IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-5937
[2013] NZHC 177

	BETWEEN	MANCHESTER SECURITIES LIMITED Applicant
	AND	BODY CORPORATE 172108 Respondent

Hearing: 7 February 2013

Appearances: M C Harris and B Prewett for Applicant
T J G Allan for Respondent

Judgment: 13 February 2013

JUDGMENT OF ASSOCIATE JUDGE R M BELL

This judgment was delivered by me on ***13 February 2013*** *at* ***3:00pm***
pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

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[1] Manchester Securities Ltd is a unit title owner in a block of apartments at 196 Hobson Street, Auckland, known as "Hobson Apartments". The body corporate for the building has imposed levies payable by Manchester, but Manchester has refused to pay them. The body corporate has served a statutory demand. Manchester has applied under s 290 of the Companies Act 1993 to set aside the demand.

[2] The total sum demanded is $74,127.56, made up as follows:

$49,139.55	-	an interim remedial levy of July 2012
$17,231.94	-	an ordinary levy of 24 April 2012
$6,290.67	-	an ordinary levy of 18 May 2011
$385.25	-	debt collection costs
$1,0880.15	-	interest at 10% per annum under s 128 of the Unit Titles Act 2010.

[3] In addition, the body corporate demands $550.00 for the costs of issuing the demand under s 124 of the Unit Titles Act 2010.

[4] The grounds given in the setting-aside application are that there is a substantial dispute whether or not the amounts sought in the statutory demand are owing or due, that Manchester is solvent, and that the statutory demand was served despite the fact that the amount sought in the demand has been the subject of a long-running dispute between it and the body corporate.

[5] The matters to be decided are:

(a) On what basis can Manchester attack the remedial levy?

(b) Has Manchester shown an indisputable case that it does not have to pay the remedial levy?

(c) Is Manchester entitled to interim relief against paying the remedial levy pending arbitration?

(d) Can Manchester claim a set off against the ordinary levies?

(e) Can the body corporate include in the statutory demand a claim for its costs in making the demand? and

(f) What is the relevance of the financial position of Manchester Securities Ltd?

Background to the levy for remedial works

[6] The main focus of the case is the body corporate's interim levy for remedial works. Manchester says that it has sound grounds for resisting payment. It characterises the decision to impose the levy as manifestly erroneous on its face. It is necessary to give some background.

[7] Hobson Apartments is a 12-storey apartment block with 39 apartments with unit titles. Manchester owns the 12th floor, which was built separately from the floors below. The outside of the building on levels 1-11 is common property, owned by the body corporate. The outside of level 12 belongs to Manchester. Under the Unit Titles Act 1972 body corporates were ordinarily responsible for repairing and maintaining common property and unit title owners were responsible for unit property.[1] Owners ordinarily contribute to body corporate expenses based on unit entitlement. Manchester's unit entitlement is 11.88%.

[8] The building suffers from serious weathertightness defects. All but five of the owners on levels 1-11 sued the Auckland Council for negligence associated with the original construction of the building. Major repair works are required, which include full replacement of the exterior cladding on levels 1-11. The 12th floor also requires repairs but in the early stages Manchester contended that the scope of that

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[1] See Unit Titles Act 1972 s 15(f) and clause 1(e) of Schedule 2 of that Act. For the current legislation see ss 138(1) and 80(1)(g) of the Unit Titles Act 2010.

work would be relatively minor in comparison with the work required on the floors below.

[9] In 2009 the body corporate applied to the court for approval of a scheme under s 48 of the Unit Titles Act 1972. Under that section, when any building or improvement is damaged or destroyed, the court may settle a scheme for the reinstatement of the building. The court can provide for the application of insurance money, for payment of money by or to the body corporate, and such terms and conditions as it thinks fit. Schemes under s 48 are commonly used to arrange reinstatement of unit title developments.[2]

[10] Initially, the body corporate proposed a scheme under which it was to have the power to determine the scope of work for all parts of the building, including Manchester's unit. The scheme would also give it the power to levy Manchester for the full cost of all work to the top floor, plus a full unit entitlement share (11.88%) of the costs for the floors below. Manchester opposed. It was the only owner to object to the scheme. Its case was that the body corporate should not have control over the level 12 work and that the proposed costs allocation was inequitable. Its position was that it should not have to contribute to the costs of the common property on the floors below as well as meeting all the costs for level 12.

[11] In an interim judgment of 3 March 2010,[3] Heath J held that Manchester was entitled to determine the nature and scope of the work to level 12 within certain parameters. He also held that Manchester's costs under the scheme would be capped at its unit entitlement share of the combined costs of its work to level 12 and the work to the rest of the building. The approach of Heath J can be seen in [44]–[50] of his decision:

> [44] In my view, MSL, in addition to meeting all costs associated with repairs on Level 12 (whether pertaining to private or common property), ought to make a contribution to the balance of repairs to be undertaken to common property.
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> [45] I have no doubt that MSL will gain significant advantages from the balance of the common property being repaired at the same time as

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2 The corresponding provision of the Unit Titles Act 2010 is s 74.

3 *Body Corporate 172108 v Meader* (2011) 12 NZCPR 101.

