 162791* [2013] NZHC 1762.
9 *QSM Trustees Ltd v Body Corporate 162791* HC Auckland CIV-2013-404-1286, 24 October 2013.

The High Court decision

[26] As already noted, before Associate Judge Abbott, the body corporate was seeking a declaration by way of summary judgment against Mr Gilbert as receiver for the levies due from the time it says that the receiver became obliged to pay them (9 August 2013 – being 14 clear days after the date of his appointment) through until the date of judgment, in reliance on s 32(5) of the Act. Mr Gilbert argued that that section did not apply but that if it did, he should be excused from personal liability under s 32(7)(b).

[27] Associate Judge Abbott held that s 32(5) did not make Mr Gilbert as receiver personally liable for the levies for two reasons:[10]

(a) levies are not payments due under an agreement, as that word is used in s 32(5); and

(b) even if an agreement can be construed as including an agreement between an owner and a body corporate arising as a matter of law when a unit is purchased, such agreement arises as an incident of ownership, and is not an agreement "relating to the use, possession or occupation by the grantor of the property" for which a receiver is personally liable under s 32(5).

[28] Associate Judge Abbott did not need to address whether Mr Gilbert had an arguable defence for relief from personal liability under s 32(7). He did comment, obiter, that he did not regard this question as appropriate for determination in the summary judgment context.[11]

Submissions

[29] Ms Anderson for the body corporate submitted that Associate Judge Abbott erred and that Mr Gilbert is personally liable for the body corporate levies that have fallen due since his appointment because:

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10 *Body Corporate 162791 v Gilbert*, above n 1, at [41].
11 At [53].

(a) The obligation to pay body corporate levies arises under an agreement and it is captured by s 32(5).

(b) Imposing personal liability on Mr Gilbert to pay the levies is consistent with the purpose of s 32(5).

(c) The proceeding is appropriate for summary judgment. Mr Gilbert cannot point to any arguable ground on which the Court should limit or excuse his liability. The facts which he asserts are in dispute are irrelevant to the determination of the issues raised in this aspect of the proceeding.

[30] Mr Chisholm QC for Mr Gilbert submitted as follows:

(a) The levies sought from Mr Gilbert are not payments due under any agreement subsisting as at the date of Mr Gilbert's appointment. They are payments levied by the body corporate pursuant to its statutory power to determine and impose levies on owners contained in s 121 of the Act.

(b) An owner's obligation to pay levies under s 121 is an incident of ownership whether or not the owner is using, possessing or occupying the property. The payments sought are not made under any agreement relating to the use, possession or occupation by the grantor of property in receivership.

(c) Unless he could sell the units within 14 days of appointment as receiver, Mr Gilbert had no practical ability to stop QSMTL from owning the units and thus avoiding becoming personally liable for the levies.

(d) Mortgagees in possession are not liable for body corporate levies and it would be unusual if receivers appointed by mortgagees could become personally liable.

(e) Mr Gilbert has sought relief under s 32(7) of the Act, and that issue cannot be determined in the summary judgment context.

Analysis

A receiver's powers and liabilities

[31] A receiver can be appointed by a secured creditor if the debtor company defaults in its obligations under the security agreement. On appointment the receiver takes charge of such of the company's assets as are subject to the security agreement; he or she can run the business and/or sell off the company's assets to repay the creditor.

[32] The primary role of a privately appointed receiver is to act in the interests of the creditor or creditors on whose behalf he or she has been appointed. Although appointed by a secured creditor or creditors, a receiver appointed under a security agreement is at law the agent of the debtor company, unless the relevant documentation provides otherwise.[12] It is however a limited agency. While the receiver is the agent of the debtor company, he or she carries out his or her duties for the benefit of the secured creditor.[13]

[33] A privately appointed receiver's powers are derived primarily from the security agreement. They are supplemented by s 14(2) of the Act. Inter alia, a receiver can demand and recover income derived from property in receivership and manage the property. Generally, a receiver will have the same powers to run or close the business and realise its assets that, prior to the receivership, were held by the directors of the debtor company:[14]

> The basic function of a receiver appointed by a secured creditor is to take control of the assets in receivership and to generate cash through profitable trading or, more commonly, the sale of some or all of the assets and, subject to the rights if any of prior or preferential creditors, to apply the net proceeds towards repaying the appointing creditor.

