**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 20/2013**
**[2014] NZSC 137**

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| BETWEEN | CHUAN WU<br>Appellant |
| AND | BODY CORPORATE 366611<br>First Respondent |
| | THETA MANAGEMENT LIMITED<br>Second Respondent |

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| Hearing: | 7 November 2013 |
| Court: | Elias CJ, McGrath, William Young, Glazebrook and Tipping JJ |
| Counsel: | B P Rooney for Appellant<br>N R Davidson QC and G Burgess for First Respondent<br>S C Price and D M Cross for Second Respondent |
| Judgment: | 9 October 2014 |

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**JUDGMENT OF THE COURT**

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**A The appeal is allowed and the judgment of Asher J on the first cause of action is reinstated.**

**B The cross appeal is dismissed.**

**C The respondents are to pay to the appellant costs of $25,000 plus reasonable disbursements (to be set by the Registrar if necessary).**

**D The costs orders made in the Court of Appeal are set aside and the costs and interest awards in the High Court reinstated. If costs cannot be agreed for the Court of Appeal, costs should be set by that Court in light of this judgment.**

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## REASONS



**ELIAS CJ, McGRATH, GLAZEBROOK and TIPPING JJ**
(Delivered by Glazebrook J)

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## Introduction

[1] Mr Wu, an Australian resident, owns a unit in the Empire Apartments building in Auckland. Body Corporate 366611 is the building's body corporate. Theta Management Ltd (Theta) is the building manager. The building is run as a student hostel. Most of the owners lease their units to Theta, which in turn licences them to students.

[2] Mr Wu and a small number of other owners wished to manage their units and lease them to students themselves. The respondents required such owners to sign the building Security and Access Protocol (the Protocol) and pay a security deposit as a condition of access to the building. Mr Wu issued proceedings,[1] claiming that this wrongfully interfered with his ability to rent his unit. In his first cause of action, he claimed in both private nuisance and trespass.

[3] In the High Court, Asher J found in favour of Mr Wu and held the respondents to be liable to Mr Wu in nuisance.[2] The Court of Appeal allowed the respondents' appeal in part, finding in favour of Mr Wu on a more limited basis.[3] In both courts below, it was held that signing the Protocol was an unreasonable step that Mr Wu was not required to take to mitigate his loss.

[4] On 3 May 2013, this Court granted leave to appeal and cross appeal.[4]

[5] We have decided that neither the Body Corporate Rules nor the Unit Titles Act 1972[5] gave the respondents the power to require owners or occupiers of owner-

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1 Mr Wu brought the action in the High Court as a representative action under r 4.24 of the High Court Rules on behalf of the owners of eight other units who have identical interests. See *Wu v Body Corporate 366611* [2011] 2 NZLR 837 (HC) [*Wu* (HC)] at [21] for the list of the claimants represented by Mr Wu. For convenience, in this judgment, we will just refer to Mr Wu.

2 *Wu* (HC), above n 1. Mr Wu also challenged certain of the Body Corporate Rules and resolutions in the High Court and also the proxies given by the other owners to Theta. He succeeded on his challenges of the rules and resolutions but not on the issue of proxies.

3 *Body Corporate 366611 v Wu* [2012] NZCA 614, [2013] 3 NZLR 522 (Hammond, Arnold and Heath JJ) [*Wu* (CA)]. Hammond J delivered a separate concurring judgment. While a challenge to one of Asher J's findings on one of the Body Corporate's Rules was in the Body Corporate's notice of appeal to the Court of Appeal, it was subsequently abandoned as a ground of appeal: see [22].

4 *Wu v Body Corporate 366611* [2013] NZSC 46.

5 The Unit Titles Act 2010 has now replaced the Unit Titles Act 1972. However, this case is based on the provisions of the Unit Titles Act 1972. Any reference in this judgment to the Unit Titles Act is a reference to the 1972 Act.

managed units to sign the Protocol and to pay the security deposit as a condition of access to the building. In any event, the Protocol purported to impose "informal rules" on owners and occupiers, circumventing the rule-making provisions of the Unit Titles Act.

[6] As indicated above, the pleadings contained actions in private nuisance and trespass. At the hearing of this appeal, the Court indicated to the parties its doubts about whether the appropriate cause of action lay in private nuisance. We have decided that the doubts were well-founded and we have decided that that the respondents are liable in trespass for ousting Mr Wu from the common property, which he part owns.

[7] While it was not strictly necessary to discuss nuisance, given the conclusion with regards to trespass, we consider that, attached to a unit holder's unit title, there is a natural right of access to the unit. There could therefore, by analogy with the cases regarding access to and from a public highway, be a good argument that the respondents committed a private nuisance by substantially and unreasonably interfering with Mr Wu's access right.

[8] We agree (by majority) with the finding of the Courts below that Mr Wu took all reasonable steps to mitigate his loss. Mr Wu was not required, in mitigation, to accept the offer made by the Body Corporate to pay a reduced security deposit and accede to the Protocol. We have also upheld Asher J's quantification of damages.

[9] We therefore allow the appeal, dismiss the cross appeal[6] and reinstate the damages awarded in the High Court.

