IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA178/2022
[2023] NZCA 302

BETWEEN	BODY CORPORATE 406198 Appellant
AND	PROPERTY OPPORTUNITIES LIMITED First Respondent
	SHIRAZ HOLIDAY LIMITED Second Respondent
	BIANCO LIMITED Third Respondent
	AVONDALE PROPERTIES LIMITED Fourth Respondent

Hearing:	14 February 2023
Court:	Katz, Whata and Davison JJ
Counsel:	D R Bigio KC and H W Struthers for Appellant T J Rainey for Second Respondent No appearance for First, Third and Fourth Respondents
Judgment:	19 July 2023 at 11:00 am

JUDGMENT OF THE COURT

A The appeal is allowed in part.

B The matter is referred back to the High Court for reconsideration of the unjust enrichment claim in light of our finding that cl 5.6.6 is ultra vires.

C The second respondent must pay costs to the appellant for a standard appeal on a band B basis and usual disbursements.

REASONS OF THE COURT

(Given by Whata J)

Introduction

[1] This appeal relates to a unit title development in central Auckland known as "Bianco Off Queen". The development comprises 157 principal units in two tower blocks. Some units are used as residential apartments, while others are used as part of a hotel/short-term accommodation business. One of the units is a commercial unit (Management Unit)[1] owned by the first respondent, Property Opportunities Ltd (POL).

[2] The appellant, Body Corporate 406198 (Body Corporate) is the body corporate for the development. The second respondent, Shiraz Holiday Limited (Shiraz) is the building manager (the Manager) pursuant to a management agreement (the Management Agreement) originally entered into between the Body Corporate and Shiraz's predecessor in 2008. At that time, the developer of the project, Timothy Manning, had sole control of both contracting parties.

[3] Under the Management Agreement, Shiraz is given the exclusive right to provide letting services on behalf of the unit owners. This enables it to operate a hotel/short-term accommodation business on the site. Shiraz leases the Management Unit from POL for use as the reception and office for the hotel/short-term accommodation business. Clause 5.6.6 of the Management Agreement envisages payment of a contribution by the Body Corporate to the rental cost incurred by Shiraz for the Management Unit.

[4] The Body Corporate issued proceedings in the High Court challenging the validity of the Management Agreement. At heart, the Body Corporate's concern is that the effect of the Management Agreement is to improperly require unit owners to cross-subsidise Shiraz's running of the hotel and short-term accommodation business, in breach of the Unit Titles Act 1972 (UTA 1972).

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[1] Also known as Unit 1F/2.

[5] The Body Corporate's claims succeeded in part. Campbell J found that the provisions in the Management Agreement giving Shiraz exclusive rights to provide letting services and hotel management services were ultra vires the UTA 1972.[2] The Judge was not satisfied, however, that the Management Agreement as a whole, or cl 5.6.6 in particular, were ultra vires.[3] The Body Corporate appeals on the grounds that the Judge erred in deciding that clause 5.6.6 is not ultra vires, that the Management Agreement is intra vires, and that the ultra vires provisions were severable.

Overview

[6] For the reasons set out below, we have found that the Judge erred in finding that cl 5.6.6 was not ultra vires. All actions of a body corporate must be referrable to the performance of its lawful powers and duties. In this case, the Body Corporate invalidly bound itself to an exclusive letting regime. As cl 5.6.6 was directed to providing compensation for the rental cost of the unit used for this exclusive letting regime, it must also be invalid. But the Management Agreement is otherwise lawful. The Body Corporate's remaining powers and duties under it can be discharged without recourse to provisions relating to the exclusive letting regime.

Key facts

[7] Bianco Off Queen was developed to completion by the third respondent, Bianco Ltd, in late 2008. Mr Manning was then a director of Bianco Ltd. On deposit of the unit plan for Bianco Off Queen on 18 November 2008, the Body Corporate was created. At that point, the rules for the Body Corporate were the default rules set out in schs 2 and 3 of the UTA 1972.

[8] In December 2008, the developer acting through the Body Corporate created a bundle of rights that were saleable as a hotel and serviced apartments business and provided for building management services. At that time the Body Corporate resolved at an extraordinary general meeting:

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2 *Body Corporate 406198 v Property Opportunities Ltd* [2022] NZHC 418 [Judgment under appeal] at [79] and [96].

3 See [99]–[122] and [132]–[140].

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

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

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

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

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

[9] The Amended Rules, Management Agreement, and lease formed a suite of documents relating to the management of Bianco Off Queen. Bianco Ltd remained the sole owner of all the units. Mr Manning signed the Body Corporate resolution as director of Bianco Ltd. The Amended Rules were registered and took effect on 5 December 2008.