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12 Receiverships Act 1993, s 6(3).

13 *Downsview Nominees Ltd v First City Corp Ltd* [1993] 1 NZLR 513 (PC) at 522–523; and see Paul Heath and Mike Whale (eds) *Insolvency Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2014) at [12.10].

14 Heath and Whale, above n 13, at [12.34]. See also at [12.21]–[12.33]; Receiverships Act, s 18.

[34] The appointment of the receiver does not affect the debtor company's liability under existing contracts.[15] The company remains liable, and subject to various statutory exceptions, the receiver does not, on appointment, become liable for pre-receivership contracts.[16]

The Receiverships Act 1993 – Section 32

[35] The statutory exceptions are detailed in s 32 of the Receiverships Act. Relevantly, it provides as follows:

> **32 Liabilities of receiver**
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> (1) Subject to subsections (2) and (3), a receiver is personally liable—
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> (a) on a contract entered into by the receiver in the exercise of any of the receiver's powers; and
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> (b) for payment of wages or salary that, during the receivership, accrue under a contract of employment relating to the property in receivership and entered into before the appointment of the receiver if notice of the termination of the contract is not lawfully given within 14 days after the date of appointment; and
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> (c) for payment of remuneration under any contract with—
>
> (i) a director of a grantor that is a body corporate; or
>
> (ii) a person who, in relation to a grantor that is not a body corporate, occupies a position equivalent to that of a director of a body corporate—
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> if the receiver has expressly confirmed the contract.
>
> (2) The terms of a contract referred to in paragraph (a) of subsection (1) may exclude or limit the personal liability of a receiver other than a receiver appointed by the court.
>
> …
>
> (5) Subject to subsection (7), a receiver is personally liable, to the extent specified in subsection (6), for rent and any other payments becoming due under an agreement subsisting at the date of the appointment of the receiver relating to the use, possession, or occupation by the grantor of property in receivership.

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15 *Parsons v The Sovereign Bank of Canada* [1913] AC 160 (PC).

16 *Re Sew Hoy & Sons Ltd (in rec)* (1991) 5 NZCLC ¶96-455 (HC); Heath and Whale, above n 13, at [12.39].

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

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

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

whichever is the earlier.

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

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

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

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

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

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

(9) A receiver is entitled to an indemnity out of the property in receivership in respect of personal liability under this section.

…

[36] Section 32(5) operates to impose personal liability on receivers for rent and other payments accruing due under a pre-receivership lease or rental contract 14 days after the commencement of the receivership, in respect of property that the company continues to use.[17] The purpose of the provision is to ensure that a receiver does not obtain a benefit for the debtor company or the secured creditor without paying for it.[18]

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17 Heath and Whale, above n 13, at [12.43]; Peter Blanchard and Michael Gedye *The Law of Private Receivers of Companies in New Zealand* (3rd ed, LexisNexis, Wellington, 2008) at [11.08].

18 See Blanchard and Gedye, above n 17, at [11.08]. In Australia the Law Reform Commission took the view that it is inequitable that a receiver could permit a company to obtain the benefit of the occupation of premises or the use of chattels without being liable for rent: Australian Law Reform Commission *General Insolvency Inquiry: Summary of Report* (ALRC 45, 1988) at [38]. The law was changed – see now Corporations Act 2001 (Cth), s 419A; *Lewis v Hunter Valley Coal Processing Pty Ltd* [2003] NSWSC 642, (2003) 46 ACSR 467 at [71]. It seems that the Australian developments influenced the legislative changes which were introduced in New Zealand, although there are significant differences between the legislative provisions – see *Insolvency Law & Practice* (online looseleaf ed, Brookers) at [RA32.04(2)(a)].

[37] There is no personal liability for rent accruing during the initial 14 days of the receivership. The 14 day period operates as a period of grace. It affords a receiver breathing space to consider his or her options.