[10] We now discuss the facts and the procedural history in more detail, summarise the judgments below and set out the relevant legislative provisions, before analysing in more detail the issues in the appeal and cross appeal.

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[6] Most of the cross appeal related to specific findings of the Court of Appeal distinguishing between owners and occupiers. Given that the Court of Appeal judgment has not been upheld, those issues have fallen away.

**Background**

[11] The Empire Apartments building is 19 storeys high and contains 313 residential units, virtually all of which are overseas owned. The building was purpose-built for student accommodation with shared facilities and services to units. When fully occupied, approximately 800 students can be accommodated.

[12] The Empire development was undertaken by Sanctuary Developments Empire Ltd (Sanctuary), which owned the land on which the Empire was built. On 29 March 2006 it deposited a unit plan, which had the effect of creating a stratum estate in freehold for each individual unit.[7] Sanctuary acquired each of the strata titles that were created and became (as the sole owner) the Body Corporate.[8] Sanctuary passed a unanimous resolution amending the default rules under schs 2 and 3 of the Unit Titles Act to a new set of rules.[9]

[13] Before selling any of the units, Sanctuary entered into a lease of each unit to an associated company, Academic Accommodation Management (3) Ltd (Academic). This was a company formed by Mr Groves, the principal of Sanctuary. Individual units were sold subject to that lease and on 1 August 2006 Academic was appointed as the building manager to manage the rental of the units. These in turn were rented to students under licences to occupy.[10]

[14] Academic contracted to pay a fixed rent to the purchasers of the units, the units having been marketed in New Zealand and overseas on the basis that each investor would receive a fixed rent amounting to eight per cent of the purchase price of each unit for the first two years.

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7 Unit Titles Act, s 4(2).

8 Section 12(1).

9 Given Sanctuary held 100 per cent of the units at that time, it could alter and amend the default rules under s 37 of the Unit Titles Act.

10 Because the Empire is operated as a "student dormitory", the District Court has held that the Residential Tenancies Act 1986 does not apply to it by virtue of s 5(h)(i) of the Act: *Mai v Body Corporate 366611* DC Auckland CIV 2008-004-1026, 7 October 2008. This is not a matter that is before us and so it is unnecessary for us to make any comment on that judgment.

[15] Mr Wu entered into an agreement to purchase Unit 810 in 2004 (with settlement in 2006). He acquired (like the other owners) the unit not for personal occupation but as a passive investment.

*Restructuring of the building's management*

[16] On 22 August 2007, Academic sent a letter to all owners advising that it was unable to continue its role in dealing with student occupiers. It resigned, effective from 31 August 2007, and, as from that date, terminated all the occupational licences with the students. Academic also made it clear that it could not perform its obligation to pay the fixed rent to the owners. Academic was placed in liquidation on 12 September 2007. On 28 November 2007, Academic's liquidators disclaimed the leases with the owners as onerous property.

[17] In the letter of 22 August 2007, unit owners had been advised by Academic that Mr John Chen had resigned from Academic[11] and formed a new company, Theta, which had been appointed as building manager. It was indicated that Theta would be soliciting their business and that Academic would help in any transition arrangements as required.

[18] Theta sent out to unit owners a standard form letter, dated 29 August 2007, asking them to sign a Theta management lease appointing Theta to manage the units. The leases that Theta invited owners to sign were not on the same terms as the original Academic leases. In particular, they did not provide for fixed rental returns. Between August and October 2007 Theta signed leases with the majority of the unit owners and proceeded to licence those units to student occupants.

[19] Mr Wu did not enter into a lease agreement with Theta. He wanted to place his own tenants in his unit and to collect the rent directly from them. Given that Academic had not paid all of the rent that had been agreed to, and the fact that Mr Wu perceived a connection between Theta, Sanctuary and Academic, he had no confidence that Theta would pay the rent either. Further, Theta did not offer a fixed rent and Mr Wu did not consider Theta's proposed rent to be adequate. He also did

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[11] Mr Chen said in his cross-examination that he was not in fact connected with Academic but that he had done work for Sanctuary.

not wish to give Theta his proxy in the affairs of the Body Corporate for the full term of the lease (10 years plus a 10 year renewal), which Theta's lease required.

*Problems in the building*

[20] During Academic's tenure, there had been management problems with the building, including property damage, vandalism, numerous building evacuations, access by unauthorised persons, security and tenant safety concerns and fire sprinkler activations. Fire sprinkler activations inside apartments only activate the in-house alarm systems but those in common areas involve the fire service and consequential costs, which fall on the Body Corporate if the perpetrator is not identified.

[21] There had been a number of insurance claims made by the Body Corporate before 1 August 2007, arising out of property damage and vandalism. From August 2007 until May 2008, six further claims were made against the general building insurance policy that the Body Corporate had taken out with New Zealand Insurance (NZI).