[10] The Management Agreement was signed by Tim Manning on behalf of both the Body Corporate and as the sole director of the then manager, Avondale Properties Ltd. Mr Manning as director of Bianco Ltd, the sole owner of all the units, was the sole member of the Body Corporate when it resolved to adopt the Amended Rules and the lessor when the lease was executed.

[11] It appears that almost immediately after the Management Agreement and the lease were entered into, Avondale Properties Ltd assigned its interests under them to VR Management Services Ltd. In November 2013, POL became the owner of the Management Unit. The rights under the Management Agreement were later assigned to Shiraz in 2014, and this was accompanied by a deed of covenant of obligations under that agreement, recording the consent of the Body Corporate to that assignment.

Under this agreement Shiraz agrees to perform and be bound by all of the provisions of the Management Agreement.

[12] Shiraz has been the building manager under the Management Agreement since June 2014. It appears the Body Corporate has not had any issues with Shiraz's performance of its duties under that agreement. Shiraz has been paid the management fee provided for by the Management Agreement.

[13] We address the provisions of the Management Agreement in detail below. It is helpful to note here that the Amended Rules and the Management Agreement include provisions requiring the Body Corporate to pay to the building manager, presently Shiraz, in addition to the management fee, a contribution equivalent to the rent payable under the lease for the Management Unit. The relevant provisions are r 3.1(v) of the Amended Rules and cl 5.6.6 of the Management Agreement. It is common ground this contemplates that Shiraz will pay to POL the rent under the lease and then be reimbursed an equivalent amount by the Body Corporate.

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

[15] The Body Corporate commenced this proceeding in May 2019 challenging the validity of a number of the 2008 Amended Rules that related to the lease of the Management Unit, the validity of aspects of the Management Agreement, and the validity of the lease. The Body Corporate applied for summary judgment on parts of its claim.

[16] Associate Judge Sargisson delivered a decision on the summary judgment application on 7 May 2020, finding that:[4]

(a) Rules 3.1(v) and 3.2(1) (which empowered the Body Corporate to guarantee a lease of the Management Unit) of the Amended Rules were ultra vires the UTA 1972 and therefore void and of no effect; and

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

[17] Relevantly, Judge Sargisson found:

> [37] However, the terms of r 3.1(v) go well beyond such a scheme. Under that rule, the Body Corporate is empowered, indeed obliged, to pay a contribution to the Manager equivalent to the rent payable under the Lease for the Management Unit. Nothing in the UTA 1972 could possibly be construed as authorising the Body Corporate to make replacement rules authorising or obliging it to assume a responsibility to contribute to the rent of the lessee for the Management Unit which must, in terms of the lease, be used for a reception and office for the serviced apartments. Further, counsel for Shiraz Holiday Ltd properly acknowledges that, "[i]f the rule places an obligation on the Body Corporate to provide a rental guarantee regarding the lease of the management unit, the rule would not appear to be incidental to performing the duties or powers imposed on the Body Corporate under the UTA 1972."

[18] The Body Corporate subsequently narrowed its claim at the hearing before Campbell J in the High Court on 26 and 28 October 2021. The claims that the Body Corporate pursued at the hearing were that:

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

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

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

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4 *Body Corporate 406198 v Property Opportunities Ltd* [2020] NZHC 926 at [50].

[19] The High Court found that the UTA 1972 governed the validity of the Management Agreement.[5] The Judge also found that Shiraz was liable for the outgoings.[6] Those findings have not been appealed. Before examining the High Court decision further, we provide an overview of the Management Agreement, the Deed of Lease and Rules that are the focus of this appeal.

The Management Agreement

[20] The following parts of the Management Agreement are directly relevant to the issues in this case.

Key terms

[21] The agreement relates to the management of the "Property" which is defined to mean "collectively the Land, the Buildings, the Units, and the Common Property." "Land" refers to the land subject to Deposited Plan 406198. The "Buildings" refers to the buildings erected on the Land, and "Common Property" refers to that term under the Act and includes all personal property of the Body Corporate.

Exclusive Appointment

[22] Clause 2.1 grants "exclusively" to the Manager the "Management Rights and Letting Service Rights and appoints the Manager to perform the Duties and provide the Services set out in this agreement." "Management Rights" refers to "the Management Rights proposed in this Agreement [and] the Body Corporate Rules." "Services" means the services specified in cl 3.2. This clause refers to the provision of a wide range of services (including Unit maintenance) to individual proprietors or occupiers of Units. The Manager may make a separate charge to individual proprietors and their tenants and invitees for these services.

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5 Judgment under appeal, above n 2.
6 At [176].