> work is undertaken on Level 12. Economically, if the building were to retain the stigma of a "leaky building", there would be real difficulties for MSL in developing (eg adding another floor) or selling the penthouse apartment. That should be reflected in the apportionment of cost.
>
> [46] It is only possible to give an indicative view of the amount that should be paid by MSL by way of contribution to repairs to common property, other than on Level 12. The figures are far from clear. Adjustments will be required in time or, alternatively, a formula will need to be set out in the redrafted scheme.
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> [47] I work out my figures on the following assumptions:
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> a) The cost of repairs for Levels 1 to 11 is (say) $5,750,000.
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> b) The cost of repairs for Level 12 (individual and common property) is (say) $500,000.
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> c) The total cost of repairs is, therefore, (say) $6,250,000.
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> [48] MSL's unit entitlement is 11.88%. Applying that percentage to the total estimated costs of repairs (whether individual or common property) of $6,250,000, amounts to a contribution of $742,500.
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> [49] The indicative amount of $500,000 to be paid in respect of Level 12 work amounts to 8% of the estimated total repair cost of the building. In my view, that needs to be topped-up to equate to the sum of $742,500, which would have been the cost, based on 11.88% of the total cost of repair for the building. On that basis, in respect of common property (other than that situated on Level 12), MSL's contribution would be $242,500.
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> [50] For the purpose of drafting the scheme it may be better for MSL's apportionment to reflect 11.88% of the total cost of remediating the building, so that the amounts involved can be fixed by reference to higher or lower costs of remediation, both in respect of Levels 1 to 11 and Level 12.

[12] Heath J contemplated that the costs of repairs to level 12 would be less than 11.88% of the total repair work, so that after the costs of repairs to level 12 were taken into account, Manchester would still be required to pay something towards other costs. While Heath J's calculations were indicative, a tender given by a building contractor in March 2010 gave a lump sum price for all the works of $4,933,000, with the work on level 12 to cost $470,000.

[13] In that interim decision he also noted three requirements that he regarded as obvious:[4]

(a) There must be a single contractor appointed to do all work;

(b) There must be a single work programme; all work to both common and private areas, must be carried out as part of the same work programme and to the same standard; and

(c) If feasible, a single building consent should cover all work.

[14] Notwithstanding that, matters evolved differently. The body corporate did not want to start the remedial works until the owners' proceeding against the Council had been resolved. Manchester said that it wanted to start as soon as possible, without waiting for the other owners to complete their proceeding. The matter came back before Heath J again. He settled the terms of the scheme in his judgment of 19 August 2010.[5] It allows Manchester to carry out its work independently and under a separate building consent.

[15] Heath J gave a further decision on 10 February 2011 as to costs.[6] Manchester had incurred solicitor-client costs of $132,605.62 in the proceedings. The body corporate's costs had been funded out of general levies. Heath J directed that the actual costs of both the body corporate and Manchester should be regarded as costs of the scheme, with the consequence they would be paid out of levies based on unit entitlements.

[16] The scheme approved by Heath J authorises the repair of the whole building. The body corporate controls the remedial works for levels 1-11. Manchester controls the remedial works for level 12. The parties are required to consult each other and co-operate appropriately. The body corporate is given extensive powers, including:

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4 At [30].
5 *Body Corporate 172108 v Meader (No 2)* HC Auckland CIV-2009-404-6868, 19 August 2010.
6 *Body Corporate 172108 v Meader (No 4)* HC Auckland CIV-2009-404-6868, 10 February 2011.

4 Powers

4.1 The Body Corporate, for itself and for each Owner, is hereby granted the general power to ensure that the Repairs are identified and the work required is undertaken and completed in good and workmanlike fashion and that the money required to meet the Costs of the Repairs is collected from each Owner.

[17] Clause 5 imposes a range of duties on the body corporate, including to act in a proper and professional manner, to proceed to have the repairs carried out as diligently and expeditiously as possible, to apply due care and attention to the making of all decisions on matters relating to the scheme, to seek advice from suitably qualified advisors where necessary or appropriate, to have regard to professional advice, to consult with its advisors and to record the reasoning by which decisions are reached.

[18] The body corporate is also given the power to collect levies from owners:

6 Levies

6.1 The Body Corporate is hereby authorised to levy ("Levy"), and collect from each Owner from time to time such money as the Body Corporate deems necessary for undertaking, progressing or completing the Repairs, in such proportions as between each Owner as the Body Corporate shall from time to time decide. For clarity the right to levy includes levies based on reasonable interim or estimated costings, the issue of several progressive levies, or to reassess and vary levies in light of changing circumstances, and may include estimates and allowances or provisions for then unknown factors or anticipated Costs.

6.2 Without limiting the generality of the above, the Body Corporate has the authority to:

(a) Seek advice from suitably qualified advisors on the basis to be adopted for any apportionment of Costs;

(b) To demand payment of such Levies from each Owner in amounts and at times that the Body Corporate may from time to time determine.

(c) To sue for and take such other steps as the Body Corporate deems advisable to recover from any Owner who fails to pay their Levies in the amount and at the time determined by the Body Corporate.

(d) Where possible to attach the amount due under any such Levy to the Unit of which the Owner is the Registered Proprietor, to the intent that such Levy, shall until satisfied in

full, remain a charge against such Unit notwithstanding that a change of Owner or charge holder may subsequently occur.