[22] There was evidence of issues with insurance cover. A letter dated 3 April 2008 advised the Body Corporate that five out of six insurers had declined to provide a quote for insurance cover. The reason given was the extensive claims history. Only NZI was prepared to quote for insurance cover. However, that quote contained severe conditions with expensive premiums, a 500 per cent increase in the excess for general claims, and a 2,000 per cent increase in the excess for water damage claims.[12]

[23] Insurance for the apartment complex was essential; if the building could not be insured, the Body Corporate would not have been able to fulfil its duty to "insure and keep insured all buildings".[13]

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[12] A similar facsimile was received from the Body Corporate insurance broker on 24 March 2010. The facsimile specified five options for insurance offered by NZI. Increases in insurance premiums apparent from the NZI quote were said to be due to the claim costs for the last four years. The broker advised that five other insurers (Vero, Allianz, QBE International, Lumley General Insurance and Zurich New Zealand) had "all declined to quote due to the claims history".

[13] Unit Titles Act, s 15(1)(b).

*The access issue*

[24] Access to the units is by way of common property. For security reasons, entry to the common property (including lift access to each floor) and to each individual unit is controlled by a magnetic "access card", similar to those used in hotels. These cards are centrally programmable.[14]

[25] As noted above, immediately after deposit of the unit plan, Sanctuary (as sole proprietor) amended the default rules set out in schs 2 and 3 of the Unit Titles Act. The new rules provided for two groups of rules: one under the heading "Rules that may be amended by unanimous resolution" and the other under the heading "Rules that may be amended by majority resolution". Under the second heading a new r 3.10 was promulgated, relating to security keys. That rule provided:

> **3.10 Security Keys**
>
> (a) If for security purposes the Body Corporate or its agent the Secretary and/or the Building Manager restricts the access of any Proprietor or occupier to Common Property it may make available to that person a Security Key.
>
> (b) A Proprietor or occupier in possession of a Security Key must not duplicate it, or permit it to be duplicated, and must take all reasonable steps to ensure that the Security Key is not lost or handed to any other person.
>
> (c) A Proprietor or occupier must notify the Building Manager or the Body Corporate promptly if a Security Key is lost, or destroyed.

[26] On 31 August 2007, when Academic abandoned its roles as building manager and lessee, it deactivated all existing electronic access cards so that they no longer worked.[15] Access cards were programmed for tenants in those units whose owners had signed Theta's leases. Only Theta and the Body Corporate had the ability to programme and activate the access cards.

[27] On 18 October 2007, Mr Wu's solicitors wrote to Theta to obtain an access card that would allow him to access the building and his unit. On 22 October 2007 Theta wrote to the solicitors who were by then acting for the owners who did not

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14 See *Wu* (HC), above n 1, at [11]–[13].

15 There was a conflict of evidence as to whether the Mr Wu's unit's locks were reprogrammed via an electronic impulse or whether Mr Wu's access cards were deactivated.

wish to sign a lease with Theta (at the time between 50 and 60 in number) requiring the owners to sign the Protocol and to pay a security deposit in the nature of a bond before the access cards would be issued. The letter said:

> Theta is willing to programme and provide access cards to your clients which will provide access to the common areas of the building and to each of their specific apartments upon [Academic's] confirmation that your client is entitled to occupy that apartment but as part of our building management requirements any person who is given such access to the building must enter into and comply with our security and access protocol agreement and related materials, copies of which are enclosed.
>
> For Theta to provide owners or occupants access they need to read and comply [with] the attached Empire residents rules and regulations handbook and the security and access [protocol] agreement.

[28] The letter also said that Theta was willing to provide access to the owners' agent at reasonable times as required in the course of the agent's duties. The letter inquired about the nature of those duties and asked that the extent of and reason for any access be explained. It also said that, for security purposes, the agent had to be accompanied by a member of Theta's staff.

[29] Attached to the above letter was a standard letter in the following form:

> We understand that Mr … wishes to occupy unit …, or manage and tenant out unit *[said unit.]*
>
> Theta Management Limited (**Theta**) as building manager of the Empire – has the responsibility of (amongst other things) managing security and access at the Empire. Accordingly, before Theta will grant any person security access to the Empire, Theta requires:
>
> (a) The occupier to complete the **enclosed** occupant's registration form and sign the **enclosed** security and access protocol agreement; and
>
> (b) A security deposit of $2575 to be paid to Theta.
>
> We also **enclose** a copy of the Empire Rules and regulations referred to in the security and access protocol agreement.
>
> Theta's reasons for requiring satisfaction of these conditions prior to providing security access include:
>
> (a) As part of its management role, Theta must operate strictly controlled premises, much higher than one would otherwise find in rental premises. With over 700 student residents, Theta enforces strict curfews, rules and regulations as set out in the Resident Handbook, and policies regarding noise

> control, drugs and so on. Overall, Theta enforces a stringent level of security and control (and, in particular, access and occupation) at the Empire with a view to providing a safe environment to residents that is conducive to study. Under the management agreement, Theta is obliged to maintain a register of residents of the building, as well as to liaise with unit owners and their tenants to promote the quiet enjoyment by residents of their units. In order to maintain this high standard of control, and comply with its obligations under the management agreement, Theta must know who has security access (and for which units).
>
> (b) In the event of an occupant triggering a false fire alarm, costs of evacuation and for all applicable services caused by the false fire alarm is approximately $2,000. There are also costs which are incurred if security key cards are lost. Where an occupant causes such a cost, then they (or the owner who has given them occupation) – rather than the other owners – should meet those costs. The requirement of the security deposit is to protect the owners as a whole. Theta aims to ensure that, out of fairness, other owners do not have to contribute towards costs incurred by individual owners or their occupants. Such costs should obviously be borne by the owner (or occupier, where applicable).