[23] There is also separate reference to "Letting Service Rights". "Letting Service" means:

> … the business of letting Accommodation Units on a short and long term basis to be conducted on the Property by the Manager on behalf of the Proprietors who require such a service on the terms of the Letting Agreement.

[24] "Letting Service Rights" are defined as:

> … the provision of the Letting Services by the Manager incidental to the Letting Service including, without limitation:
>
> (a) advertising and promotion;
>
> (b) offering Accommodation Units for short and long term letting;
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> (c) negotiating with person to occupy or use Accommodation Units for reward;
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> (d) entering into and terminating any agreement or arrangement for occupation or for use of the Accommodation Units;
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> (e) collecting fees and other monies payable for occupation and use of the Accommodation Units;
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> (f) instituting proceedings for recovery of possession of the residential Units or any fees and money payable for occupational use of the Accommodation Units;
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> (g) any additional services required for the short or long term letting and management of the Accommodation Units.

Duties and Services

[25] The Management Agreement also specifies the duties and services to be performed by the Manager at cls 3.1 and 3.2 (addressed above). In summary, the duties stated at cl 3.1 relate to the works on the Units and the maintenance and operation of the Common Property. Clause 3.1(p) has particular relevance to the present case as it enjoins the Manager to:

> … provide adequate rental accommodation within the complex to the on-site building manager. If the rental for such accommodation is greater than the $20,000.00 allowance contained in the Management Fee the shortfall shall be payable by the Manager.

[26] The breadth of the services that may be provided by the Manager is captured by cl 3.2(u) which refers to "[o]ther services required by the Proprietors or tenant[s]

or invitee of Units." "Letting Services" are not included in this list of services that the Manager may provide under cl 3.2.

[27] The Body Corporate's duties are recorded at cl 4. In short, the Body Corporate must do all things necessary to ensure that the Common Property, the Property, and the building are maintained in accordance with the statutory and regulatory obligations. Clauses 4.2, 4.4 and 4.5 also contain proscriptions against interference with the Manager's rights and duties under the Agreement. More specifically they state:

> 4.2 The Body Corporate must not employ or contract with any other person to perform any duty or provide any service that the Manager is entitled to provide under this agreement.
>
> …
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> 4.4 The Body Corporate shall not procure any other person or persons to provide the Services to the Proprietors. The Body Corporate agrees that all revenue earned by the Manager from providing such Services shall belong to the Manager.
>
> 4.5 The Body Corporate must not pass any resolution varying or rescinding (or purporting to vary or rescind) the Rules in any way which may compromise or adversely affect the Manager's rights under this Agreement.

Management Fees and Management Unit

[28] Clause 5 refers to the obligations of the Body Corporate in terms of payment of a management fee and a rental contribution to the Manager. Clause 5.1 refers to the "Management Fee" at the Commencement Date of $220,000 per annum plus GST (if any). It includes a:

> $20,000.00 Allowance towards the cost of providing adequate accommodation within the complex to the on-site building manager. Any shortfall of rental payable above this sum shall be payable by the Manager.

[29] Clause 5.3 also stipulates that the Manager may not assign, transfer, or licence its right to occupy the Management Unit (as the right to occupy is for the purpose of the Manager providing the Duties and Services to the Proprietors) other than in accordance with cl 13.1(a) which provides for such assignment.

[30] Clause 5.5 states that the Management Fee represents remuneration for the performance of the Duties (being the Duties set out in Clause 3). The Management Fee does not include provision for the Services, payment by the Manager of any levy pursuant to s 15 of the Act or pursuant to any other powers, authorisations, duties, or functions conferred or implied by the Agreement.

[31] Clause 5.6.6 addresses the obligation to make a rental contribution. Given its significance to the case we restate it here in full:

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

Letting Services

[32] Clause 11.1 envisages that the Proprietors utilising the Letting Service enter into a Letting Agreement with the Manager and cl 11.2 envisages that the Manager may enter into agreement with proprietors or occupiers of the Accommodation Units for the provision of any other services approved by the Body Corporate from time to time.

[33] Clause 12 deals with the Letting Service Rights. Clauses 12.1, 12.2 and 12.4 confer exclusive letting service rights to the Manager:

> 12.1 The Body Corporate or the Proprietors shall not procure any other person or persons to provide the Letting Service and the Body Corporate and the Proprietors shall not provide any facilities on the Property or permit any part of the Property to be used by any person or persons who may provide services identical or similar to the Letting Service.
>
> 12.2 The Body Corporate must take all reasonable steps to ensure that there is no interference with the exclusive right of and the exercise by the Manager of the Letting Service.
>
> …
>
> 12.4 The Body Corporate and the Proprietors shall not, without the prior written consent of the Manager:
>
> (a) authorise any person to, or permit any person or any of its staff to, or itself exercise the Letting Service on the Property or any

other letting service of the same or similar nature as the Letting Service;

(b) licence, lease or grant restrictive or exclusive use of any part of the Property (other than to the Manager) for the purpose of allowing any person to exercise the Letting Service or carry on any letting service of the same or similar nature as the Letting Service.