(e) To generally have the same powers with regard the collection and recovery of Levies in respect of each unit, including the right to charge interest and any collection costs (including legal costs), from each Owner that the Body Corporate has under the Act for the recovery of levies for repairs and maintenance to common property.

(f) To determine any refunds that may be payable to an Owner or Owners and to determine when such refunds should be made.

6.3 Any levy raised under this Scheme shall have the same legal status as a levy validly raised under s15 of the Act.

[19] The scheme has provisions for levy defaults and refunds, the use of the funds for the costs of repairs, allocation of costs between owners and the body corporate, and accounting.

[20] Clause 13 provides for dispute resolution:

13 Dispute resolution

13.1 The Body Corporate's decision shall be final in all respect all matters arising under this scheme, except where 5 or more Owners whose objection in monetary value cumulatively exceeds $30,000, or where one Unit Owner has an objection which in monetary terms exceeds $10,000. Upon receiving notice of such an objection, the Body Corporate shall refer the matter to arbitration.

13.2 The objecting Owners must give notice to the Body Corporate of their objection within 15 working days of receiving an assessment as to Costs or other notice from the Body Corporate which is the subject of the objection outlining the grounds on which such objection is made. On receipt of the notice the Body Corporate will refer the matter to an arbitrator (to be appointed by the President of the Quantity Surveyors Association) and the arbitrator shall determine the issue under the provisions of the Arbitration Act 1996. The arbitrator's decision shall be final and the costs of the arbitration shall be borne as between the objecting Owners and the other members of the Body Corporate generally as the arbitrator shall decide.

13.3 No Owner shall be entitled to withhold payment of a Levy on the basis that the matter is in the process of dispute resolution. ...

[21] Clause 21 sets out the specific arrangement with Manchester. In particular, Manchester's liability is capped at 11.88% of the total cost of repairs carried out (with a proviso that any costs incurred by Manchester in respect of project management consultants or other construction-related advisors that do not provide any benefit to all other individual proprietors or the body corporate shall be borne solely by Manchester).

[22] Clause 21.4 says:

> **21 Specific arrangement with Manchester Securities Ltd in respect of level 12**
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> ...
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> 21.4 ... the amount payable by Manchester on account of Repairs to the building other than the works to level 12 listed in clause 21.7 shall be 11.88% of the total Cost of Repairs less the cost of repairs assessed and paid for in accordance with clause 21.3.
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> ...

[23] Clause 21.3 provides that Manchester is to pay for the cost of repairs at level 12 separately, but there are obligations for Manchester to provide information and consult with the body corporate.

[24] Remedial work did not start immediately on approval of the scheme under s 48. Work could not start until the proceeding against the Auckland Council was resolved. That claim resulted in a settlement payment that apparently substantially but not totally covers the other owners' share of the repair costs. There have been changes to the design for remedial work. On levels 1-11 the owners have decided to have their balconies enclosed rather than repair and reinstate the existing balustrades and walls.

[25] Manchester says that it has now become apparent that its repair costs will be substantially higher than the parties had previously anticipated. It has engaged a quantity surveyor who has estimated the cost of work provided for in the Scheme at $1,083,938 plus GST and the costs of the proposal to close in the balconies at $925,856 plus GST. The work to levels 1-11 is expected to cost $4.5m plus GST. Manchester says that the costs it will incur will substantially exceed 11.88% of the

total costs. It has obtained a resource consent to enclose the balconies on its floor and has applied for a building consent, but it also has not started any remedial works.

[26] Manchester says that because its own costs will substantially exceed the cap of 11.88% of the total cost of remedial works, it cannot be required to contribute to the other remedial costs for the rest of the building.

[27] The body corporate takes a different view. At this stage it does not accept Manchester's contentions. Under a resolution in July 2012 it raised an interim levy for 75% of the combined value of its building contractor's tender for all units, including Manchester's on the 12th floor. The total amount to be paid under the levy was $4,354,000 to be apportioned among all owners according to unit entitlement. In the case of Manchester, a further credit was to be given - 75% of the difference between the original price of its building contractor completing all levels under the original building consent and the cost of completing levels 1-11 separate from level 12. The figure adopted for the difference was $389,066 plus GST, taken from the contractor's tender. 75% of that is $335,569.43. The amount of Manchester's levy before the credit was $517,314.60 and after $181,745.17.

[28] The body corporate then made a further deduction of $132,605.62 on account of the costs Manchester is entitled to under Heath J's costs judgment. It did so on a without prejudice basis, because it reserves the right to claim that Manchester's solicitor-client costs are too high.[7] With the credit for the costs of the s 48 proceeding, the balance the body corporate requires Manchester to pay is $49,139.55 – the amount claimed for the remedial levy in the statutory demand.

[29] On 9 July 2012 the body corporate gave notice of the interim levy to Manchester. In response Manchester gave a notice of objection on 16 July 2012. That was within the time to object under clause 13.2 of the scheme. It has not paid.

[30] Manchester attacks the decision to impose the interim remedial levy on these grounds:

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[7] I am not required to consider that aspect in this case.

