IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-00817
CIV-2015-404-02754
[2016] NZHC 814

BETWEEN	AN LI TAO Plaintiff
AND	STRATA TITLE ADMINISTRATION LTD First Defendant
AND	JIGAR PANDYA Second Defendant
AND	
UNDER	Section 141 Unit Titles Act 2010
BETWEEN	AN LI TAO Applicant
AND	BODY CORPORATE 198693 Respondent

Hearing:	15 April 2016
Appearances:	Ms Tao in person E St John and C Baker for the Defendants/Respondent
Judgment:	27 April 2016

JUDGMENT OF THOMAS J

This judgment was delivered by me on 27 April 2016 at 4.30 pm
pursuant to Rule 11.5 of the High Court Rules.
Registrar/Deputy Registrar

Date:……..

Introduction

[1] The plaintiff, Ms An Li Tao, is the registered proprietor of one of 36 units in a unit title development at 8 Margan Avenue, New Lynn, Auckland. She has filed a statement of claim making various claims against the defendants, Strata Titles Administration Ltd (Strata), the body corporate secretary, and Jigar Pandya, the body corporate chairperson. The defendants now apply for summary judgment against the plaintiff, on the basis that none of the claims can succeed.

[2] Ms Tao has also made an application for the appointment of an administrator under s 141 of the Unit Titles Act 2010, (the Act). This is opposed by the body corporate.

[3] Ms Tao's amended statement of claim alleges as follows:[1]

(a) That the service contract signed on behalf of the body corporate with Strata (the service contract) is invalid, as it was signed by Mr Pandya who did not have the authority to enter into such a contract, and his signature was not witnessed, in breach s 108 of the Act, and Regulation 17 of the Unit Titles Regulations 2011 (the Regulations). She also alleges that the service contract is invalid because there have been changes to it without informing the body corporate members, and that the cancellation clause is unfair.

(b) That Strata, acting as body corporate manager from 2012 – 2014, failed to keep financial statements, and has failed to provide bank statements, invoices and other documentation as proscribed by the Act and Regulations.

(c) That Strata has not properly convened the body corporate annual general meetings (AGMs) between 2013 and 2015 because notices of the AGMs were not received by all members.

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[1] Excluded are some points which are simply statements and do not allege any conduct.

(d) That Strata misled Ms Tao, and other owners, with respect to creating an owner's committee.

(e) That Strata has failed to maintain the common areas, under s 138 of the Act.

(f) That Strata has raised body corporate levies unjustly.

(g) That Strata has not provided details of the bank accounts into which levies are paid, in breach of s 120 of the Act.

(h) That Mr Pandya has never been elected chairperson of the body corporate, and therefore has no authority to act as chairperson. He has breached the requirements for calling meetings, and has failed to keep financial accounts and records in accordance with the responsibilities of a body corporate chairperson under the Regulations.

[4] On the basis of these causes of action, Ms Tao claims the following relief:

(a) A refund of $157,985.71 from Strata to the body corporate;

(b) Cancellation of the service contract, including cancellation of all current levy invoices;

(c) A refund of the remaining body corporate fund (approximately $47,331.92) currently held by Strata back to the body corporate; and

(d) Removal of Mr Pandya as body corporate chairperson (if he has ever legitimately held this position).

[5] The defendants say that Ms Tao has alleged generally that the body corporate has been mismanaged, as well as alleging fraud and conspiracy, but that none of the causes of action identified in Ms Tao's statement of claim can succeed. The

defendants say that Ms Tao's pleadings are not conventional, and there are different causes of action but only one prayer for relief, as detailed above.

[6] The defendants maintain that Ms Tao has no standing to seek any of these remedies, other than the removal of the chairperson, as they should be sought by the body corporate itself. Further, that none of the causes of action has any legal or factual basis for success. The managing director of Strata and Mr Pandya have provided affidavits in support of their position.

[7] Ms Tao says that the summary judgment application is absurd and groundless as there are still many legal issues to be determined under both legislation and common law.

[8] Ms Tao claims that the "invalid" service contracts have no legal binding power and should be ended. Furthermore, she claims that the operating accounts of the body corporate must be established by the body corporate, and that there is no evidence that Strata has been nominated to administer the body corporate funds. She objects to service fees being charged by Strata.

[9] Ms Tao then says that the owners have not received any contact from Mr Pandya for the past few years, including no printed meeting agendas, financial statements, or postal voting forms.

[10] Eight other body corporate owners have signed affidavits supporting Ms Tao's actions, and confirming her claims that they have not received postal voting forms and/or notices for the AGMs from 2013 to 2015, that the service contract was not validly witnessed, and that Mr Pandya was not elected as chairperson of the body corporate and was not authorised to enter into any contracts. The affidavits also confirm that there has been no further maintenance work, despite levy rates going up "madly".

[11] Overall, Ms Tao raises serious accusations against Strata and Mr Pandya. She was cautioned against this when her earlier application for an injunction was

heard.[2] Notwithstanding clear evidence, she has persisted with a number of her allegations. This extended to claiming that the lawyers preparing the bundle for the summary judgment application had falsified the copy of an affidavit by inserting an additional page into the copy of an exhibit to one of Mr Pandya's affidavits. It was explained to her in painstaking detail at the hearing that the reason for her confusion was that two copies of the same page were inserted in the bundle, one being a full copy of the front of the page and the other being a copy of the folded over page showing the exhibit note on the back. I invited Ms Tao to inspect the Court file to satisfy herself of this but she assured me that she accepted the position. Notwithstanding that, however, she filed a memorandum with the Court after the close of the hearing repeating her allegation.

[12] This decision is structured as follows:

Part I – Collation of Ms Tao's complaints under the following headings:

(i) Validity of the service contract;

(ii) Challenges to Strata's and Mr Pandya's authority;

(iii) Challenges to Mr Pandya's and Strata's compliance with the Act and Regulations.