[34] The remainder of the cl 12 Letting Service Rights refer to the rights of the Manager to fulfil the Letting Service.

Deed of Lease

[35] At about the same time as the Body Corporate and the then Manager entered into the Management Agreement, they executed a Deed of Lease relating to the Management Unit.[7] The Deed defines the business use of the premises as "Reception and Office for the building manager to be used for operation of the complex as serviced apartments".

[36] Clause 16 of the Deed stipulates that the Manager must obtain the prior consent of the Body Corporate to use or permit to be used any part of the premises for any use other than the business use.

The Amended Rules

[37] The Amended Rules[8] refer to, among other things, the "Management Agreement" as:

> … the agreement in relation to the management control and administration of the Property and operation of a Letting Service and provision of services entered into by the Body Corporate."

[38] "Letting Service(s)" means:

> … the offering of the Units for short term/medium term/long term accommodation and in accordance with any building or resource consent which may apply in respect of any particular Unit.

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7 The Deed of Lease refers to a specified unit and accessory units. It is common ground that these include the Management Unit.

8 Dated 3 December 2008.

[39] Clause 2 refers to the duties of a proprietor. Relevantly, cl 2.1(u) states that any lease of the Management Unit "must be collateral to any Management Agreement" and the proprietor of the Management Unit must "not … act in any way which is inconsistent with the grant of management rights as set out in the Management Agreement".

Exclusive rights and rental contribution

[40] The Amended Rules, under cl 3.1(t) specifically confer on the Body Corporate the power to enter into a Management Agreement that reserves "exclusively to the Manager the right to manage the Units, the Common Property, and the Building" and the exclusive right to provide additional services to the proprietors of Units or tenants or occupiers.

[41] Clause 3.1(u) also stipulates that the Body Corporate:

> (u) not appoint any other Manager or any other person or entity to provide management services or Letting Services to the intent that there shall only be at any given time one Manager providing management services and Letting Services;

[42] Clause 3.1(v), the ultra vires provision, then empowers the Body Corporate to pay a rental contribution in respect of the Management Unit and Reception as follows:

> (v) pay a contribution to the Manager equivalent to the rent payable under the lease for the Management Unit and Reception and provide a rental guarantee to the lessor of the Management Unit throughout the term of that lease agreement and any renewal thereof;

High Court Judgment

[43] Campbell J acknowledged that the conferral of an exclusive right to provide letting services to Shiraz was ultra vires the UTA 1972,[9] but he was not satisfied that the Management Agreement as a whole, or cl 5.6.6 of that agreement were ultra

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9 Judgment under appeal, above n 2, at [96].

vires.[10] The Judge considered that the ultra vires exclusive letting provisions could be easily severed from the balance of the Management Agreement, noting:

(a) The valid provisions, including payment for the building services, operate perfectly well if the ultra vires provisions are severed.[11]

(b) The ultra vires provisions are subsidiary to the main clauses relating to the management of the Common Property.[12]

(c) The powers of exclusivity reflect commercial reality in any event — Managers enjoy a natural commercial advantage over other letting service providers.[13]

(d) Clause 29.1 of the Management Agreement expressly provides for severability.[14]

(e) Unlike leading cases where similar arrangements were ultra vires, the right to exclusivity in those cases was essential.[15]

(f) Any ongoing commercial advantage to the Manager of a letting right under the Management Agreement was not an improper subsidy but an agreed commercial benefit at the time of acquisition of a unit, the consideration for which is the discharge of the Management Duties and Services.[16]

(g) Evidence of apparent disproportionate benefit did not support a finding that the Management Agreement was ultra vires as a whole.[17]

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10 See [99]–[121], and [132]–[140].
11 At [99].
12 At [100].
13 At [100(c)].
14 At [101].
15 At [105]–[110], referring to *Humphries v Proprietors "Surfers Palms North" Group Titles Plan 1955* (1994) 179 CLR 597; and to *Atrium Management Ltd v Quayside Trustee Ltd* [2012] NZCA 26, (2012) 7 NZ ConvC 96-001.
16 At [112]–[121].
17 At [122].