(a) The body corporate did not take into consideration or have regard to the report prepared by Manchester's quantity surveyor as to the costs for the new scope of works – which Manchester had sent to the body corporate's secretary;

(b) The body corporate erred in taking the sum of $389,066 plus GST as the amount of the difference, as the tender from the building contractor also made allowances for additional significant costs for the Level 12 work (contractor's margin, contingencies and provisional sums);

(c) The body corporate had not taken professional advice, as it was required to;

(d) The body corporate had not engaged in constructive dialogue to address Manchester's arguments;

(e) The body corporate was motivated to obtain a surplus for other owners by levying Manchester unnecessarily;

(f) The body corporate's reliance on earlier costings for the Level 12 work was also misplaced because they had also not made proper allowance for contractor's margin, contingencies and provisional sums;

(g) It has offered to co-ordinate its work with the body corporate, but the body corporate refuses to do so.

[31] In response the body corporate says:

(a) It is suspicious that Manchester has claimed increased costs to avoid having to contribute to the costs of repairing other levels;

(b) The figures the body corporate has adopted are consistent with the figures used at the time of the hearings of the s 48 application;

(c) It is not confident that Manchester will actually carry out the work it says it will. It points to Manchester's earlier assertions in 2010 that it wanted to get started as soon as possible and the absence of any remedial work by Manchester since then;

(d) There are good reasons for suspecting that Manchester cannot afford the works in its new scope of works;

(e) It is not required to engage in dialogue with Manchester; and

(f) It gave proper reasons for not discussing co-ordinating work with Manchester.

[32] It will be no surprise that Heath J described the parties' relationship as fractious.[8]

[33] So far, the body corporate has done nothing to get any arbitration underway as it is required to do under clause 13.2 of the scheme.

[34] The Court may cancel, vary, modify or discharge an order under s 48.[9] Correspondence between the parties referred to the possibility of returning to the Court for further orders. In the hearing neither side showed any enthusiasm for doing that. For this case, the scheme settled under the s 48 order governs the matter of remedial levies. The possibility of the scheme being varied later is not relevant.

The other levies

[35] The body corporate raised a levy of $6,290.67 under a resolution of 18 May 2011. The body corporate's authority to levy contributions on owners for the management of common property and related purposes is s 15(2) of the Unit Titles Act 1972. The levy of $17,231.94 was raised by resolution of the body corporate of 24 April 2012. The authority for that levy is s 121 of the Unit Titles Act 2010.

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8 *Body Corporate 172108 v Meader (No 4)* at [14].
9 Unit Titles Act 1972, s 48(6); Unit Titles Act 2010, s 74(8).

These levies were raised for the ordinary purposes of the body corporate under the Unit Titles legislation. Manchester does not contest the validity of these levies. However, it says that because it has an arguable defence to the remedial levy of $181,745.17 in [27] above, it still has an indisputable credit for $132,605.62 for costs under Heath J's costs of judgment. It can therefore apply that credit against its liability for ordinary levies and is therefore not required to pay them.

On what basis can Manchester attack the remedial levy?

[36] Manchester's case is that it has proper grounds for disputing the body corporate's resolution to impose the remedial levy of $181,745.17 and because it has good grounds for contesting that decision, the part of the statutory demand seeking payment of the remedial levy of $49,139.55 should be set aside under s 290(4)(a) of the Companies Act on the grounds of substantial dispute.

[37] In response, the body corporate refers to the dispute resolution provisions of the s 48 scheme. Under clause 13.1 its decision is final, except where owners are entitled to object. It accepts that as a single unit owner, Manchester is entitled to object under clause 13.1, because the sum in issue, $181,745.17, exceeds the threshold of $10,000. It also accepts that the decision to raise the interim levy can be the subject of arbitration under clause 13 of the scheme. The body corporate does not dispute that Manchester gave notice of its objection within time under clause 13.2.

[38] The body corporate relies on clause 13.3 – the provision that no owner may withhold payment of a levy on the basis of matters that are in the process of dispute resolution. In the body corporate's submission, this is a "pay now argue later" provision. Even if Manchester disputes the levy, it is still required to pay it while taking the matter to arbitration.

[39] I accept the submission as to "pay now argue later". There is an obvious practical purpose. It enables the body corporate to fund remedial works effectively. Cash flow is assured. Dissident owners who want to contest levies are still required to pay, although they may take their complaints as to the levies to arbitration.

[40] If the body corporate brought an ordinary proceeding to recover a remedial levy from a unit owner and the owner had given a notice of objection under clause 13.2 and contested the validity of the levy, the court would apply clause 13.3. The owner's arguments as to the validity or merits of the levy would not stand in the way of the body corporate obtaining judgment. Because the merits of the dispute are to be decided by arbitration under clause 13, the unit owner's arguments contesting the levy would not give grounds to withhold payment in the meantime.

[41] If the court were to consider the merits of the owner's arguments, it would be deciding something which, under the scheme, must be decided by arbitration. One of the purposes of the Arbitration Act 1996 is to encourage the use of arbitration as an agreed method of resolving commercial and other disputes.[10] Under s 6 of that Act the provisions of schedule 1 apply to an arbitration in New Zealand. The first schedule contains rules applying to arbitration generally. There are rules as to court intervention in arbitrations. Under article 5, in matters governed by the schedule, no court shall intervene except where so provided in the schedule. If the court cannot intervene in any of the limited ways allowed under the first schedule of the Arbitration Act, the court cannot determine the merits of a unit owner's objection to a levy. Ordinarily then, objections to a levy cannot be a defence to a proceeding seeking a payment of a levy by reason of clause 13.3.