[38] Pursuant to s 32(6), a receiver's personal liability ends either when the company ceases to use, possess or occupy the property, or the receivership is concluded.[19]

[39] While the section is primarily aimed at rental payable in respect of property (real property or chattels) used, possessed or occupied by a debtor company, it extends liability to "any other payments becoming due under an agreement subsisting at the date of appointment of the receiver relating to the use, possession, or occupation by the grantor of the property".

[40] Body corporate levies are clearly payments due. There are two questions for this Court – first, do the body corporate levies owing for units 3A to 3E fall due under an agreement, and secondly, do the levies due under the agreement relate to the use, possession or occupation by QSMTL of the units?

Issues

(a) Do the body corporate levies fall due under an agreement?

[41] The word "agreement" used in s 32(5) is not defined in the Act. Associate Judge Abbott cited the Concise Oxford English Dictionary, and noted that it defined the word agreement as meaning "a negotiated and typically legal binding arrangement".[20] He considered that the obligation to pay levies is imposed on owners by the Unit Titles Act 2010, and that it is not an agreed obligation.

[42] In our view, the definition adopted by Associate Judge Abbott is too narrow in the context of s 32(5). The ordinary meaning of the word "agreement" extends to a mutual understanding, or arrangement entered into between parties as to a course

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19 See Heath and Whale, above n 13, at [12.43]; Blanchard and Gedye, above n 17, at [11.08].
20 *Body Corporate 162791 v Gilbert*, above n 1, at [42]–[46].

of action.[21] It should not receive a narrow and legalistic construction. Our view is reinforced by reference to s 32(1) and (2). Those subsections use the word "contract". Parliament must have intended that the word "agreement" in s 32(5) has a different meaning than the word "contract". In our judgment the word "agreement" is of wide import.

[43] In any event, and as a matter of law, there is a legally binding contract between QSMTL and other unit owners in the Mid City complex for the payment of levies which creates a debt in favour of the body corporate.

[44] It has been held, in a variety of contexts, that a person joining a group or club thereby becomes party to a contract with existing members, to the effect that the rules to which all existing members of the group or club are subject, will bind them.[22] Thus the rules of an incorporated society constitute a contract between the society's members, and rights arising under these contracts can be enforced by the Court in the same way as any other contract,[23] and the constitution of a company is binding between the shareholders and between the company and each shareholder.[24]

[45] Similarly when a person purchases a unit in a unit title development, that person thereby becomes subject to the body corporate rules. Those rules constitute a contract between the purchaser and the other unit holders.[25]

[46] The rules of the body corporate in this case do not expressly refer to the obligation to pay levies. Rather clause 31(b) provides as follows:

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

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21 See Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, 2005) at 20, definition of "agree" and "agreement".

22 See for example *Lee v The Showmen's Guild of Great Britain* [1952] 2 QB 329 (CA) at 344.

23 *Antunovich v Dalmatinsko Kulturno Drustvo Inc* [2001] NZAR 229 (HC) at [22]; *Finnigan v New Zealand Rugby Football Union* [1985] 2 NZLR 159 (CA).

24 Companies Act 1993, s 31(2).

25 *Tisch v Body Corporate No 318596* [2011] NZCA 420, [2011] 3 NZLR 679 at [31]; *St John's College Trust Board v Body Corporate No 197230* [2013] NZCA 35, (2013) 14 NZCPR 56 at [20]; *Body Corporate 114424 v L V Trust Holdings Ltd* [2014] NZCA 21, (2014) 15 NZCPR 375 at [30].

[47] While the wording is rather awkward, one Act in force, in the area in which units 3A to 3E are situated as well as elsewhere, and which relates to the use, occupation or enjoyment of those units, is the Unit Titles Act. Under that Act, QSMTL, as a unit owner, is obliged to pay body corporate levies.[26] It must also comply with the body corporate's operational rules.[27]

[48] In any event we consider that when a purchaser enters into an agreement to buy a unit in a unit title development he or she also implicitly agrees to abide by the obligations imposed on unit owners by the Unit Titles Act. Owners acquire not only the contractual rights created by the rules, but also the benefit of the obligations imposed on unit holders under the Unit Titles Act. As noted one of those obligations requires owners to pay body corporate levies and unpaid levies are recoverable as a debt due to the body corporate.[28]

[49] The agreement to abide by the body corporate's rules, and by the obligations contained in the Unit Titles Act, to which QSMTL was a party, was subsisting when Mr Gilbert was appointed as its receiver.