[44] Campbell J also found that cl 5.6.6 was not ultra vires because the UTA 1972 authorised the Body Corporate to pay a building manager for building services. The Judge found that the payment under cl 5.6.6 is the same as payment under cl 5.1 — that is, they are "each part of the consideration that the Body Corporate agreed to pay to the building manager in exchange for the provision of building management services".[18] The Judge emphasised that the proprietors enjoyed the "usual liberty that contracting parties have to agree the amount to be paid for services".[19] The Judge found that the Manager is obliged to occupy the Management Unit to provide building services (as well as hotel services) under cls 5.3 and 13.1 of the Management Agreement, so the rent was a cost incurred in relation to those services.[20]

[45] The Judge also addressed the unjust enrichment claim. He found there was jurisdiction to consider the claim and found that Shiraz was clearly enriched to the extent of the payments made by the Body Corporate pursuant to cl 5.6.6.[21] As he found that cl 5.6.6 was not ultra vires it was not necessary for him to form a final view on the quantum of any relief. He acknowledged it was a difficult issue, raising problems as to the proper basis for such a claim and potential counter restitution.[22]

[46] Justice Campbell nevertheless observed that the Body Corporate had shown that the value of the services provided by Shiraz was less than the amount by which its payments to Shiraz exceeded those services, noting that on the available evidence the difference between the amount paid to Shiraz and the highest of the other comparable complexes is about $125,000 per annum.[23] The Judge also found that, had he found cl 5.6.6 to be void (when dealing with a claim to recoup outgoings payments),[24] the fact that Shiraz had acquired the rights under the Management Agreement on a different basis would not have affected the unjust enrichment claim.[25]

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18 At [132].
19 At [134].
20 At [117] and [135].
21 At [152].
22 At [158].
23 At [159].
24 The findings in relation to the outgoings are not under appeal.
25 At [179]–[180].

Argument

[47] Mr Bigio KC for the Body Corporate submits that the Judge erred in deciding that the Management Agreement as a whole and cl 5.6.6 were not ultra vires. He says that none of the reasons given by the Judge to the contrary support a finding that the agreement is vires. The exclusive right to provide letting services was an essential feature of that agreement given the multiple safeguards built into the Management Agreement and in the collateral lease of the Unit, to protect exclusivity. The cl 5.6.6 rental payment is then said to correlate directly to the exclusive right to provide letting services as evidenced by the fact that it would otherwise grossly exceed usual provision for rental cost. He submitted that the Judge was wrong to find that the lease permitted the Manager to perform their Duties from there and that the Unit was in fact used for both the performance of Duties and the Letting Services. The evidence shows that the Unit was used as a hotel reception office. The entire basis therefore of the agreement and cl 5.6.6 is flawed and incapable of severance. This outcome is consistent with the approach and outcome taken by the Courts here[26] and in Australia.[27]

[48] Mr Rainey for Shiraz responds that while the exclusivity aspect of the letting service provisions was ultra vires, the letting services components of the Management Agreement were not essential and clearly severable. The agreement expressly separates out "Duties" from "Services", and "Letting Services" are separate from both. Furthermore, there is nothing inherently wrong with contracting to provide letting services as part of a management agreement and the inclusion of an additional fee to cover the rental cost of the Unit was simply a normal arrangement for rental reimbursement as part of the Manager's overall package that the owners are now seeking to renege on. Importantly, the Manager uses the Unit to perform his management duties (as well as any letting service). Furthermore, the power to enter commercial arrangements to pay rent was acknowledged by this Court in *Vermillion Wagener Ltd v Body Corporate 401803*.[28]

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26 *Atrium*, above n 15.
27 *Humphries,* above n 15.
28 *Vermillion Wagener Ltd v Body Corporate 401803* [2015] NZCA 313, (2015) 16 NZCPR 483 [*Vermillion Wagener* (CA)] at [33].

Is clause 5.6.6 ultra vires?

[49] With the benefit of argument, we prefer to address first whether cl 5.6.6 is ultra vires.

[50] A body corporate is a creature of statute, and its powers and duties are tightly prescribed by the unit titles legislation.[29] The validity of a contract or agreement entered into by the body corporate therefore depends on the powers of the body corporate pursuant to the relevant Act or to valid body corporate rules.[30] The normal effect of a finding of ultra vires is that the rule, transaction, or agreement, or the part of it which is ultra vires, is void ab initio.[31]

Duties and powers

[51] In the present case, the UTA 1972 applies. Section 15 of that Act sets out the duties of the body corporate. Section 16 refers to the powers of a body corporate. The s 15 duties were helpfully summarised by Paterson J in *Chambers v Strata Title Administration Ltd*:[32]

> The duties specified in the Act relate to insuring the buildings and other improvements on the land, paying the premium on the insurance policies, keeping the common property in a state of good repair, complying with notices issued by local authority or public body requiring repair work, the control, management and administration of the common property, the enforcement of any lease or licence under which the land is held, the enforcement of any contract of insurance, the establishment of a maintenance fund for administrative and other expenses, and the levying of the proprietors to maintain this fund. The statutory rules contain a provision headed "Powers and Duties of Body Corporate". The duties relate to the repair and maintenance of chattels, fixtures and fittings, the repair and maintenance of essential services, and the production on request by certain people of insurance policies.