Part II – The application for summary judgment;

(i) The law;

(ii) An analysis of the application considering:

(b) Standing;

(c) Causes of action;

Part III – The application for appointment of an administrator;

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2 *Tao v Strata Title Administration Ltd* [2015] NZHC 2215 at [27].

(i) The law

(ii) Analysis

[13] The matters dealt with under Part I comprise a general overview of the various complaints raised by Ms Tao and underlie the claims in her statement of claim and her application for appointment of an administrator.

Part I

(i) Validity of the service contract

[14] The service contract between the body corporate and Strata was signed on 12 March 2015. The copy of the service contract exhibited to the affidavit of Mr Pandya dated 20 June 2015 shows it as signed by Mr Pandya, and witnessed by Mr Burt Ong, a member of the body corporate "working group" (formed following a body corporate resolution not to form a committee) and a unit owner.

[15] However, the copy of the service contract annexed to Ms Tao's affidavit shows it as un-witnessed. She says that her version of the contract was obtained when proceedings were brought against her in the Residential Tenancy Tribunal.

[16] Regulation 17 provides:

> **17 Method of contracting**
>
> (1) Subject to subclause (2), a body corporate may not enter into an obligation without the body corporate's approval by ordinary resolution.
>
> (2) Subclause (1) does not apply if the body corporate is required to enter into an obligation urgently for the purpose of avoiding serious damage to property or preventing injury.
>
> (3) Subclause (4) applies to the following obligations:
>
> > (a) an obligation that, if entered into by an individual, is required to be by deed; and
> >
> > (b) an obligation that, if entered into by an individual, is required to be in writing.

> (4) An obligation to which this subclause applies may be entered into on behalf of the body corporate in writing by the chairperson, or by the committee chairperson if this power has been delegated to a body corporate committee, and must be witnessed by—
>
> > (a) 1 member of the body corporate committee; or
> >
> > (b) if no body corporate committee has been elected, 1 member of the body corporate; or
> >
> > (c) if there is only 1 member of the body corporate, a person who is not a member of the body corporate and who is not a party to, or otherwise interested in, the obligation.
>
> (5) An obligation that, if entered into by an individual, is not required to be in writing may be entered into on behalf of the body corporate in writing or orally by the chairperson, or by the committee chairperson if this power has been delegated to a body corporate committee.
>
> (6) In this Regulation, obligation means a contract or other enforceable obligation.

[17] Except in the case of an emergency, a body corporate may not enter into an obligation without the body corporate's approval by ordinary resolution. The 2015 AGM minutes record, at paragraph 8, that it was resolved that a service contract be entered into with Strata, and that Mr Pandya agree its terms and sign it on the body corporate's behalf. On 13 March 2015 Strata sent copies of the minutes of the 2015 AGM, the approved budget for the 2015 year, and the service contract to all owners.

[18] At the EGM, discussed in more detail below, the resolution to terminate the service contract failed.

[19] The obligation for an agreement to be in writing and witnessed under Regulation 17(4) applies only where, had the obligation been entered into by an individual, it would be required to be either by deed or in writing. If the obligation, if entered into by an individual, would not be required to be in writing, it may be entered into in writing or orally by the chairperson pursuant to Regulation 17(5).

[20] Section 13 of the Property Law Act 2007 relates to contracts entered into by bodies corporate and is essentially consistent with Regulation 17. There is no general requirement for contracts to be in writing, and there is nothing to suggest that a

contract in the nature of the service contract warrants being made in writing.[3] Therefore, pursuant to Regulation 17(5) Mr Pandya could have entered into the service contract either in writing or orally. There was no need for it to have been witnessed. Furthermore, any challenge to the execution of the service contract can be brought only by the parties to it – either Strata or the body corporate

[21] Ms Tao says that the front page of that document, where it has a witness' signature is forged. The defendants accept that the witness signed the document some time after its execution by Mr Pandya. However, as noted, no witnessing is required and this does not affect the validity of the service contract.

[22] The only other grounds on which Ms Tao claims the service contract is invalid relate to its content, the "unfair" cancellation clause and other changes which Ms Tao says occurred without informing the body corporate members, a complaint which appears to relate to the changes in the 2015 service contract as compared with the earlier service contracts. None of these complaints can be legitimately pursued by Ms Tao given the body corporate's resolution authorising Mr Pandya to agree the terms of and enter into the contract.

(ii) Challenges to Strata's and Mr Pandya's authority

[23] Ms Tao challenges Mr Pandya's standing as chairperson of the body corporate. The minutes of the 2015 AGM record that Mr Pandya had been the chairperson for the prior three years, and that he was re-nominated and it was resolved to appoint him as chairperson.

[24] Ms Tao challenges the notifications surrounding the AGMs between 2013 and 2015, saying that they were not properly convened as notices pursuant to the Regulations were not given. Regulations 5 and 6 require:

> **5 Notice of intention to hold annual general meeting**

[3] For example, the specific types of contracts falling within ss 24 - 27 of the PLA 2007, which are contained in the subpart entitled "Writing required in certain cases".

(1) A notice of intention to hold an annual general meeting must be issued to every unit owner in the unit title development by each owner's preferred method of contact.

(2) A notice of intention to hold an annual general meeting must be issued by—

(a) the body corporate, in the case of the first annual general meeting; and

(b) the chairperson, in the case of every other annual general meeting.

(3) A notice of intention to hold an annual general meeting must be issued—

(a) at least 6 weeks before the date of the annual general meeting where the unit title development is a parent unit title development; or

(b) at least 3 weeks before the date of the annual general meeting in every other case.