[30] The Protocol attached to the standard letter provided for the payment of $2,925 as a "security deposit". That deposit was to be paid before a licensee began to occupy a unit. It was to be refunded on "satisfactory return of all keys and security swipe cards" but "less any costs applicable". Theta also included "other fees" in the Protocol, which could be deducted from the security deposit. These included fees for lost or additional room keys or access cards,[16] fines for tampering with or setting off a fire alarm, an acknowledgement of liability for repair costs to the complex and in the event of substantial damage that required an insurance claim, for the insurance excess under the Body Corporate's insurance policy.[17]

[31] Both the Protocol and the Occupant's Handbook[18] set out other obligations, duties and rights of Theta and occupants. Many of these were effectively the same as in the Body Corporate Rules, albeit differently worded. Some, however, purported to extend further than the Body Corporate Rules. For example, Mr Wu

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16 Although not fully clear from the evidence, it appears that a "room key" was an internal room key for "bedroom doors", while the access cards were for access to individual units and to the complex.

17 These fees, fines and associated costs are set out in full in *Wu* (CA), above n 3, at [47].

18 The Protocol contained a clause that required the occupant to comply with the Occupant's Handbook.

points out that the Protocol provided for the common areas to be at all times under the control of Theta and that Theta had the right to create, modify and enforce any rule relating to the common area. There was also the requirement to pay the security deposit.

[32] The Protocol provided to the owners of owner-managed units appears to have been a modified form of an agreement that Theta required its student tenants to enter into. It was, however, clear from the evidence that it was expected that the owners in Mr Wu's position (those that did not enter into a lease with Theta) were expected to become parties to the Protocol and pay the security deposit personally. This was the finding of both the High Court and the Court of Appeal.[19]

[33] Mr Chen explained in his affidavit that it was necessary to have owners of owner-managed units sign the Protocol and provide the security deposit because neither the Body Corporate nor Theta had any contractual right to bind the tenants of those owner-managed units.[20] Mr Chen said that the owners could obtain the funds from their tenants to cover the security deposit if they chose to do so.

[34] If the owners paid the security deposit, Mr Chen's evidence was that the deposits were kept in a separate bank account but this does not seem to have been communicated to Mr Wu. One of Mr Wu's concerns with the payment of the security deposit was that it was to be paid to a body other than the Body Corporate and that it was not kept in a trust account.

[35] Mr Chen said in cross-examination that the building was unmanageable without the Protocol and the security deposit arrangements and, if they had not been in place, he would have resigned.

[36] It is convenient now to deal with a point of dispute between the parties. Mr Wu in his submissions maintains that he never objected to his tenants being required to sign the Protocol and pay a security deposit: he merely objected to being

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19 See *Wu* (HC), above n 1, at [28]; and *Wu* (CA), above n 3, at [86].

20 It was also said in evidence, by a building manager for Theta, Mr Xu, that difficulties could arise in identifying who was occupying the owner-managed units.

required to sign the Protocol and pay the security deposit personally. The respondents submit that Mr Wu did object to his tenants signing the Protocol.

[37] Neither the High Court nor the Court of Appeal made findings on this point, possibly because it was not suggested to Mr Wu in cross-examination that he could have procured his tenants to sign the Protocol and pay the security deposit to Theta in his stead. Nor does it appear from the evidence that this had ever been suggested as an option. The only offer for the tenant rather than the owner to sign the Protocol and provide the security deposit was contained in Theta's letter of 1 April 2008 but that was conditional on the owners signing a management agreement with Theta.[21]

[38] We are satisfied that, even had Mr Wu been happy for his tenants to sign the Protocol and pay the security deposit, access would not have been granted unless he also did so personally. This means that the question of whether Mr Wu was happy for his tenants to sign is ultimately irrelevant to the issues to be decided in this appeal.

*The dispute moves to the District Court*

[39] Mr Wu and others responded to Theta's requirement to sign the Protocol and pay a security deposit by issuing proceedings in the District Court against the Body Corporate seeking orders requiring the Body Corporate to provide them with keys to their units and for damages. Mr Wu and others, in addition to the substantive proceedings, sought an interim injunction requiring the Body Corporate to provide them with access to their units. At the hearing of the interim injunction application, the Body Corporate sought an adjournment as it took the view that its Secretary did not have the authority to engage in court proceedings and therefore it could not instruct counsel. In any event, it said that it did not have possession of the keys as these were held by Theta.

[40] On 16 January 2008, Judge Hole in the District Court declined the adjournment application[22] and issued an injunction directing the Body Corporate to

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[21] See below at [49].

[22] *Mai v Body Corporate No 366611* DC Auckland CIV-2008-004-14, 16 January 2008 [*Mai v Body Corporate No 366611* (16 January)] at [31].