[52] Section 16 outlines the powers of a body corporate:

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29 At [24].

30 *Humphries,* above n 15; *Low v Body Corporate 384911* [2011] 2 NZLR 263 (HC); *Body Corporate 396711 v Sentinel Management Ltd* [2012] NZHC 1957, (2012) 13 NZCPR 418; and *Body Corporate 401803 v Vermillion Wagener Ltd* [2015] NZHC 285, (2015) 15 NZCPR 758 [*Vermillion Wagener* (HC)] at [62], upheld on appeal in *Vermillion Wagener Ltd* (CA), above n 28.

31 *Humphries*, above n 15; *Low v Body Corporate 384911*, above n 30, at [28]–[30]; and *Vermillion Wagener* (HC) above n 30, at [64].

32 *Chambers v Strata Title Administration Ltd* (2003) 5 NZCPR 299 (HC) at [41].

> Subject to the provisions of this Act, the body corporate shall have all such powers as are reasonably necessary to enable it to carry out the duties imposed on it by this Act and by its rules:
> Provided that the body corporate shall not have power to carry on any trading activities.

[53] As is evident from the face of s 16, the powers of a body corporate must be reasonably necessary to carry out identified duties.[33] As Muir J said in *Vermillion* in the High Court, "[e]verything must ultimately be referable to its duties".[34]

Rules

[54] Schedule 2 of the UTA 1972 sets out the default body corporate rules. Section 37(3) enables these rules to be amended, provided that no rule or amendment may prohibit or restrict the devolution of units, or transfer, lease, mortgage or dealing therewith, or destroy or modify any right created by the UTA 1972.[35] The immediate effect of this provision is that agreements purporting to confer an exclusive right to let are ultra vires. As Lang J said in *Russell Management Ltd v Body Corporate No 341073*:[36]

> The legislature was clearly of the view that it was important to preserve the ability of individual unit owners to deal with their units without restriction or interference by the body corporate. The section therefore prevents the body corporate from amending its rules so as to prevent or restrict the unit owners from transferring, leasing, mortgaging or otherwise dealing with their units.

Clause 5.6.6

[55] Returning to the facts, it is common ground that r 3(v) of the Amended Rules is ultra vires at least insofar as it purports to enable a third-party guarantee of Shiraz's rental costs in respect of the Management Unit. It is also common ground that cls 12.1, 12.2 and 12.4 are ultra vires because they purport to confer an exclusive right on the Manager to let the properties. Similarly, cls 4.2 and 4.4 which purport to bind the Body Corporate to prescribe non-interference with the Manager's rights insofar as they relate to any exclusive right to let, are ultra vires. While not a matter of agreement we

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33 *Vermillion Wagener* (CA), above n 28, at [34].
34 *Vermillion Wagener* (HC), above n 30 at [67]; cited with approval in *Vermillion Wagener* (CA), above n 28, at [34].
35 Section 37(6).
36 *Russell Management Ltd v Body Corporate No 341073* (2008) 10 NZCPR 136 (HC) at [38].

also consider that cl 2(u) of the Amended Rules is ultra vires insofar as it purports to bind the proprietor to observe the Manager's exclusive rights to let. All of this sets the frame for the assessment of the vires of cl 5.6.6.

Analysis

[56] The key issue is whether cl 5.6.6 is ultra vires.

[57] Campbell J found that cl 5.6.6 was intra vires because it formed part of the compensation for the building management services. More specifically Campbell J said:[37]

> [132] Clause 5.6.6 is a promise by the Body Corporate to make a payment to the building manager. The payments made under cl 5.6.6 are payments (or more correctly part of the payments) for the provision of building management services. They are no different in that respect from the payments of the management fee under cl 5.1. They are each part of the consideration that the Body Corporate agreed to pay the building manager in exchange for the provision of building management services.

[58] We take a different view of the purpose and effect of cl 5.6.6. We consider that the cl 5.6.6 compensation is directly referable to the ultra vires exclusive letting service and we do not consider that it can now be sensibly decoupled from the corresponding ultra vires exclusivity provisions.