(b) Do the levies due under the agreement relate to the use, possession or occupation by QSMTL of the units?

[50] Associate Judge Abbott considered that any payments to which s 32(5) relates must arise under an agreement with a third party relating to the use, possession or occupation by the grantor company of a third party's property.[29]

[51] Normally the rental and other payments will be due for the use, possession or occupation by the debtor of property belonging to a third party. Strictly the section does not require that the property being utilised belong to a third party and we can see no reason to confine it in this way.

[52] The primary property the subject of the receivership comprises units 3A to 3E.

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26 Unit Titles Act 2010, s 80(1)(f).
27 Section 80(1)(j).
28 Section 124(2).
29 *Body Corporate 162791 v Gilbert*, above n 1, at [50]–[52].

[53] It was asserted in the affidavits filed on behalf of the body corporate that there are tenants or licensees occupying units 3A to 3E. That assertion was not denied by Mr Gilbert in the affidavit he filed in opposition to the application. Those tenants or licensees can only be occupying the units with the consent of Mr Gilbert as receiver and he is using the units by allowing the tenants or licensees to remain in occupation. It is a reasonable inference that Mr Gilbert as agent for QSMTL is deriving income from the tenants or licensees occupying units 3A to 3E.

[54] As we have already noted, the common property in the complex is owned by the body corporate. QSMTL is beneficially entitled to a share in that common property as a tenant in common with all other unit owners.[30] That beneficial entitlement is also property in receivership.

[55] Persons seeking to access units 3A to 3E can only do so by using the common property. Further Mr Gilbert put a fence across one of the arcades comprising part of the common property. The body corporate had to apply for and obtain an interim injunction in that regard, as we have noted. Ultimately, undertakings were agreed and Mr Gilbert signed the undertaking, both personally and as agent for QSMTL. Clearly, Mr Gilbert was using and occupying the common property when he took these steps.

[56] The view we have reached is reinforced when a purposive approach is taken to the interpretation of s 32(5).

[57] The body corporate is required by law to establish and maintain a long term maintenance plan,[31] to insure the buildings making up the unit title development,[32] and to repair and maintain the common property, the infrastructure, and building elements.[33] It has power to levy unit owners to comply with these obligations.[34]

[58] QSMTL has not paid the levies required to enable the body corporate to meet its statutory obligations. If Mr Gilbert, as receiver of QSMTL is not personally

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30 See above at [9]; Unit Titles Act, s 54(2).
31 Sections 116 and 117.
32 Section 135.
33 Section 138.
34 Section 121.

liable, then QSMTL and/or Gartmore Nominees Ltd as the security holder, will be enjoying, without payment, a variety of services required to be provided by the body corporate. A body corporate has no power to levy unit owners differentially. Rather their liability is governed by their unit entitlements. If QSMTL or Mr Gilbert do not pay their share of the levies, then the burden will fall on other unit owners. Mr Gilbert could elect to remain in the property indefinitely, derive whatever income is being obtained from it, and repay Gartmore Nominees Ltd the monies owing to it, effectively at the expense of other unit owners, who have not charged their units in favour of Gartmore. In our view this is the sort of inequity which s 32(5) was designed to avoid.

[59] Mr Chisholm argued that a mortgagee in possession is not liable to pay body corporate levies, and that it therefore follows that a receiver of a mortgagee should be in a similar position.