[42] Even if the parties waived the requirement to take the matter to arbitration, the "pay now argue later" provision would still apply. The body corporate would be entitled to obtain summary judgment on a claim for a remedial levy, leaving arguments as to the merits of the levy to be decided later.

[43] If objections to a levy cannot be a defence in an ordinary proceeding, then they do not provide grounds to a unit owner to say that there is a substantial dispute as to the debt under s 290(4)(a) of the Companies Act in an application to set aside the statutory demand.

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[10] Arbitration Act 1996, s 5(a).

[44] Manchester counters that its argument is not just one of objection to the levy, but that the body corporate's resolution is manifestly erroneous on its face. In particular, it relies on the alleged failure to take professional advice and the misplaced reliance on the sum of $389,066 plus GST taken from the building contractor's tender. It says that these matters go to conditions that had to be satisfied before a levy could be imposed. Because they were not satisfied, there was no valid resolution to raise remedial levies.

[45] I do not accept that characterisation. The objections by Manchester simply go to the quality of the decision to impose the levy. They do not give grounds to say that the levies were not imposed. Manchester's argument is one calculated to avoid the ordinary application of the dispute resolution provisions of the s 48 scheme. There is no good reason to give wide scope to arguments along the lines that the power to raise a levy has not in law been exercised. In this case, the objections by Manchester can be comfortably accommodated within the provisions for dispute resolution, but would cut across the "pay now argue later" purpose of clause 13.3.

[46] Manchester's objection is an attack on the general merits of the resolution to raise the remedial levy. Ordinarily, an attack on the general merits of the decision is resolved by arbitration under clause 13 of the scheme. However, the first schedule of the Arbitration Act does provide occasions when the courts may intervene, even though a dispute is to be determined by arbitration.

[47] If Manchester wishes to pursue its objections in court, it must look for some way by which court intervention is permitted, notwithstanding the provisions of the first schedule of the Arbitration Act for determining disputes by arbitration. There are two potential avenues for Manchester:

(a) To show that there is not in fact any dispute between the parties with regard to the matters to be referred; and

(b) To seek interim relief pending arbitration.

[48] The first arises through article 8 of the first schedule:

> **8 Arbitration agreement and substantive claim before court**
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> (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or *that there is not in fact any dispute between the parties with regard to the matters agreed to be referred*. (Emphasis added)
>
> (2) Where proceedings referred to in paragraph (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

[49] New Zealand courts have given a wide interpretation to "there is not in fact any dispute between the parties with regard to the matters agreed to be referred". These are added words. They do not appear in the Model Law on International Commercial Arbitration, the basis for the Arbitration Act 1996.[11] The prevailing interpretation is that if it can be shown that a party does not have any arguable defence to a claim, then there is not any dispute to be referred to arbitration and the matter should not go to arbitration, but may remain in court.[12] Under the "reverse side of the same coin" test, a party who can show that it will obtain summary judgment against the other party can resist any application to stay a proceeding on the grounds of an arbitration agreement. If that approach can be used to decide whether a summary judgment application can be heard, there is no reason not to use it in a case such as this where a payer maintains that it has a watertight defence and that therefore there is no point going to arbitration.

[50] The second avenue is to seek interim relief pending arbitration. Article 9 allows a court to give interim relief ahead of an arbitration:

> **9 Arbitration agreement and interim measures by court**

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11 Arbitration Act 1996, s 5(b).

12 *Cognition Education v Zurich Insurance Ltd* [2012] NZHC 3257.

(1) It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure and for a court to grant such measure.

(2) For the purposes of paragraph (1), the High Court or a District Court has the same powers as an arbitral tribunal to grant an interim measure under article 17A for the purposes of proceedings before that Court, and that article and article 17B apply accordingly subject to all necessary modifications.

(3) Where a party applies to a court for an interim injunction or other interim order and an arbitral tribunal has already ruled on any matter relevant to the application, the court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

[51] Under article 9(2), the court can give the same interim relief as an arbitral tribunal can give under article 17A. The interim relief includes a measure to "maintain or restore the status quo pending the determination of the dispute".[13]

[52] Article 17B(1) sets the test for the grant of interim relief:

17B Conditions for granting interim measure

(1) If an interim measure of a kind described in subparagraph (a), (b), or (c) of the definition of that term in article 17 is requested, the applicant must satisfy the arbitral tribunal that—

(a) harm not adequately reparable by an award of damages is likely to result if the measure is not granted; and

(b) the harm substantially outweighs the harm that is likely to result to the respondent if the measure is granted; and

(c) there is a reasonable possibility that the applicant will succeed on the merits of the claim.

[53] In summary, Manchester cannot attack the remedial levy simply by asserting arguments attacking the decision to raise the levy, even if those arguments characterise the resolution as "manifestly erroneous on its face". Instead, it might either contend that the body corporate has no defence to its arguments, so that there is not in fact any dispute to be referred, or that it should have interim relief pending arbitration.