[59] First, cl 5.6.6 demands a contribution to the rental cost payable by the Manager in respect of a "Reception and Office to be used for operation of the complex as serviced apartments" as defined in the Deed of Lease. There is no other compensatory mechanism in the Management Agreement directed to this operation. The Management Fee relates only to the performance of the Manager's "Duties". Those duties do not include the Letting Services. The Manager's "Services" under the Management Agreement are related only to services provided to individual proprietors and tenants at their cost under cl 3.2 of the Management Agreement.[38] The cl 5.6.6 payments therefore provide the only method for compensating for the exclusive letting service.

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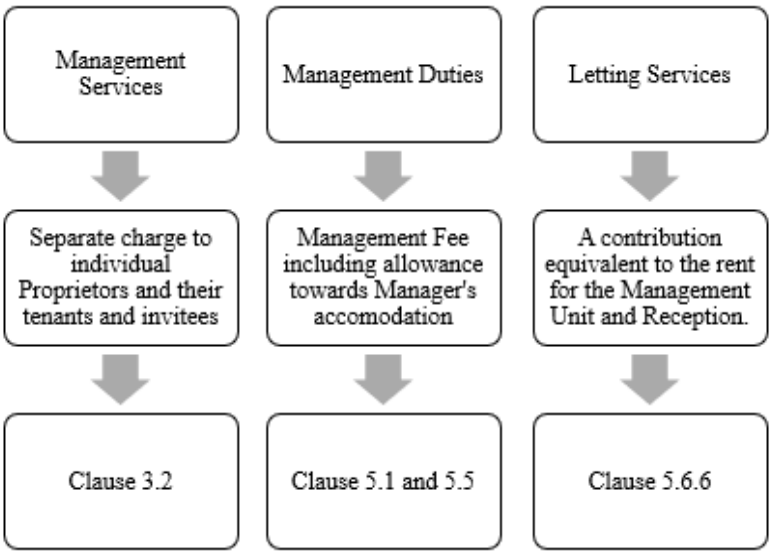
37 Judgment under appeal, above n 2.

38 Per cl 3.2 of the Management Agreement. See discussion above at [22], [25], and [26].

[60] Second, as detailed above, the "Letting Service Rights" are defined as the Manager's rights and the power to provide those services is conferred exclusively on the manager by cl 12 of the Management Agreement. Thus, the entire premise of the letting service is that it would be exclusive. There is no scope within this letting service scheme, as drafted at inception, for a non-exclusive letting service. Accordingly, cl 5.6.6 was clearly directed to compensating the manager for the rental costs of an ultra vires exclusive letting service.

[61] Figure A below depicts the relationship between the Duties, Services and Letting Rights and the compensation provisions. As illustrated there, there is no method of payment for the exclusive letting service except cl 5.6.6.

Figure A



[62] Mr Rainey nevertheless submits that a non-exclusive power of the Manager to operate a letting service out of the Management Unit remains efficacious, and thus, cl 5.6.6 remains a valid form of compensation. He also says that the Manager's Duties and Services are performed out of the Management Unit and so further justify the added expense. Campbell J also reasoned that as the Unit was being used for a dual purpose — letting and performance of the Manager's Duties — the cl 5.6.6 payments were intra vires.

[63] We are unable to agree. For reasons we have just explained, the clear purpose of cl 5.6.6 is to compensate the Manager for rental costs associated with the ultra vires

exclusive letting services. A clause requiring the Body Corporate to pay for an ultra vires purpose must also be ultra vires and void ab initio. The fact that Duties and Services may also have been performed out of the Management Unit does not validate payments clearly made for an ultra vires purpose.

[64] We acknowledge the point made by Campbell J that the Body Corporate was at liberty to engage a manager on terms it thought appropriate. But a body corporate can only bind itself to do something that is referable to its lawful powers and duties. By purporting to bind itself to an exclusive letting service, and to pay the rental cost associated with that service, it acted ultra vires its powers and duties. A compensatory method premised on that exclusivity is necessarily also ultra vires from inception.

[65] We are fortified in our conclusion by the approach taken by this Court in *Vermillion*. In that case, the issue was whether the body corporate had the legal power to guarantee obligations under two separate leases. We are concerned with only the lease of a unit to the building manager. The management agreement in that case authorised the body corporate to guarantee the lease of a unit by the building manager within the complex. But, this Court found, there being no duty within the amended rules to secure accommodation for the manager and more particularly for the body corporate to assume a primary obligation to pay a manager's rent, the guarantee could not be justified. This Court then endorsed the following reasoning of Muir J from the High Court judgment:[39]

> … a power to appoint a building manager does not, in turn, empower the body corporate to enter into any related agreements simply because they are said to be reasonably necessary or incidental to the exercise of that power. Beyond entry into … the management agreement itself the exercise of the power must be anchored to a duty in the Act or the rules.