[60] We do not consider that this submission is soundly based. There is no statutory provision to the effect that mortgagees in possession are not liable for the payment of body corporate levies. Rather pursuant to s 105(3) of the Unit Titles Act, body corporate operational rules are binding on the body corporate, the owners of principal units, any person who occupies a principal unit, and any mortgagee who is in possession of a principal unit. If the operational rules of a body corporate provide that unit holders must pay body corporate levies, then clearly there will be an obligation on a mortgagee in possession to pay those levies. If the body corporate's operational rules require all owners to abide by Acts in force in relation to the use, occupation or possession of the unit, as they do in this case, then again a mortgagee in possession will be liable to pay levies, because the obligation to do so is contained in s 80(1)(f) of the Unit Titles Act.

[61] Mr Chisholm also submitted that Mr Gilbert could not cause QSMTL to simply cease to own the unit, unless the unit was sold. He submitted that Mr Gilbert had no choice, and no ability to avoid personal liability.

[62] Again, we do not agree for three primary reasons:

(a) Mr Gilbert could have sold, or at least endeavoured to sell the units during the 14 day breathing space afforded by s 32(6). We accept that the value of the units may be affected by uncertainty in relation to the development covenant, and the letter of understanding dated 24 November 2010. There was however nothing before the Court which suggests that the units are worthless, or that they are unsaleable, until those issues are resolved. It appears that in effect Mr Gilbert has chosen not to sell the units, but to continue to hold them. The fact that Mr Gilbert had a choice is implicit from his affidavit. He there said that he has "determined as receiver that the appropriate course of action is to have [the redevelopment] issues resolved before a sale can proceed". This is in effect a concession by Mr Gilbert that he had the option to sell, but that he chose not to do so.

(b) If Mr Gilbert was concerned at the possibility of incurring personal liability, he could have retired as a receiver,[35] made application under s 32(7), or sought the directions of the Court.[36]

(c) Mr Gilbert, as receiver, is entitled to an indemnity out of the property in receivership in respect of his personal liability arising under s 32(5).[37]

[63] For these reasons, we have concluded that Mr Gilbert has no arguable defence to the body corporate's claim for the levies owing for units 3A to 3E as from 9 August 2013, to the date of this judgment. Mr Gilbert is personally liable for the levies due over this period.

[64] In addition, Mr Gilbert is personally liable to pay interest, at the rate of 10 per cent per annum on the outstanding levies from the last day of each month, until the date of this judgment. The body corporate rules so provide. Interest on overdue levies and costs was agreed by unit owners by way of resolution of the body corporate passed on 7 August 2012.

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35 Receiverships Act, s 11.
36 Section 34.
37 Section 32(9).

(c) Is Mr Gilbert entitled to relief under s 32(7)?

[65] Mr Chisholm submitted that Mr Gilbert has an arguable case under s 32(7), either to limit his personal liability, or to be excused from it.

[66] We note that Mr Gilbert has not made an application under the subsection.[38] Further we are satisfied that Mr Gilbert does not, in the circumstances of this case, have an arguable case for relief under s 32(7).

[67] Mr Gilbert is asserting that QSMTL has a dispute with the body corporate in relation to the development agreement and the letter of understanding. He asserts that QSMTL has a claim against the body corporate for an amount which exceeds the unpaid levies.

[68] There is a fundamental difficulty in this argument. The effect of our judgment is that Mr Gilbert is personally liable for the levies. This precludes any suggestion that his liability should be limited by the fact that he is, in law, the agent of QSMTL. If there is a bona fide dispute between QSMTL and the body corporate, there is no mutuality between the body corporate and Mr Gilbert, which would entitle Mr Gilbert to set off his personal liability against any damages payable by the body corporate to QSMTL. There is no set off available at common law.

[69] Where mutuality is lacking, it is, in some circumstances, possible to maintain an equitable set off, but only provided that there is a necessary relationship between claim and cross-claim.[39] The cross-claim must so affect the plaintiff's claim that it would be unjust to allow the plaintiff to have judgment without bringing the cross-claim to account. The link must be such that the two are in effect interdependent.[40]

[70] Here there is an insufficient nexus between any claim which Mr Gilbert says QSMTL may be able to make against the body corporate, and the body corporate's

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[38] The request in Mr Gilbert's affidavit that the Court "exercise its discretion under s 32(7) of the Act to excuse [him] from any such liability" is part of the evidence; it cannot suffice as an application made pursuant to s 32(7).