(4) A notice of intention to hold an annual general meeting must—

(a) state the date, time, and venue of the meeting; and

(b) state that a unit owner may not vote unless all body corporate levies and other amounts that are from time to time payable to the body corporate in respect of the unit have been paid; and

(c) invite unit owners to nominate candidates for election—

(i) as the chairperson:

(ii) as the subsidiary body corporate representative where the body corporate is a subsidiary body corporate:

(iii) to the body corporate committee (where applicable); and

(d) state that candidates must be owners of principal units in the unit title development; and

(e) invite unit owners to propose matters for discussion at the meeting; and

(f) state the date by which nominations under paragraph (c) and proposals under paragraph (e) must be received, and to whom they must be sent.

6 Notice of annual general meeting

(1) Notice of an annual general meeting must be issued to every unit owner in the unit title development by each owner's preferred method of contact.

(2) Notice of an annual general meeting must be issued by—

(a) the body corporate, in the case of the first annual general meeting; and

(b) the chairperson, in the case of every other annual general meeting.

(3) Notice of an annual general meeting must be issued—

(a) at least 3 weeks before the date of the annual general meeting where the unit title development is a parent unit title development; or

(b) at least 2 weeks before the date of the annual general meeting in every other case.

(4) Notice of an annual general meeting must—

(a) set out the agenda for the meeting; and

(b) contain the text of motions to be decided by resolution (if any); and

(c) contain the names of the candidates for election; and

(d) set out the voting procedures for unit owners who wish to vote by proxy or by post; and

(e) set out the procedure to be followed if a quorum is not present; and

(f) contain any other information that the body corporate or chairperson (as the case may be) considers relevant.

(5) Notice of an annual general meeting must be accompanied by the following documents:

(a) a proxy appointment form; and

(b) a postal voting form; and

(c) a copy of the financial statements for the most recent financial year; and

(d) any other document that the body corporate or chairperson (as the case may be) considers relevant.

[25] Ms Tao and seven other unit owners have provided affidavits stating that they never received notices of AGMs compliant with these regulations. Strata says that it has complied with the requirements, and offers evidence of compliance through documents annexed to the affidavit of Michael Williams, managing director of Strata. These show the documentation surrounding the notices of intention to hold an AGM and notice of AGM sent to unit owners between 13 February 2013 and 9 April 2015. The evidence shows mailing checklists detailing the proposed delivery method for "levy delivery" and "meeting delivery" for each unit owner, dated by

hand. There is a tick next to each name, indicating that the relevant documents were mailed or emailed to the addresses provided.

[26] The defendants cannot prove that Ms Tao and those who support her did receive the notices. However, the Regulations do not require service of such notices. Rather, the requirement is for them to be **issued**. Generally, if a document is to be served, it must be received by the person who is to be served, whereas there is no such requirement if a document is to be issued. This distinction is supported by the contrasting definitions of issue and service in *Spiller's Legal Dictionary*: with service meaning "the giving of notice by one party to another", as opposed to issue meaning "the act of delivery; emission; sending".[4]

[27] However, s 205 of the Act provides for a more lenient standard for service where it is required under the Act as opposed to that required under the High Court Rules,[5] allowing a document to be served by, inter alia, post or email with delivery and receipt deemed to have occurred on proof of certain matters. The Act requires documents to be served in some cases, for example, notice of a designated resolution must be served pursuant to s 213 of the Act. There is no requirement to serve notices of AGMs or indeed EGMs. The Act and Regulations clearly distinguish between which documents must be served and which must be issued. The relatively more lenient requirement for service emphasises that, if a document is only to be **issued,** no proof of receipt is necessary. There is good reason why the Regulations provide as they do - it would be onerous and unworkable if notices of general meetings had to be served on all owners.

[28] The evidence provided by the defendants shows that the various notices were issued in accordance with Regulations 5 and 6. Strata has produced its business records recording the addresses to which the documents were sent.

[29] Regulation 4 provides for a body corporate to hold a register of unit owners which includes their contact details and preferred method of contact. Pursuant to Regulation 4(3) the register of unit owners may be searched by inter alia the

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[4] Peter Spiller *Butterworths New Zealand Law Dictionary* (7th edition, LexisNexis, Wellington, 2011).

[5] Kenneth Palmer and others (eds) *Land Law* (online looseleaf edition, Westlaw) at [UTA205.03].

chairperson and any person approved by the body corporate for purposes including giving notice of body corporate meetings, advising owners of matters relating to the body corporate and forwarding information.

[30] Inherent in that regulation is that a person approved by the body corporate will be able to fulfil the purposes set out in Regulation 4(4). Strata is entitled to have the contact details of owners, give notices of meetings and forward information or documentation to owners, including the minutes of meetings. There is nothing which precludes the chairperson from procuring that the requisite notices of AGMs are issued.

[31] This also deals with Ms Tao's concern as to whether Mr Pandya has fulfilled his responsibilities as chairman to notify owners about certain matters. Where these matters have been included in the body corporate meeting minutes, Mr Pandya has procured compliance with his obligations.

[32] Ms Tao claims that she attended the AGM on 7 March 2013, but that no voting occurred, despite the resolutions being marked resolved. She says that, although the meeting minutes state that the AGM was adjourned to 14 March 2013, no owners attended that adjourned AGM other than Strata itself. Ms Tao says that the AGM minutes are incorrect in saying that she gave her proxy vote to Strata for that adjourned AGM. In support of this, she points to her own affidavits.

[33] Regulation 13 provides, if there is no quorum at an AGM, there is automatically a reconvened meeting in seven days at which a quorum is not required. The documents confirm that this took place in 2013. There is nothing which precludes Strata acting as a proxy. Even if Ms Tao is correct in her allegation that she did not give her proxy to Strata, no relief is claimed in this regard.