"take all practicable steps necessary to provide the plaintiffs with electronic key cards giving access to their respective units and the common property of Empire Apartment Buildings".[23] The order was directed to the Body Corporate as it was the only defendant to the proceedings and because it had the statutory obligation to manage the common property.[24] Judge Hole recognised that the Body Corporate did not have the keys and that Theta did. However, Judge Hole did not think this was an impediment as the Body Corporate had a "right of action, if necessary, against [Theta] to force it to disgorge the relevant keys".[25]

[41] The Body Corporate and Theta did not provide electronic key cards to Mr Wu and the other locked out owners. Instead, an Extraordinary General Meeting was called on 8 February 2008. The Body Corporate passed a number of resolutions including a resolution to appeal against the District Court decision and also resolved not to "indemnify Theta" by having the Body Corporate sign the Protocol and pay the security deposit on behalf of the owners of owner-managed units.[26]

[42] Also on that day, the Body Corporate purported to pass (by majority resolution) an amended r 3.10. That rule change purported to empower the Body Corporate to require owners or occupiers of any unit to enter into a protocol agreement and to require them to pay a refundable deposit of $2,650. From that date, Theta purported to operate in accordance with that amended rule. Mr Chen's evidence was that Theta had taken its own legal advice in late 2007 and had no reason to believe that the amended rule, adopted by the Body Corporate in February 2008, was defective or unlawful.

[43] Given that Judge Hole's first interlocutory order had not been complied with, Mr Wu and others applied to the Court and on 14 February 2008, the matter again came before Judge Hole.[27] He noted that the current position was that Mr Wu and the other owners could gain access by "acquiescing to Theta Management Limited's demands" by paying the deposit or, alternatively, if the Body Corporate indemnified

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23 At [47].
24 Unit Titles Act, s 15(1)(h).
25 *Mai v Body Corporate No 366611* (16 January), above n 22, at [37].
26 See *Wu* (CA), above n 3, at [51]. At that stage, there were 43 owner-managed units.
27 *Mai v Body Corporate No 366611* DC Auckland CIV-2008-004-14, 14 February 2008.

Theta against all costs and damages that may result from release of the keys.[28] Judge Hole could understand Mr Wu's reluctance to pay the deposit to Theta given the lack of security.[29]

[44] Judge Hole considered that the resolution not to indemnify Theta and not to pay the security deposit was "passed effectively in defiance of the Court order".[30] He considered that the Body Corporate had not taken all practicable steps (including giving the undertaking to Theta) to comply with the injunction[31] and thus ordered the Body Corporate to provide the owners with access to their units by midday 25 February 2008.[32]

[45] This deadline came and went without access to the building and the units being made available. The Body Corporate appealed against the District Court judgments. The appeal was heard in the High Court on 6 March 2008 and allowed, but only to give the Body Corporate a "further opportunity" to comply with the orders.[33] Lang J stated that he expected that the Body Corporate would require Theta to hand the access cards to the owners by 12 March 2008.[34] Alternatively, if Theta refused, the Body Corporate should seek leave to issue third party proceedings against Theta, including an application for an interim injunction.[35] The Body Corporate did not comply with either of these orders.

*Settlement offer*

[46] On 25 March 2008, the Body Corporate,[36] through its counsel, made a without prejudice offer to accept $1,000 as a refundable deposit, as long as the

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28 At [5], based on advice from the solicitor (Mr Grove). Judge Hole thought Mr Grove was appearing for the Body Corporate.

29 At [6].

30 At [9].

31 At [11(e)].

32 At [12].

33 *Body Corporate No 366611 v Mai* HC Auckland CIV-2008-404-809, 6 March 2008 at [57]. Lang J accepted that Mr Grove had not been instructed to act for the Body Corporate at the hearing before Judge Hole on 14 February but he accepted that this would not have been apparent to Judge Hole. Nonetheless, there was a risk of injustice to the Body Corporate as it had not been able to present its full argument before the District Court: see at [27]–[31].

34 At [59].

35 At [59].

36 The Court of Appeal in *Wu* (CA), above n 3, at [15] said that it was Theta that made this offer. That is incorrect.

Protocol was signed and the proprietors undertook to ensure that any tenant would abide by the relevant rules and regulations. While the letter stated that it was to settle "your clients' interlocutory application for interim orders",[37] in fact, there was no extant application.[38] As noted above, the interim orders in favour of Mr Wu and the other owners had already been granted (and upheld on appeal).

[47] The offer appears to have been an attempt to comply with Lang J's judgment but essentially it was an offer that would have required Mr Wu and the other owners to give up the benefit of the interim injunction by which access was to be provided to the owners without any conditions imposed. While the security deposit was reduced, that reduced sum was still payable to Theta. The requirement to sign the Protocol with Theta also remained. Theta was, at that stage, not a party to the proceedings.