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[13] Under the definition of "interim measure" in article 17.

Has Manchester shown an indisputable case that it does not have to pay the levy?

[54] Because Manchester is saying that the case ought not to go to arbitration, it has to show that an arbitrator could not find in favour of the body corporate, but would inevitably find for Manchester. Under the "reverse sides of the same coin" test, the court applies the same test as on a summary judgment application. The party contending that the arbitration agreement does not apply has the burden of showing that the other party does not have a defence to its case. It will fail if the other party has an arguable defence.

[55] On considering whether an arbitrator would inevitably find for Manchester,[14] it becomes apparent that there are significant differences between the hearing of arguments on a setting aside application and a determination by an arbitrator.

[56] Clause 13.2 of the scheme provides that the arbitrator is to be appointed by the president of the Quantity Surveyors Association. It is therefore likely that any arbitrator would be a quantity surveyor. An arbitrator is likely to apply specialist expertise, particularly in establishing what the amount of an interim levy should be, given anticipated building costs. It is useful to remember that what might seem straightforward to the lay mind may bristle with issues for the expert (and vice versa). At this stage I cannot say that the matter would be straightforward for an expert quantity surveyor, because I do not know enough about quantity surveying.

[57] Also, the information that may be made available to the arbitrator may be more extensive than the evidence that has been provided in this application. The arbitrator will be able to determine not only whether the body corporate's decision was correct or not, but would also be able to substitute his own findings as to the appropriate amount of a levy, if any. As an example, an arbitrator may have a better appreciation of cash flow requirements, which may lead him to a different view as to the timing and amounts of interim levies. While a court may find the levy resolution to be in error, it cannot determine what a fresh levy should be.

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[14] *Cognition Education v Zurich Insurance Ltd* [2012] NZHC 3257 at [54].

[58] With a lack of comparable expertise, and with insufficient information to assess the merits of the parties' competing contentions, it is not possible to find that Manchester's contentions as to the merits of the interim levy resolution are indisputable. At this stage it is not possible to say that going to arbitration would be a pointless exercise. Manchester has not shown that it is bound to win in any arbitration and it has not shown that, even if all its arguments are accepted, an arbitrator would inevitably rule that it should not pay anything by way of an interim levy.

[59] For completeness, I also record that the body corporate has not shown that the case for Manchester is hopeless. Both sides have arguable cases, neither is bound to fail.

Is Manchester entitled to interim relief against paying the remedial levy pending arbitration?

[60] Where there is a "pay now argue later" régime, it may sometimes be appropriate to give interim relief to the payer, as when it can prove that any interim payment may become final because there is no hope of recovery. It has been recognised that the courts may give interim relief against the "pay now argue later" provisions of the Construction Contracts Act 2002.[15]

[61] By virtue of article 9(2) any claim by Manchester that it ought to have interim relief is assessed under the test in article 17B(1) of the first schedule of the Arbitration Act. That requires Manchester to show among other things that any harm it is likely to suffer from being required to pay the interim levy now is not adequately reparable by an award of damages. In this situation, the potential risk is that the payment of an interim levy may become final: even if Manchester establishes in the arbitration that the levy ought never to have been raised, it will not be able to recover the payment from the body corporate. The approach taken under the Construction

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[15] *Concrete Structures (NZ) Ltd v Palmer* [2006] NZAR 513 (HC); *Gill Construction Co Ltd v Butler* [2010] 2 NZLR 229 (HC); *Yun Corporation Ltd v YQT Ltd* HC Auckland CIV-2009-404-7656, 26 February 2010; *Canam Construction Ltd v Ormiston Hospital Investment Ltd* HC Auckland CIV-2010-404-291, 10 August 2010; *Kariiti Ltd v Donovan Drainage and Earthmoving Ltd* HC Whangarei CIV-2010-488-613, 19 November 2010; *Chow Group Ltd v Walton* HC Auckland CIV-2011-404-3148, 9 June 2011.

Contracts Act on applications for interim relief is that it is not sufficient simply for the payer to express fear that the payee will not repay. In *Chow Group Ltd v Walton*, Rodney Hansen J said:[16]

> The applicant must show a real risk that the payee may not be able to repay. The risk must be more than nominal. It is not enough for the payer to simply express concern at the payee's ability to pay. There needs to be "a high degree of likelihood that the payee will not be able to repay if a determination ... goes in the payer's favour".

[62] Here, there is no evidence that the body corporate would not be able to repay the sum of $49,139.55 plus interest if an arbitrator later finds that the remedial levy should never have been raised. In the absence of any evidence of irremediable loss, and of a cast iron case, there is no basis for granting interim relief by providing that Manchester should not have to pay pending arbitration.

[63] At this stage, Manchester has not shown any basis for not giving effect to the "pay now argue later" requirements of clause 13.3 of the s 48 scheme. The interim remedial levy of $181,745.17 remains effective and binding, pending a decision in an arbitration setting it aside. Manchester has no basis under s 290(4) to say that the demand for $49,139.55 for the remedial levy in the statutory demand should be set aside. It is also liable for interest on the remedial levy.

Can Manchester claim a set off against the ordinary levies?