[34] Ms Tao also claims that Mr Pandya was removed as chairperson, effective at an EGM held on 16 April 2015. On 25 March 2015 Ms Tao requested Mr Pandya to convene an EGM for the purpose of removing Mr Pandya as chairperson. The meeting was convened for 16 April 2015.

[35] Notice of intention to hold an EGM dated 2 April 2015 was sent out by Strata to owners and notice of an EGM was sent on 9 April 2015. These notices complied with the requirements of regulations 7 and 8. On 8 April 2015, Mr Pandya sent a letter to owners putting forward his side of the dispute. The notices reminded unit owners that they were not entitled to vote unless all body corporate levies and other dues were up to date. These were, just, at least two weeks between the notice of intention and date of the EGM, as required by Regulation 7, where an EGM is held to elect a chairperson.

[36] According to the minutes of the meeting, Ms Tao was unsuccessful in her motion to remove Mr Pandya as chairperson because fifteen owners in attendance were unable to vote as they had not paid their levies

[37] Section 96 of the Act provides that an eligible voter may not vote unless "all body corporate levies and other amounts that are from time to time payable to the body corporate in respect of his or her unit have been paid." In a previous decision in this matter, Woodhouse J informed Ms Tao that this provision was mandatory, in that a person who has not paid a levy is not entitled to vote regardless of any possible contention over the scale of the payment.[6]

[38] Section 96 relevantly provides:

> **96 Voting: eligibility**
>
> …
>
> (4) In the case of an eligible voter who is a subsidiary body corporate representative, the eligible voter may not vote unless all body corporate levies and other amounts that are from time to time payable to the body corporate by the subsidiary body corporate have been paid.
>
> …
>
> (6) The payment of any body corporate levies and other amounts that are from time to time payable to the body corporate by the owner of a principal unit and that are disputed by the owner does not affect the right of that owner to dispute the payment if the sole purpose of making the payment was to exercise that owner's entitlement to vote.

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6 *Tao v Strata Title Administration Ltd* [2015] NZHC 2215.

[39] This provision makes it clear that, had Ms Tao and indeed any other owners taken issue with the 2015 levy, in order to be eligible to vote, they should have paid the levy without prejudice to their entitlement to dispute it.

[40] Ms Tao argues, presumably in the alternative, that Mr Pandya deliberately delayed the EGM to jeopardise members' voting rights, and that this breached s 90 of the Act which sets out who may call an EGM. There appears to have been no undue delay: he sent the notice out on 2 April following notification on 25 March, which was a week later. Given the EGM agenda included the election of a chairperson and body corporate committee members, a notice of intention to hold an EGM, as well as a later notice of EGM were required. The notice of intention to hold an EGM was required to be issued a minimum of two weeks prior to the EGM. In those circumstances, and noting the need to comply with other procedural requirements,[7] it is clear that the EGM was called as soon as reasonably practicable.

[41] The documentation shows that the EGM was properly called and that the motion to remove Mr Pandya validly failed. He remains the chairperson of the Body Corporate.

(iii) Challenges to Mr Pandya's and Strata's compliance with the Act and Regulations

[42] Ms Tao mounts various attacks on Mr Pandya and Strata claiming non-compliance with the Act and the Regulations.

[43] In relation to the alleged failure to provide financial statements and documents verifying expenditure on behalf of the body corporate in compliance with s 132 of the Act, the defendants' affidavits show that they have kept accounting records in accordance with s 132(1) of the Act and have had them audited.

[44] The AGM documents since 2013 show the relevant yearly financial statements accompanying the notices of AGMs, as required by the Act. These are in the prescribed form. Ms Tao alleges that the defendants must provide bank

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7 Regulation 7(4).

statements, invoices, receipts and insurance policy documents to verify the expenditure in the financial statements. There is no obligation to provide all the documents Ms Tao seeks other than as may be required for the purposes of an audit.

[45] In relation to the alleged misleading of owners as to the merits of electing a body corporate committee rather than a working group, Ms Tao says that in 2012 a Mr Wilson advised that there was possible personal liability on committee members and that this advice violated s 112(2) of the Act. That section requires the formation of a body corporate committee if there are 10 or more principal units. However, there is an exception if the body corporate by special resolution decides not to form a committee. Under s 98, a special resolution requires 75 per cent of eligible voters to support the resolution. There have been clear special resolutions resolving not to do so, recorded at the 2013, 2014 and 2015 AGMs. There is thus no breach of the Act.

[46] As to the advice, the defendants say it was not misleading and that a committee could have been appointed and now has been.

[47] A committee was formed at the EGM. Pursuant to Regulation 7(2) election of committee members can take place at an EGM, provided the notice requirements are met which, as detailed above, they were.

[48] Regulation 24 appears to suggest that the election of a body corporate committee must take place at an AGM. Regulation 25(4) provides that, if removal or resignation of a committee member reduces the membership of the committee below that required for a quorum, the committee must issue a notice of intention to hold an EGM to elect a new committee member. Both those Regulations read together support Ms Tao's proposition that formation of a body corporate committee takes place at an annual general meeting where the meeting is to decide how many members will comprise the committee and what constitutes the quorum. She, therefore, takes issue with the formation of the committee at the EGM although conversely, she claims she is a member of the committee.

[49] I am not convinced that the Regulations preclude a resolution to form a committee at an EGM. Indeed, given the Act allows a body corporate with more

than 10 principal units to resolve not to form a committee,[8] it would be surprising if that decision could not be reversed until the next AGM. For these reasons, I am not persuaded that any illegality attaches to the formation and constitution of the committee at the EGM. Even if it did, the correct defendant in any proceeding to challenge that point is the body corporate.