[48] The offer stated:

> **CIV 2008-404-809 – BODY CORPORATE 366611 v MAI & ORS**
>
> 1. I refer to our without prejudice discussion Thursday last. I am now in a position to relay the following without prejudice offer to settle your clients' interlocutory application for interim orders only:
>
>    a. Theta will [accept a] $1,000 refundable security deposit from each of [your] client owners rather than the full $2,650;
>
>    b. My client will cover the remainder of the security deposit;
>
>    c. Theta would then provide access to each of your client owners conditional upon each of them:
>
>       i. signing the security access protocol;
>
>       ii. providing written authorisation from the owners personally (rather than just your firm in light of the fact it appears that your firm is acting without some plaintiff owners authority); and

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[37] Mr Cheung in an affidavit of 3 March 2011, on behalf of the Body Corporate, said that the intention of the Body Corporate was that "if the parties could agree on access issues in the interim then the balance of the matters could be litigated in due course". He had earlier referred to the offer dealing with how "the impasse over the issue of the electronic access cards and payment of the refundable security deposit could be dealt with in the interim". This affidavit was not in the Case on Appeal before us but was before the High Court. It was provided to this Court by memorandum of 16 May 2014.

[38] The Body Corporate had not issued proceedings against Theta (as suggested by Lang J in his judgment).

iii. undertaking that their occupant tenant will be required (as a term of any occupation or tenancy) to agree to abide by the Empire Rules and Regulations (attached).

2. Alternatively, Theta would be willing to enter into the following arrangement:

a. Your client owners will enter into management agreements (i.e.: rental agreements by which Theta finds occupants for the apartments) on Theta's standard terms as attached;

b. Theta would not then require any payment of the refundable security deposit from either such plaintiff owners or my client, and instead would receive such amounts from the occupants;

c. The occupants will sign the security access protocols rather [than] your client owners; and

d. Your client owners would have the right to inspect their apartment on 48 hours prior written notice to Theta.

3. Could you please advise as a matter of priority whether either or both of the above options are acceptable to your clients.

[49] Those proposals were not accepted.[39] By letter dated 1 April 2008, Theta wrote to the Body Corporate's secretary to "clarify" its position. It is clear from this letter that Theta was continuing to refuse access to the units unless the Protocol was signed and the security deposit paid to it. We do not agree that Theta's letter was an attempt to resolve the substantive proceedings, as William Young J suggests.[40] It was addressed to the Body Corporate and not the owners and, in any event, Theta was not a party to the proceeding at that stage. Further, there is nothing in the letter that suggests Theta was prepared to offer access in the interim on terms other than those set out in the letter:[41]

**The Empire Apartments**

The Body Corporate has asked us to clarify the basis on which Theta Management Limited (**Theta**) is willing to program and provide access keys to any apartment in the Empire Apartments.

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39 Mr Wu, in a memorandum of 22 May 2014, says that there is doubt that this letter was ever sent. He also says that he did not waive privilege in respect of the letter. However, it does not appear that objection was taken to the inclusion of the letter before the courts below on the basis of privilege. The letter was referred to by the Court of Appeal and we therefore assume, for the purpose of this appeal, that it was sent and received.

40 See the reasons of William Young J at [159].

41 Under the terms of the Body Corporate's offer of 25 March 2008 Mr Wu and the others would only pay $1,000 and the Body Corporate would cover the remainder.

> Theta has further considered its position regarding the terms upon which it is obliged to yield up the keys etc to any of the apartments in the Empire Apartments. As Building Manager Theta acknowledges that it is required to comply with the terms of its contract with the Body Corporate and the Rules set by the Body Corporate. Theta has responsibility for security for the Empire Apartments and as such is mindful of the requirements under Rule 3.10(a) of the Body Corporate Rules.
>
> In order to meet its obligations to the Body Corporate, Theta is willing to provide programmed access keys to a particular apartment in the Empire Apartments if
>
> (a) Theta is provided a written authorisation, signed by the owner of the particular apartment personally, to provide such access; and
>
> (b) The owner of the particular apartment pays the security deposit of $2,650 and signs the security access protocol personally, as is required by rule 3.10(a) of the Body Corporate Rules.
>
> Requirement (a) above is necessary because it has come to light that a number of owners that Glaister Ennor still purports to act for are in fact not instructing Glaister Ennor to continue to act for them. Theta does not wish to grant access to apartments only to be sued by the owners of those apartments for granting access without their direct authority.
>
> Theta does not reasonably consider that it has an ability to deviate from the above requirements without being in breach of its contractual obligations to the Body Corporate.
>
> Alternatively, Theta would be willing to enter an arrangement in which the owners enter into shorter term (2 years) management agreements (ie: rental agreements by which Theta finds occupants for the apartments) on Theta's standard terms. Theta would not then require any payment of the refundable security deposit from either such owners, and instead would receive such deposit amounts from the occupants. Similarly, it would be the occupants which would sign the security access protocols rather than the owners. An owner would have the right to inspect their apartment on 48 hours prior written notice to Theta.

[50] Mr Chen's evidence was that Theta was not a party to the 2008 court proceedings but he deposed that he was aware that the Body Corporate had tried to reach an agreement to allow Mr Wu and the other owners to gain access to the units and commence renting them. He said that offers were made in March through to May 2008 offering access on part payment of $1,000 to the Body Corporate (not Theta) with the payment made under protest and without prejudice to the ability to challenge the Protocol if the owners chose.

[51] If Mr Chen meant that the settlement offer did not still require the owners to sign the Protocol personally then his evidence is at odds with the letter sent on 25 March 2008. That letter still required the owners to sign the Protocol and the $1,000 was payable to Theta, not the Body Corporate. Further, such a position would have been contrary to Theta's letter of 1 April 2008 which states that the owner of the apartment must sign the Protocol and pay the security deposit for it to grant access.