[39] Laws of New Zealand *Set-off and Counterclaim* at [35].

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

claim for levies. Any liability the body corporate may be under is not interdependent with Mr Gilbert's obligation to pay the levies. The issues relating to the redevelopment rights and the letter of understanding dated 24 November 2010 have no bearing on the issue of whether or not the body corporate levies are due and payable.

[71] We also note that QSMTL failed to prosecute the proceedings earlier advanced by it in this regard.

[72] We are satisfied that there are no factors disclosed in the affidavits that have been filed which could arguably lead the Court to exercise its discretion under s 32(7) to limit or excuse Mr Gilbert's personal liability. The obligation to pay the body corporate levies is plainly due. Mr Gilbert has been aware of that obligation from the outset. He has continued to receive the benefits of the body corporate fulfilling its obligations imposed by the Unit Titles Act, and he has continued to derive benefit from his ongoing occupation of units 3A to 3E.

[73] We can see no arguable defence to the claim for summary judgment.

Costs

[74] Unit owners resolved at the body corporate's annual general meeting held on 7 August 2012 that all costs associated with debt recovery by the body corporate should be on-charged to the proprietor in default, in accordance with ss 124(2) and 128 of the Unit Titles Act.

[75] On this basis, Ms Anderson seeks indemnity costs on behalf of the body corporate.

[76] Mr Chisholm responds by noting that a claim for indemnity costs was not pleaded. He also asserts that neither reasonable costs pursuant to s 124(2) of the Unit Titles Act, nor any costs directly imposed on owners by the body corporate's resolution, are payments due under an agreement relating the use, possession or occupation by the grantor under s 32(5).

[77] Costs were sought in relation to the first cause of action relating to unpaid levies in the amended statement of claim. We do not consider that it is necessary to spell out the basis on which a costs claim will be advanced. The agreement which we have found to exist requires unit holders to abide by the body corporate rules. The body corporate rules provide for the recovery of solicitor/client costs. In such circumstances this Court can order a party to pay indemnity costs.[41]

[78] Section 124(2) of the Unit Titles Act provides that the amount of any unpaid levy, together with any reasonable costs incurred in collecting that levy, is recoverable as a debt due to the body corporate. The use of the words "reasonable costs" does not compel the conclusion that solicitor/client costs cannot be recovered. Rather it compels the conclusion that it is only reasonable solicitor/client costs, objectively assessed, that can be recovered.[42]

[79] We conclude that the body corporate is entitled to recover its reasonable solicitor/client costs from Mr Gilbert.

Result

[80] The appeal is allowed.

[81] Judgment is entered in favour of the body corporate against Mr Gilbert as receiver of QSM Trustee Ltd. Mr Gilbert is personally ordered to pay the body corporate levies outstanding in respect of units 3A to 3E (inclusive) in the Mid City complex, from 9 August 2013 to the date of this judgment.

[82] In addition Mr Gilbert is personally ordered to pay interest on the outstanding levies, at the rate of 10 per cent per annum, calculated from the last day of each month to the date of judgment. Interest is not to be compounded.

[83] We anticipate that counsel will be able to reach agreement as to the resulting amount owing by Mr Gilbert to the body corporate. Leave is reserved to counsel to

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41 Court of Appeal (Civil) Rules 2005, r 53E(3)(e); *ANZ Banking Group (NZ) Ltd v Gibson* [1986] 1 NZLR 556 (CA) at 565–566 per Richardson J and 571 per Casey J.

42 *Black v ASB Bank Ltd* [2012] NZCA 384 at [77]–[98].

file memoranda in the High Court, in the event that they are unable to reach agreement as to the amount owing by Mr Gilbert to the body corporate.

[84] Mr Gilbert is ordered to pay to the body corporate its reasonable solicitor/client costs, together with its reasonable disbursements.

[85] Leave is reserved to counsel to file memoranda in the High Court in the event that there is any disagreement as to the costs or disbursements payable pursuant to this judgment.

Solicitors:
Grove Darlow & Partners, Auckland for Appellant
Tompkins Wake, Hamilton for First Respondent