[50] Ms Tao claims that no maintenance has been undertaken, despite being charged for it by Strata since 2012. In her statement of claim, she alleges that this breach entitles her to cancel the service contract. Again, Ms Tao is not a party to the contract so cannot seek its cancellation.

[51] In any event, the service contract does not require Strata to carry out maintenance work. The only relevant obligation is for Strata to deal with consulting engineers for the purpose of long-term maintenance plans or other maintenance matters. The body corporate retains the primary responsibility for maintaining common areas. The body corporate is in charge of repair and maintenance of common property under s 138 of the Act. Body corporate levies include maintenance charges.

[52] Next, Ms Tao alleges that Strata has raised the levies every year without sufficient agreement of the owners. However, the levies are agreed by the body corporate members by AGM each year. They are not raised by Strata. The AGM minutes show that the body corporate has determined the annual budget each year, which then forms the basis of the annual levies on unit owners. Strata has not breached any duties.

[53] The 2015 AGM agenda noted the following:

> That the Body Corporate adopts a budget of $52,032.31 for the period 1 February 2015 to 28 January 2016 and sets levy due dates as 15 April 2015 (60%) and 15 September 2015 (40%);

[54] The AGM approved a budget of over $70,000 after voting to increase the contingency fund as a result of certain owners not fulfilling an arrangement to paint their own units.

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[8] Section 112.

[55] Section 101(3) of the Act provides:

> **101 How matters at general meeting of body corporate decided**
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> …
>
> (3) Any matter that is not on the agenda for a general meeting may be discussed at the meeting but, unless all the eligible voters are present at the meeting, no resolution may be voted on and made in respect of that matter except to include that matter on the agenda for a subsequent general meeting.

[56] Because the discussion was part of the budget and levies, this was not a "matter" not on the agenda.

[57] There is a potential issue with the budget because it is unclear whether any postal votes were counted as part of the approval of the revised budget. This is because, pursuant to Regulation 15(1), if the text of a motion is "materially" amended at a general meeting, a postal vote cast on the motion must not be counted in relation to that.

[58] Mr St John submitted that the amendment was not material as it amounted to approximately $550 per unit payable over 12 months. However, the fact that it constituted an increase of approximately 34 per cent means that it must constitute a material change.

[59] It is clear from the minutes of the AGM that postal votes were received. However, the number of those votes and the impact on the final decision is unclear. The minutes do not reveal if there were any opposition to the motion. In saying that, it would be a surprise indeed if the number of postal votes were so high as to be critical to the passing of the resolution and if so, it could reasonably be expected that the minutes would record that. Furthermore, the minutes specifically record that the proposed increase to the contingency fund budget "was agreed by owners present". This would seem to dispose of this issue.

[60] Furthermore, any issue regarding the levies cannot be resolved through these proceedings where Ms Tao is suing Strata, the body corporate secretary, and the chairperson. Any challenge to the levy is correctly brought against the body corporate. Ms Tao was on notice of this when she sought a mandatory interim

injunction against the defendants. Woodhouse J informed her that the means by which unit owners can seek to revisit the amount of the levy is by requiring an EGM to be convened.[9] He noted that the body corporate itself should probably be a defendant.[10] When he dismissed her application, he made directions including that she file an amended statement of claim which could include an application to add a party. Ms Tao did file an amended statement of claim but the body corporate has not been added as a party.

[61] Finally in relation to Strata, Ms Tao alleges that it has breached s 120 of the Act by failing to provide bank statements to the owners. Section 120 requires each body corporate to maintain either a separate bank account for its funds, or a single bank account in which the respective funds are kept entirely separate and are able to be identified. Section 120 does not provide for the disclosure of any bank statement information, and Strata's evidence shows that it keeps a compliant account with financial details reviewed by an auditor. The auditor's report is sent out to owners along with the AGM agenda and materials, and has been approved by the body corporate at each AGM. Section 120 places no disclosure obligations on Strata, and there is no other evidence that it is in breach of s 120 as alleged.

[62] Ms Tao then claims that Mr Pandya failed to keep any financial accounts and records in terms of cl 11(b) - (g) of the Regulations. Regulation 11 reads:

> **11 Duties of chairperson**
>
> (1) Subject to subclauses (2) and (3), a chairperson has the following duties:
>
> (a) to maintain the register of unit owners; and
>
> (b) to prepare the agenda for each general meeting; and
>
> (c) to chair each general meeting (unless it is agreed at the start of a general meeting that another person will chair that meeting); and
>
> (d) to prepare minutes of each general meeting; and
>
> (e) to record resolutions voted on and whether they were passed; and
>
> (f) to keep financial accounts and records; and

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9 *Tao v Strata Title Administration*, above n 2, at [16].
10 *Tao v Strata Title Administration*, above n 2, at [29].

> (g) to submit, on behalf of the body corporate, the body corporate's financial statements to an independent auditor under section 132(2)(a) of the Act; and
>
> (h) to receive reports from the body corporate committee and distribute them to unit owners; and
>
> (i) to sign documents on behalf of the body corporate; and
>
> (j) to prepare and issue notices of resolutions to be passed without a general meeting; and
>
> (k) to notify unit owners of the result of any vote on a resolution to be passed without a general meeting; and
>
> (l) to notify the body corporate committee of any delegation of a duty or power by the body corporate to the body corporate committee under section 108 of the Act; and
>
> (m) any other duties relating to the administration of the body corporate that the body corporate has decided by ordinary resolution to confer on the chairperson.
>
> (2) A chairperson has all of the duties specified in subclause (1)(a) to (m) except to the extent that the body corporate has delegated any of the duties to the body corporate committee under section 108(1) of the Act.
>
> (3) The duties specified in subclause (1) are in addition to those conferred elsewhere by these Regulations or by the Act.