*Events culminating in the current proceedings*

[52] At a general meeting on 15 August 2008, the Body Corporate passed a number of resolutions, including one not to sue Theta in respect of any of the acts that had been the subject of the prior proceedings.

[53] On 17 April 2009, a further purported amendment to r 3.10 was passed by majority. With numerous other small changes, the amendment increased the refundable security deposit from $2,650 to $5,000 and contained extra rules providing for the situation where a proprietor has appointed a representative.

[54] In August 2009, new proceedings culminating in this appeal were issued in the High Court, replacing the earlier District Court proceedings. Relief was sought against both the Body Corporate and Theta in respect of their alleged unlawful acts in interfering with Mr Wu's enjoyment and use of his unit.

*Judgment on preliminary question*

[55] On 30 November 2009, Lang J delivered a judgment on preliminary questions in the proceedings.[42] As to the new r 3.10 inserted in 2006,[43] Lang J stated that it may be arguable that the rule was valid "to a limited extent" because it was adopted by unanimous resolution.[44] To the extent it purported to be capable of future amendment by majority resolution, however, it was invalid. This is because the rule

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42 *Wu v Body Corporate 366611* (2010) 10 NZCPR 917 (HC) [*Wu* (preliminary questions)]. In summary, the preliminary questions were whether the Body Corporate acted in excess of its powers under the Unit Titles Act in amending r 3.10 on 8 February 2008 and 17 April 2009 and, if so, whether those amended rules were invalid and unenforceable.

43 Set out above at [25].

44 *Wu* (preliminary questions), above n 42, at [45].

did not properly fit within sch 3, which can be amended by majority resolution but within sch 2, which cannot.[45] He held the amendments that had been made on 8 February 2008[46] and on 17 April 2009[47] to the Body Corporate Rules were ultra vires and invalid because they were not passed by unanimous resolution. He stated:[48]

> There can be no justification for the Body Corporate and Theta denying proprietors access to their units in the future. Counsel for the body corporate responsibly accepted during the hearing that this was the case. I would therefore expect the body corporate and Theta to co-operate immediately in providing Mr Wu and others in his position with keys to their units.

[56] It had been argued that the rules as amended in 2008 and 2009 would have been invalid, even if passed by unanimous resolution, because they conferred powers wider than those permitted by the Unit Titles Act. The Judge refused to decide this issue on the basis that the question was hypothetical.[49]

[57] Following Lang J's decision, in December 2009, electronic key cards were given to Mr Wu and the other owners. These cards only worked in the common areas and did not open the doors to the individual units. The respondents' evidence was that this was due to the fact that the batteries in many of the units' locks had become flat. As a result, individual owners engaged locksmiths to open their individual doors and provide working cards and locks. The owners were at that point able to access their units.

**The High Court judgment**

[58] The High Court held that the actions of Theta were an unreasonable interference with Mr Wu's use and enjoyment of his unit and the common property and constituted a nuisance.[50] The actions identified were the reprogramming of the electronic locks and then maintaining electronic locks on the common areas that the proprietors could not use. These actions were held to be unreasonable because there

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45 At [39]–[41]; see ss 37(3) and (4) of the Unit Titles Act.
46 See above at [42].
47 See above at [53].
48 *Wu* (preliminary questions), above n 42, at [53].
49 At [49]–[50].
50 *Wu* (HC), above n 1, at [54].

was no power under the Unit Titles Act or the Body Corporate Rules[51] to impose the conditions relating to the Protocol and the security deposit.[52]

[59] In the High Court the case had been presented on the alternative basis of trespass. Given the nuisance finding, Asher J did not find it necessary to determine whether the electronic impulse that changed the configuration of the locks (including those in the proprietors' units) could have been a trespass.[53]

[60] As to the question of damages, Asher J said he was satisfied by the evidence on Mr Wu's loss of net income from rent during the period prior to December 2009 (when access cards were supplied).[54] He awarded damages accordingly. The lost rental was assessed based on evidence of the actual tenancies and net returns for the initial one-year period after Mr Wu and his fellow owners were granted access to their units.[55] Asher J also awarded damages for the costs of locksmiths who replaced the units' locks, allowing the owners to enter their units.[56]

[61] As to whether Mr Wu had failed to mitigate his losses by declining to enter into the security protocols, Asher J held that it is not a required reasonable mitigation step that a victim accede to a demand from the wrongdoer that it enter into a long-term contract with the wrongdoer on the wrongdoer's unwelcome terms and pay the wrongdoer money. The claimants did not need to do any more than a reasonable person would do ordinarily in the course of that person's business and reasonable persons do not give way to such unlawful and unfair ultimatums. Reasonable persons are entitled to seek redress through the courts rather than surrender.[57]

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51 For these purposes Asher J appears to be of the view that Lang J had held the 2006 insertion of r 3.10 to be invalid.
52 At [47] and [54].
53 At [75].
54 At [55].
55 At [67]–[69].
56 At [71].
57 At [58].