[64] Manchester's argument that it does not have to pay the ordinary levies relies on it escaping the effect of the interim remedial levy for $181,745.17. The body corporate gave the credit for costs against that levy to reduce the amount claimed under the levy to $49,139.55. Manchester's argument that it has a set-off against the ordinary levies for the costs order can only succeed if it can show that applying the credit for costs against the interim remedial levy is incorrect. As it has failed in its attack on the interim levy, its combined indebtedness to the body corporate under the interim remedial levy and for the ordinary levies exceeds the amount of the costs order by more than $1000. Accordingly Manchester cannot invoke s 290(4)(b).

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[16] *Chow Group Ltd v Walton* HC Auckland CIV-2011-404-3148, 9 June 2011, at [7].

Can the body corporate include in the statutory demand a claim for its costs in making the demand?

[65] Under s 124(2) of the Unit Titles Act 2010 the reasonable costs in collecting levies are recoverable as a debt due to the body corporate. The question here is whether the body corporate is allowed to include a demand for the costs of issuing and serving the demand in the statutory demand. The point is covered by the decision of Master Kennedy-Grant in *Keene v Okere Holdings Ltd*.[17] In that case, a demand under the Companies Act 1955 had been used as a notice of cancellation under an agreement for sale and purchase of real estate. Master Kennedy-Grant held that the demand could not also be a notice of cancellation. He said:[18]

> A statutory demand must ...
>
> "... be in respect of a debt that is due ..."
>
> when the notice was served. The debt in this case was not due when the notice was served because, on the facts of this case, the debt did not become due until the notice was served. A notice which creates the debt cannot be said to be given in respect of a debt which is due when the notice was given.

[66] While that case was decided under the Companies Act 1955, s 289 of the 1993 Act is to similar effect:

> A statutory demand is a demand by a creditor in respect of *a debt owing* by a company made in accordance with the section. (Emphasis added)

[67] In this case, the debt for the service of the statutory demand was not due when the demand was served because the service of the demand created the debt. The debt was not due before the demand was given. Accordingly, the statutory demand may not demand payment of the costs of the demand. That part of the statutory demand is invalid. However, this defect in the statutory demand does not mean that the statutory demand as a whole should be set aside.[19]

What is the relevance of the financial position of Manchester Securities Ltd?

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17 *Keene v Okere Holdings Ltd* (1996) 7 NZCLC 261,034 (HC).
18 At 261,038.
19 Companies Act 1993, s 290(5).

[68] Manchester asserts that it is solvent. It has put in evidence extracts from its financial statements for the year ending 31 March 2011. The statement of financial position shows that current assets more than amply cover current liabilities. However, most of the current assets (which total $596,000) are advances to beneficiaries or to related parties. Cash in the bank is $5,000. Rent receivable is about $6,000. For present purposes it is the ability to pay the debts as they fall due that is relevant.[20] A statement of financial position as at 31 March 2011 is not very helpful for assessing the ability to pay debts as they fall due in February 2013.

[69] In his affidavit in October 2012, Manchester's director says that the accounts for the year ending 31 March 2012 were currently being prepared. He has given no evidence as to what would be in those financial statements. He asserts that Manchester is in a position to meet all of its obligations as they fall due. In a reply affidavit of January 2013 he says that Manchester has no outstanding accounts with respect to the remediation project and has no outstanding general creditors. He also says that since service of the statutory demand, Manchester has paid about $88,000 towards the remediation of level 12. It has also been paying its legal costs. It has arranged funding to carry out and complete the works. He has not deposed that Manchester has cash in hand to pay the amount of the statutory demand if it is not set aside.

[70] The body corporate criticises Manchester's evidence on insolvency. It refers to the age of the financial statements put in evidence and notes that they appear to be incomplete. It refers to evidence that Manchester has been a slow payer of levies. It notes that despite its assertions to Heath J that it wanted to start remedial works as soon as possible, it has not yet got under way. It submits that an inference can be drawn that Manchester's financial position is not as strong as Manchester would have the court believe.

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[20] *Re Tweeds Garages Ltd* [1962] Ch 406 (HC) at 410.

[71] In *AMC Construction Ltd v Frews Contracting Ltd*,[21] the Court of Appeal gave guidance on the relevance of solvency in an application to set aside a statutory demand. It said:[22]

> The solvency of a company will very often be relevant to a consideration of the grounds in subsection (4)(a) and (b). The court must evaluate whether there is substantial dispute or a cross-claim. The court must make an assessment whether the case is one where, as frequently occurs, the account is disputed as a means of buying time to pay, or whether the grounds for the dispute are genuine. An examination of the company's solvency will often be a useful aid in determining whether the refusal to pay is the result of a bona fide dispute as to liability or whether it reflects an inability to pay.

[72] On the other hand, it held that it would only be in rare cases that solvency would be an independent ground to set aside under s 290(4)(c):[23]

> [7] If the company simply refuses to pay, without good reason, it should not be able to avoid the statutory demand process by proving, at the statutory demand stage, that it is solvent. The demand should be allowed to proceed.
>
> ...