[66] We make the same point here. There was no basis upon which the Body Corporate could assume an obligation to compensate a manager for exclusive letting services.

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[39] *Vermillion Wagener* (HC), above n 30, at [72] (footnote omitted), cited with approval in *Vermillion Wagener* (CA), above n 28, at [34].

[67] This Court in *Vermillion* also rejected the contention advanced by Mr Rainey in that case that a guarantee was appropriate as the rental of the unit was needed to enable the building manager to perform its duties. The Court said:[40]

> [33] We reject Mr Rainey's submission. As we have found, he has failed to identify any duty for which it was reasonably necessary for the Body Corporate to provide accommodation for the building manager or, more particularly, that giving a guarantee was reasonably necessary to performance of any of the duties imposed by ss 15(1)(a), (f) or (h). In the normal course any arrangement between the members of the Body Corporate and the manager to meet or subsidise rental would be met by a contractual provision for reimbursement of the rental component or part of it. It would not be satisfied by an obligation in the name of a guarantee to pay rental to the owner or lessor of the manager's unit.

[68] Like Campbell J, Mr Rainey in the present proceedings places some significance on the above statement that "[i]n the normal course any arrangement between the members of the Body Corporate and the manager to meet or subsidise rental would be met by a contractual provision for reimbursement of the rental component."[41] That may well be so as a matter of generality (for which we express no concluded view), but that is not what happened in this case. The Body Corporate bound itself, and therefore the members, to an ultra vires exclusive letting regime with corresponding compensation at cl 5.6.6 for the Manager. Furthermore, it plainly never had in contemplation the type of unfettered non-exclusive letting arrangements now advanced by Mr Rainey.

[69] Accordingly, we find that cl 5.6.6 was ultra vires from inception.

Was the management agreement as a whole ultra vires?

[70] We turn then to examine the larger question of whether the Management Agreement as a whole is ultra vires. On this issue, the High Court of Australia in *Humphries* provides some helpful guidance:[42]

> … the question is whether the provision of the letting service was so material and important a part of the bargain between the parties that the body corporate would not have agreed to pay the sum of $60,000 per annum without that service being provided. Unless that question is answered in the negative, the

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40 *Vermillion Wagener* (CA), above n 28.
41 At [33].
42 *Humphries*, above n 15, at 20.

promise contained in cl 2(r) must be regarded as inseverable from the promise contained in cl 8 of the agreement.

[71] We can deal with this succinctly. Referring to Figure A above, it can be seen that all of the ultra vires provisions can be removed without consequence for the balance of the Body Corporate's scheme. All of the Duties and Services, which are clearly demarcated by the Management Agreement as separate from the "Letting Service Rights", can continue to be performed with corresponding intra vires compensation provisions. We note that the lease of the Management Unit contemplates only a letting service use. But it was not seriously contended that the Management Unit could not be used to perform the Duties and Services. We note also that the Management Agreement contemplates that the Duties and Services may be performed from that Unit.[43]

[72] Mr Bigio places some emphasis on *Atrium*.[44] In that case this Court found that a promise to procure a management agreement with exclusive rights was an essential term and thus could not be severed. For the reason just expressed, we do not consider that the "Letting Service Rights" were essential to the Management Agreement as a whole.

[73] We therefore agree with Campbell J on this wider issue and dismiss this part of the appeal.

Unjust enrichment

[74] Mr Bigio submits it is not necessary to refer the matter back to the High Court to consider the unjust enrichment claim. Mr Rainey submits it should go back for that assessment.

[75] It appears, on our reading of the High Court judgment, that Campbell J would have been minded to grant relief in unjust enrichment had he found cl 5.6.6 to be ultra vires. He specifically found that the Body Corporate had shown that Shiraz had benefitted in the order of $125,000 per annum based on the costs incurred by a

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43 Per cl 5.3 of the Management Agreement, see discussion above at [29] and [44].

44 *Atrium*, above n 15.

comparable complex. But the discussion in the judgment about problems relating to the exact basis for the restitutionary claim, and the potential availability of counter restitution, leave us unclear as to whether definitive findings have been made as to quantum.

[76] As we did not hear detailed argument on the unjust enrichment claim, we prefer therefore simply to refer this aspect back to the High Court for reconsideration in light of our finding that cl 5.6.6 is ultra vires.

Result

[77] The appeal is allowed in part.

[78] The matter is referred back to the High Court for reconsideration of the unjust enrichment claim in light of our finding that cl 5.6.6 is ultra vires.

[79] The second respondent must pay costs to the appellant for a standard appeal on a band B basis and usual disbursements.

Solicitors:
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