[63] Ms Tao claims that Mr Pandya's failure to comply with these has led to the loss of the body corporate fund. There is no loss, as the money is held in a bank account by Strata. Further, the duties which Ms Tao alleges Mr Pandya has failed to perform are those which Strata is contracted to perform. Although he has not personally performed them, he has contracted on behalf of the body corporate to ensure they have been performed.

[64] Notably, there are no restrictions on the ability of a chairperson to procure that any functions are carried out by another. Indeed, it would be an extraordinary burden on a chairperson were he or she not able to do so. Judicial notice is taken of the fact that a considerable number, and likely the vast majority of bodies corporate, employ managers.

PART II SUMMARY JUDGMENT

(i) Legal principles

[65] The Court may grant summary judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.[11] Thus, the defendants must prove on the balance of probabilities that Ms Tao's claim cannot succeed, similar to an application for strike out but with further affidavit evidence.[12] In *Westpac Banking Corporation v M M Kembla NZ Ltd*, the Court said:[13]

> [64] The defendant bears the onus of satisfying the Court that none of the claims can succeed. It is not necessary for the plaintiff to put up evidence at all although, if the defendant supplies evidence which would satisfy the Court that the claim cannot succeed, a plaintiff will usually have to respond with credible evidence of its own. Even then it is perhaps unhelpful to describe the effect as one where an onus is transferred. At the end of the day, the Court must be satisfied that none of the claims can succeed. It is not enough that they are shown to have weaknesses. The assessment made by the Court on interlocutory application is not one to be arrived at on a fine balance of the available evidence, such as is appropriate at trial.

[66] *McGechan on Procedure* states:[14]

> It is important for the plaintiff to establish sufficient basic facts to raise at least a prima facie case against the defendant. Where there is insufficient detail, the Court may not be persuaded that there is no possible defence.

[67] The Court of Appeal has summarised the correct approach to assessing the available evidence, in the context of summary judgment by a plaintiff, as follows:[15]

> The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 341. In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA)."

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11 High Court Rules, r 12.2(2).

12 *Westpac Banking Corp v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [61].

13 *Westpac Banking Corp v M M Kembla New Zealand Ltd*, above n 2.

14 Andrew Beck and others *McGechan on Procedure* (online looseleaf edition, Westlaw) at [HR12.2.06].

15 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 (CA) at [26].

Submissions

[68] The defendants provided affidavit evidence and submissions in support of their position.

[69] Ms Tao's submissions summarise the law of negligence. She appears to be claiming that, in order to determine the merits of her claim, the Court should look into whether the defendants owe duties to the body corporate as justification for the causes of action. She says that the required standard of care has not been met, and that, where the statutory duties and the law do not provide the right remedies for breaches of those laws and duties, negligence should step in.

Analysis

(a) *Standing and jurisdiction*

[70] There are some preliminary problems with Ms Tao's claims. One is her standing to claim the remedies she seeks. The defendants say that only the body corporate could claim the remedies Ms Tao seeks, other than the removal of Mr Pandya as chairperson.

[71] There are indeed some issues with Ms Tao's standing in respect of some of her claims. However, given the underlying challenge to, in particular, the resolutions at the 2015 AGM and EGM, which resulted in the service contract, raising of the levy, and appointment of Mr Pandya as chairperson, I propose to consider Ms Tao's claims notwithstanding any difficulties as to standing.

[72] There is a further issue as to the jurisdiction of the Court to grant the order sought to remove Mr Pandya as the chairperson of the body corporate. Regulation 12 provides a specific procedure for removal of the chairperson, using the EGM procedure. There is no specific authorisation for the Court to remove the chairperson outside of that process. Although the Act does not exclude the general operation of equity, and other common law processes,[16] where a specific process is mandated I

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[16] *Dominion Finance Group Ltd (in Rec and Liq) v Body Corporate 382902* [2012] NZHC 3325, (2012) 14 NZCPR 252.

doubt the Court's jurisdiction to grant this order. It is entirely appropriate that the power to remove the chairperson lies with the body corporate and not with the High Court. Indeed, the power for the High Court to step in comes under the power to appoint an administrator, considered below.

(b) Causes of action

[73] The statement of claim alleges that the service contract is invalid because Mr Pandya was never authorised to enter into it.

[74] The resolution at the 2015 AGM was:

> That the Body Corporate enters into a Service Contract with Strata to assist the Body Corporate to perform its duties under the 2010 Act and Regulations, and that the Service Contract is to be agreed with and signed by the Chairperson.

[75] It is clear from the minutes of the 2015 AGM that Mr Pandya was authorised to enter into the service contract. There is no breach of Regulation 17 or s 108 of the Act, for the reasons analysed above.

[76] The statement of claim pleads that the service contract was different from the previous version. There is nothing which would preclude this.

[77] The allegations of breaches of the Consumer Guarantees Act 1993 and Fair Trading Act 1986 cannot succeed, even if Ms Tao had standing. The complaints relate to the provisions of a negotiated contract where Mr Pandya was authorised by the body corporate to agree to the terms. Even taking Ms Tao's allegations at their highest, they would not support claims of breaches of either Act.

Claims against Strata

[78] The claims that Strata has failed to keep financial statements and is in breach of s 132(3) of the Act, Regulation 32 of the Regulations, part 2 of the Fair Trading Act and part 4 of the Consumer Guarantees Act cannot succeed for the reasons set out above.

[79] The claim that the AGMs between 2013 to 2015 were not properly convened cannot succeed for the reasons set out above. The requirement is only for the relevant notices to be issued. There is a difference between the requirement for documents to be issued as opposed to being served.

[80] The 2013 AGM was properly reconvened in accordance with Regulation 13. There is nothing to prevent Strata being a proxy.