It rejected a test of arguably solvent:

> [10] The purpose of the demand procedure is to enable the creditor to take advantage of the statutory presumption in s 298 by which, if the demand is not met, the company is presumed to be unable to pay its debts. To rebut that presumption, the company must prove that it is be able to pay its debts. Where neither of the grounds in s 290(4)(a) or (b) apply, the demand ought not to be set aside, so as to avoid an enquiry into the company's solvency, solely on the grounds that the company is arguably solvent. To allow that would be to subvert the statutory process.

[73] This is not one of those rare cases where solvency is a stand-alone ground for setting aside the statutory demand. Manchester complains that a statutory demand is a coercive measure. However, it is appropriately coercive when it is used to recover a payment that is lawfully due, even in a "pay now argue later" régime.[24] If a solvent company wishes to avoid the presumption of insolvency that will arise from non-compliance with the statutory demand, it should pay the amount of the demand.

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21 *AMC Construction Ltd v Frews Contracting Ltd* [2008] NZCA 389, (2008) 19 PRNZ 13.

22 At [5].

23 At [7] and [10].

24 *Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd* (2005) 18 PRNZ 97 (HC) and *Laywood v Holmes Construction Wellington Ltd* [2009] NZCA 35, [2009] 2 NZLR 43.

Cogent evidence of solvency in this case would not amount to good reason to set aside the demand while Manchester refuses to do so, despite the clear "pay now argue later" provisions of the s 48 scheme.

[74] In any event, I do not regard the evidence given by Manchester as sufficient to amount to clear evidence of solvency, to be used as a stand-alone ground for setting-aside.

[75] If Manchester had established grounds under s 290(4)(a) or (b), the evidence it has given as to its financial position is helpful bolstering evidence to dispel any suspicion that its refusal to pay is not bona fide. However, evidence used in that way can only support grounds that have already been established. It cannot make up for their absence.

[76] Following the approach of the Court of Appeal in *AMC Construction v Frews Contracting Ltd*,[25] I find that the evidence as to Manchester's financial position does not change the position already established, that the statutory demand should stand (apart from costs claimed for the statutory demand).

Outcome

[77] Apart from the claim for costs on the statutory demand, all the sums claimed in the statutory demand are for debts owing at the date of the demand. Because of the "pay now argue later" effect of clause 13.3 of the s 48 scheme, Manchester cannot contest its liability to pay the remedial levy. Because the body corporate has already given a credit of $132,605.62 for Manchester's claim for costs in the s 48 proceedings, Manchester cannot claim that credit as grounds for not paying the ordinary levies. The statutory demand also includes debt collection costs payable under s 124 of the Unit Titles Act, and interest under s 128 of the Unit Titles Act. Those were not challenged. The total amount payable under the statutory demand is $74,127.56.

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[25] See n [21] above.

[78] Ordinarily, an order would be made under s 291(1)(a) for payment of the amount in the statutory demand within a specified period. However, an adjustment to the standard course is required in this case. Manchester gave a notice of objection to the levy within time under clause 13.2 of the scheme. The body corporate was required to refer the matter to an arbitrator "on receipt of the notice". The body corporate did not do that. Instead, it proposed to Manchester that any arbitration should await the completion of the remedial works and a final wash-up. Manchester has not agreed to that.

[79] If Manchester is to be held to the "pay now argue later" provisions of the s 48 scheme, it should be given the opportunity to argue. Manchester made that point, by saying that it was really a "pay now argue now" scheme. It is improper for the body corporate to demand payment but at the same time to decline to get the arbitration under way, as required by clause 13.2. The standard orders need to be adjusted to ensure that the arbitration is started. Accordingly, any obligation on Manchester to pay the remedial levy should be deferred until an arbitrator has been appointed. Once the arbitrator has been appointed, he will have charge of the process and will be able to give directions for the prompt and just disposal of the dispute.

[80] I make these orders:

(a) Manchester Securities Ltd's application to set aside the statutory demand is dismissed, except that the claim for $550 for issuing and serving the demand is not part of the demand;

(b) Within 10 working days of this decision, Manchester Securities Ltd is ordered to pay to Body Corporate 172108 the ordinary levies of $17,231.94 and $6290.67, and debt collection costs of $385.25 plus interest on the amounts of the ordinary levies at the rate of 10 per cent per annum, from their due dates until 19 October 2011. If it does not pay those sums within that time, it will be presumed to be unable to pay its debts on any later application for it to be put into liquidation.

(c) Within 10 working days after an arbitrator has been appointed under clause 13.2 of the s 48 scheme to determine the dispute as to Manchester Securities Ltd's liability to pay the interim remedial levy raised in July 2012, Manchester Securities Ltd is ordered to pay the sum of $49,131.55 plus interest on that sum at 10 per cent per annum from due date until 19 October 2012. If it does not pay those sums within that time, it will be presumed to be unable to pay its debts on any later application for it to be put into liquidation.

(d) Body Corporate 172108 recovers costs from Manchester Securities Ltd on the application to set aside the statutory demand. I invite the parties to confer as to costs, but if they cannot agree, memoranda may be filed.

(e) Associate Judge Abbott's order of 17 October 2012 extending time for compliance with the statutory demand pending further order of the court is adjusted so as to apply in the same way as orders (b) and (c) above mutatis mutandis.

.....

R M Bell
Associate Judge