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**The Uncertain State of Body Corporate Maintenance**

1. Recent weathertightness litigation has spawned close examination of Body Corporate rules and liability for building repair. Where are the Courts at, and how will the situation change once the Unit Titles Bill becomes law?

Background

2. Many unit title complexes will have parts of the exterior which are individual unit property rather than common property. However, a Body Corporate's statutory duty under section 15 of the Unit Titles Act 1972 is limited to keeping the common property in good repair. Default rules (from schedule 2) merely extending this maintenance obligation to associated chattels fixtures and fittings.
3. This is because under the 1972 Act the surveyor defines common property on the title plan. Practice varies greatly, but at least two common formulations are:
  - 3.1. to extend individual unit title property to the centre line of external walls, with the balance being common property. However, recessed decks, walls around or between adjacent decks, and other features can often be clearly shown on plans as being within individual unit titles. The **Young** case is an example of this (at para [26], [31]);<sup>1</sup> and
  - 3.2. to extend individual Unit Title property to the exterior of building walls—**Sunset Terraces** is an example of this approach (at [109]).<sup>2</sup>
4. This means that the parts or the whole exterior of a building exterior can be individually owned, and maintenance responsibilities can arise, in a patchwork fashion. As decks, parapet walls and the likes are showing themselves to be problem areas for many leaky developments, both of these situations can cause real problems.
5. To counteract this, developers sometimes amend the body corporate rules to make the body corporate responsible for the exterior of the building. However, the significant liability associated with weathertightness problems has made this subject to challenge as ultra vires.

Young and Sunset Terrace: Choosing Between Divergent Outcomes

6. High Court litigation on this point has been decided with surprisingly opposite results.
7. As noted, both the **Young** and **Sunset Terraces** cases concerned parts of the exterior requiring repair which were defective and were in individual ownership. The rules of each Body Corporate had been amended to require the Body Corporate to repair and maintain the exterior of the building (at paras [20] and [108] respectively).

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<sup>1</sup> **Young & Ors v Body Corporate 120066 & Ors**, 6 December 2007, Harrison J, High Court, Auckland.

<sup>2</sup> **Body Corporate 188529 & Ors v North Shore CC & Ors**, 30 April 2008, Heath J, High Court, Auckland.

8. In both cases these rules were challenged as being ultra vires, on the basis that a Body Corporate could only be responsible for the maintenance of common property. The ultra vires argument is that:
  - 8.1. the body corporate's statutory maintenance obligations are limited to the maintenance of common property;
  - 8.2. powers in amended or additional rules must be "incidental to the performance of the duties or powers imposed on" a Body Corporate by the Act (section 37(5));
  - 8.3. a duty to maintain individual property logically cannot be incidental to the existing duty to maintain common property.
9. **Young** (decided on 6 December 2007) was a challenge by disgruntled owners to a Body Corporate decision to fund all weathertightness repairs to the building, including these areas of individual property. The Court rejected the submission that maintenance of the whole exterior was ultra vires this Body Corporate. The Court reasoned that protection of the whole exterior was a means of protecting and maintaining common property (at [32]), and therefore a necessary incident of the Body Corporate's statutory responsibility.
10. With respect, this is a common sense approach but is tenuous. The statutory default rules (Schedule 2) place an express obligation on individual proprietors to repair and maintain their unit, and ensure that no damage ensues to the common property. It is unconvincing to say that it is "incidental" to body corporate powers to adopt a category of repairs which is expressly placed at the door of the individual. Rather the body corporate has the power to sue for any neglect of this obligation (section 13).
11. Further, whether or not you are in a unit title complex, it is surprising to be required to contribute to damage to your neighbour's individual property. Yet whilst difficult to justify in terms of the Act, this approach makes sense in terms of protecting the building in a practical coherent manner.
12. **Sunset Terraces** (30 April 2008) was a claim by a Body Corporate and unit title owners against North Shore City Council and the developers of the apartments. Heath J considered the body corporate's standing to sue for damage to individual property as well as common property. Unless the body corporate was validly responsible for repairs to that common property, it was not their loss and they had no standing. Note that a claim in the Weathertightness Tribunal allows the Body Corporate to claim as a representative, provided that eligibility is established.
13. An identical rule was in place requiring the body corporate to repair the exterior of the building. The Court found the rule to be ultra vires, and denied the body corporate standing (paras [106] – [124]). The Court's reasons included:
  - 13.1. The scheme of the 1972 Act distinguishes between individual responsibility for individual units and body corporate responsibility solely for common property (paras [97], [110], [118]);
  - 13.2. Additional rules must be incidental to the existing powers and duties which, for the body corporate, only extend to the common property (para [106]);

- 13.3. Placing responsibilities for individual property onto the body corporate was inconsistent with, rather than incidental to, existing powers and duties (para [106]).
14. With respect this appears a better legal analysis based on the scheme of the Act.
15. Implicit in *Sunset Terraces* is the notion that the body corporate would be a volunteer in repairing individual property. It neither has the duty to effect such repair nor the right to recover damages if it does so. This is in direct contrast to **Young**.
16. This difference of view in the High Court does not assist in advising Body Corporates as to who should foot the bill for repairs to specific areas which are individual property according to the title plan. The author considers **Sunset Terraces** the better view, that under the current Act individuals must be responsible for damage to individual property.

#### A New Act to the Rescue?

17. Some relief is at hand, through the Unit Titles Bill 2008. However, it was only introduced on 29 May 2008, and is unlikely to be passed before the election. Further, the Bill provides that its repair and maintenance obligations will be deferred for a period of 15 months from its commencement for existing developments, unless the body corporate agrees otherwise (clauses 198 and 199). Thus, any relief under the Bill will be years rather than months away for most existing complexes.
18. Should the bill be implemented in something like its current form, then it will provide an effective cure. Repair obligations are contained in Clause 122. As well as maintaining common property, the body corporate will be required to:

*... maintain, repair or renew all building elements and all infrastructure that relate to or serve more than 1 unit."*

19. "Building element" is broadly defined to mean

*the external and internal components of any part of a building or land that are necessary to the structural integrity of the building, the exterior aesthetics of the building or the health and safety of persons who occupy or use the building ...*

20. Individual items specified within that definition include roofs, balconies, decks and cladding systems amongst others. This extensive definition must include the exterior of buildings, making the current issues redundant in due course.

#### Conclusion

21. The new Bill proposes a clear and pragmatic regime of body corporate maintenance for the exterior of complexes. At present practitioners must exercise judgment between the **Young** and **Sunset Terraces** positions. For this author, individual responsibility for repair of individual property appears sensible, consistent with the scheme of the Act, and consistent with the reality that weathertightness issues are an unlucky lottery for owners of many mid-90s buildings. Yet the certainty and good management of body corporates undertaking necessary external repairs is also attractive. Which way will you leap?

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