[81] The decision to form a working group rather than establish a body corporate committee is one open to the Body Corporate pursuant to s 112 of the Act. Ms Tao's allegations that owners were misled must fail.

[82] Strata is not responsible for maintenance of the common areas. Any failures in this regard are failures of the body corporate which has those obligations pursuant to s 138 of the Act.

[83] Any issue as to the raising of the body corporate levy is a cause of action Ms Tao needs to pursue against the body corporate as discussed above, but it is plain there is no issue.

[84] It would be unusual if a party providing a service were not entitled to charge disbursements. In any event, this is a contractual issue between the body corporate and Strata. The 2015 AGM authorised the chairperson to agree the service contract.

[85] Even if there were any issue as to whether the bank account operated by Strata was in breach of s 120 of the Act, which, given s 120(b) and the evidence of compliance, it was not, a separate bank account has now been opened.

Claims against Mr Pandya

[86] There is nothing to substantiate the claim that Mr Pandya has never properly been elected as chairperson. In any event, his position was specifically confirmed by the 2015 AGM and EGM.

[87] Ms Tao and her supporters were properly disentitled to vote at the EGM given they had not paid their levies. As discussed above, the Act specifically provides for the position when the levy is disputed. The fact the EGM later resolved, as a goodwill gesture, to extend the due date for levy payment does not alter the position. This is so particularly when the AGM had voted as to the due date, and extension of the time for payment was not an agenda item for the EGM.

[88] Mr Pandya was specifically authorised by the 2015 AGM to agree and sign the service contract.

[89] Ms Tao's claim that Mr Pandya breached s 90 of the Act when he called the EGM cannot succeed. He was entitled to determine the matter was not an emergency and his decision was clearly correct.

[90] There is no evidence of procedural defects sufficient to invalidate any resolutions of the AGMs and EGM. Any other complaints, for example, that Mr Pandya did not sign the AGM minutes, are trivial and do not affect the validity of any resolutions.

[91] There is no evidence to substantiate the claim that Mr Pandya failed to comply with Regulation 11(1)(b), (d), (e), (f) and (g). Indeed, the evidence is to the contrary. There is nothing to preclude these obligations being carried out on behalf of the chairperson by a body corporate secretary.

[92] This analysis disposes of all the claims in the statement of claim. It is clear that the defendants have satisfied the Court that none of the claims can succeed.

[93] For the reasons given, summary judgment is given for the defendants.

Part III Application for an administrator

[94] The grounds for application for appointment of an administrator are set out as follows:

> (i) The existing litigation against the ill-famed body corporate manager (Strata Title Administration Ltd) and the person (Jigar Pandya) is still ongoing and will unlikely to be concluded soon.
>
> (ii) The majority of the owners have persistently refused to make levy payments to the illegitimated [sic] body corporate managers due to the serious concern over the safety of our funds. Our remaining body corporate fund of $30000 approximately is still held by that body corporate manger.
>
> (iii) Out body corporate is facing the great difficulties to operate as usual and the urgent matters need to be resolved in the due course, such as the continuance of our property insurance, urgent maintenance of common area and leaky units resolution etc.

[95] A notice of opposition to the application was filed by solicitors on behalf of the body corporate.

Legal principles

[96] Section 141 provides:

> (1) The body corporate, a creditor of the body corporate, or any person having a registered interest in a unit, may apply to the High Court for the appointment of an administrator.
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> …
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> (3) The High Court may, in its discretion on cause shown, appoint an administrator for an indefinite period or for a fixed period on such terms and conditions as to remuneration or otherwise as it thinks fit.
>
> …

[97] In this case, Ms Tao has standing to apply as a person with a registered interest in a unit. Section 141(3) gives a broad jurisdiction to the Court to appoint an administrator which has been described as "wide and open-textured".[17] Ellis J has suggested a number of matters which are potentially relevant to whether cause for the appointment of an administrator has been shown:[18]

> (a) the existence of any undemocratic or ultra vires decisions;
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> (b) the existence of any dysfunctionality or deadlock;
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> (c) the existence of any majority decisions that:

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17 D W McMorland and Thomas Gibbons *McMorland and Gibbons on Unit Titles and Cross Leases* (LexisNexis, Wellington, 2013) at 79.

18 *Melview Viaduct Harbour Ltd (in Rec) v Body Corporate 384911* [2012] 1 NZLR 84 (HC) at [71].

> (i) have been brought about by the improper influence of a third party;
>
> (ii) deliberately and/or unnecessarily harm the interests of the minority.

[98] Ellis J stated that the existence of one or more of those circumstances would not automatically require the appointment of an administrator, and the reasons for their existence and any alternative remedies would still be relevant.[19] In the context of the similarly worded provision in the Unit Titles Act 1972 in *Low v Body Corporate 384911*, Heath J stated:[20]

> In my view, the general discretion (while it must be exercised in a principled way) should not be fettered. Everything turns on the facts of the particular case, with the Court's discretion being informed primarily by the functions of a body corporate and the ability of those with responsibility for its affairs to carry out their duties fairly, against the background of the underlying principles on which the Act is based.

[99] There is therefore a broad-brush discretion in the Act allowing for consideration of a wide range of circumstances which might warrant appointing an administrator. Heath J utilised the principles set out in *Low* in the context of the Unit Titles Act 2010.[21]

Submissions

[100] Ms Tao's submissions appear to take issue with the solicitors representing the body corporate. She states that they represent Strata and Mr Pandya, neither of whom are the parties in this proceeding. Later, she states that there has been no body corporate approval of the contract between the solicitors and the body corporate and so they cannot represent the body corporate.

[101] However, as in other cases utilising s 141 of the Act, the body corporate as an entity (as represented by the committee) is the correct party to the proceedings, not the individual owners.[22] Further, the body corporate resolved to elect a committee at the EGM and delegated their powers to that committee. Mr Pandya provided his

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19 At [72].
20 *Low v Body Corporate 384911* (2011) 12 NZCPR 142 (HC) at [37].
21 *Boyce v Body Corporate 70841* [2013] NZHC 3427, (2013) 14 NZCPR 770.
22 See, for example, *Boyce v Body Corporate 70841* [2013] NZHC 3427, (2013) 14 NZCPR 770 and *Gibson v Body Corporate 3849811* (2012) 1 NZLR 84 at [71]—[78].

minutes of a committee meeting at which the current solicitors and lawyers were appointed and they resolved to oppose the application.

[102] Ms Tao's substantive submissions rely on the same allegations as canvassed above. She claims that Mr Pandya has not been properly elected because of the failure to hold valid AGMs, that he has failed to fulfil his duties as chairperson, that he has already been removed by the EGM, and that he has wrongly allowed Strata to fulfil his duties instead of him.

[103] In relation to Strata, Ms Tao argues that the service contract is fabricated and invalid, that it has "a very bad reputation for acting illegally", that it has breached its duties under the service contract including in terms of paying body corporate accounts, preparing AGM resolutions and agendas, and operating bank accounts, breaches of the Fair Trading Act, and "exorbitant" management fees. She also complains that Strata has passed resolutions with proxy votes of owners to which owners have not consented.

[104] More generally, she complains about the body corporate committee and the performance of its duties.

Analysis

[105] The grounds Ms Tao raises in relation to the application for the appointment of an administrator are primarily grounds already canvassed above. In this regard, her affidavit evidence considerably broadens the grounds of her application. In relation to Mr Pandya, she claims that he was not validly elected, and that he has not performed his duties as chairperson. Strata has been contracted to provide secretarial services including some of these functions and nothing prevents this.

[106] In relation to Strata, Ms Tao's claims relating to the validity of the service contract have already been assessed. However, she also raises new claims relating to Strata's performance of its duties under that contract, which I address in turn:

(a) Ms Tao claims the agenda does not correspond to the actual resolutions passed at the AGM. Although the agenda items were

only described in a one word summary (e.g. “Finances”) all resolutions passed were clearly on the agenda. There is no requirement that the agenda fully detail each matter.

(b) Ms Tao claims that there was no record of vote counts from 2013 – 2015. Although recording the vote counts would be preferable, the only requirement is that the resolutions be voted on and a record kept of whether they were passed. Such a record has been kept by Strata.

(c) Ms Tao claims no audits of the body corporate’s account have been held, as the audits were only of Strata generally. The audit, under s 132(2) of the Act, is required to be of either the body corporate’s financial statements, by an accountant or auditor, or an accountant may carry out “special verification procedures” as determined by the body corporate. The minutes of the AGMs record the special resolutions pursuant to s 132(2) allowing the type of audits which were carried out.

(d) Ms Tao claims Strata failed to deal with a lawyer offering a proposed class action against cladding manufacturers, which she recommended to them. There is no contractual obligation on Strata to deal with such a matter.

(e) Ms Tao claims that Strata has not paid the accounts of the body corporate as they fell due, affecting the owners’ property insurance. It appears the 2015 insurance payment was late. However, Ms Tao has not paid her 2015 levy and failures by the body corporate or Strata to pay invoices as they fall due is entirely dependent on owners paying their levies. At the EGM, the committee instructed Strata to pay the insurance from the contingency fund to cover the shortfall in body corporate funds as a result of some owners not having paid the levies by the due date.

(f) Ms Tao's concerns about the Strata bank account are addressed above.

[107] Ms Tao also complains of fraud in the Strata voting processes, as she says it claimed to have proxy votes which it did not have. There is no evidence of this other than her affidavit.

[108] Ms Tao also complains that the fees of Strata are too high. They are higher than a competitor quote she obtained. While this might be relevant to a decision whether the body corporate should change its service provider, it is not a factor which suggests an administrator should be appointed.

[109] However, the fact that no legal breaches can be made out does not necessarily require that the application to appoint an administrator cannot succeed, given the discretionary nature of that assessment. I therefore turn to the wider context for the application.

[110] Ms Tao and the other owners' complaints and confusion are not sufficient to warrant appointing an administrator. Ms Tao's intransigence is obviously holding up the functioning of the body corporate, particularly through the refusal by her and others to pay levies. However, the unit owners who refuse to pay can all be taken to the Tenancy Tribunal to resolve matters without requiring an administrator to be appointed.

[111] It is obvious that Ms Tao has serious reservations as to the way in which the building maintenance has been carried out. She may well have some justification for these concerns. Concerns about maintenance of the property and whether indeed it is a leaky building can properly raised with the body corporate using the appropriate meeting procedures, for example, calling an EGM. Simply because there was an approach by a lawyer seeking plaintiffs to join a class action and this offer was not taken up by the body corporate, is not evidence an administrator is needed.

[112] The application does not reveal the existence of any undemocratic or ultra vires decisions; any dysfunctionality or deadlock; majority decisions which have

resulted from improper influence of a third party; or which unnecessarily harmed the interests of the minority. I am not satisfied that there is any basis at all on which the Court could intervene to impose on the body corporate an administrator in place of the properly elected representatives of the body corporate. Indeed, to grant the application would be to undermine the decisions made at the 2015 AGM and EGM. Simply because Ms Tao does not agree with those decisions is not a basis on which to appoint an administrator.

Result

[113] For the reasons given, summary judgment is given for the defendants. Ms Tao's application for appointment of an administration is dismissed.

[114] In principle, costs should follow the event. Any application for costs by Strata, Mr Pandya and/or the body corporate is to be filed and served within 21 days. Ms Tao is to respond 14 days thereafter. Costs will be decided on the papers.

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Thomas J

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