**The Court of Appeal judgment**

[62] The Court of Appeal upheld Asher J's conclusion that the Body Corporate and Theta committed a private nuisance actionable by Mr Wu but on a narrower basis than the High Court.

[63] The Court of Appeal treated the version of r 3.10 as originally inserted as the operative rule.[58] The Court held that the general purpose of that rule was to permit the Body Corporate or its agent to restrict the access of any proprietor or occupier to common property on security grounds.[59] However, the rule could not sensibly be interpreted as allowing the Body Corporate or its agent to prevent an owner from accessing the unit that he or she owned.[60]

[64] It was open to the Body Corporate or its agent to invoke r 3.10 in circumstances where there were genuine concerns about property damage and vandalism that could have had an adverse impact on the insurance of the building.[61] The Court held, however, that it was not reasonably necessary to restrict Mr Wu's access to his unit as there was no suggestion he raised security or insurance concerns.[62]

[65] On the other hand, the respondents were entitled to invoke r 3.10 and refuse to supply an electronic key to any tenant of Mr Wu, in the absence of the tenant's agreement to abide by the terms of the Protocol. This would have affected Mr Wu's economic interests but would not have restricted Mr Wu's access to his unit.[63] Mr Wu was not entitled as of right to provide a key to his tenants, absent that tenant's agreement to abide by the terms of the Protocol.[64]

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58 See *Wu* (CA), above n 3, at [69]–[70], relying on *Velich v Body Corporate No 164980* (2005) 5 NZ ConvC 194,138 (CA) at [36]–[38].

59 *Wu* (CA), above n 3, at [72]–[74].

60 At [74].

61 At [79].

62 At [86]. We note that there appears to be some inconsistency between [74] and [86] of the Court of Appeal's judgment. Whereas the former paragraph indicates "the rule cannot sensibly be interpreted as allowing either [the Body Corporate or building manager] to prevent an owner from accessing the unit that he or she owned", the latter indicates that "[t]he Body Corporate was entitled to restrict access of either a proprietor *or* an occupier" if there were security or insurance concerns.

63 At [87].

64 At [88].

[66] The Court recognised that this conclusion (differentiating between owners and occupiers) was not one for which either of the parties had contended on appeal and that the conclusion provided a different foundation for any claim for damages that Mr Wu may make. Ultimately, the Court said that any loss that Mr Wu may have suffered as a result of what was unreasonably done by the Body Corporate and Theta must be measured by reference to the intrinsic economic value of the unit to him and to the (possible) loss of a chance of letting or licensing the unit to an occupier who was prepared to meet the conditions contained in the Protocol. The Court remitted the question as to damages back to the High Court for reconsideration.[65]

[67] As to mitigation, the Court of Appeal concluded that Asher J was right to hold that Mr Wu was not required to mitigate his loss by accepting the offers put forward by the Body Corporate and Theta to provide access on specified conditions.[66] Although the amount of the "refundable security deposit" was reduced from $2,650 to $1,000, Theta still required accession to the Protocol.[67]

[68] The proposals required Mr Wu to do the very things that the High Court held that he was not required to do; namely, agree to the Protocol put forward by Theta in order to gain access to his unit. The Court agreed with Asher J that there was no legal requirement that Mr Wu accept a proposal that involved Theta acting unlawfully "simply because there may [have been] some commercial justification for the demanded arrangement".[68]

**Relevant legislative provisions**

[69] Section 9 of the Unit Titles Act deals with common property. It provides:

> **9 Common property**
>
> (1) The common property shall be held by the proprietors of all the units as tenants in common in shares proportional to the unit entitlement in respect of their respective units:

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65 At [89].
66 At [112]–[115].
67 At [113].
68 At [115].

provided that nothing in this subsection shall affect the interests among themselves of the proprietors of a stratum estate in an individual unit.

(2) While the same person is proprietor of all the units, subsection (1) shall apply as if there were different proprietors for each of the units.

(3) The proprietors of all the units may sell or lease part of the common property or may grant an easement over the whole or any part of it.

[70] Section 11 provides:

**11 Incidental rights**

(1) The common property and each unit on a unit plan shall, by virtue of this section, have as appurtenant thereto all such rights of support, shelter, and protection, and for the passage or provision of water, sewerage, drainage, gas, electricity, oil, garbage, air, and all other services of whatsoever nature (including telephone, radio, and television services) over the land and every part thereof as may from time to time be necessary for the reasonable use or enjoyment of the common property or unit.

(2) The common property and each unit on a unit plan shall, by virtue of this section, have as appurtenant thereto—

(a) a right to the full, free, and uninterrupted access and use of light to or for any windows, doors, or other apertures existing at the date of deposit of the plan and enjoyed at that date; and

(b) a right to maintain overhanging eaves existing at the date of deposit of the plan—

over the land and every part thereof.

(3) The rights created by this section shall carry with them all ancillary rights necessary to make them effective as if they were easements.

(4) Nothing in this section shall affect any land other than the land to which the unit plan relates.

[71] Sections 15 and 16 of the Unit Titles Act deal with the duties and powers of bodies corporate:

**15 Duties of body corporate**

(1) The body corporate shall—

(a) subject to the provisions of this Act, carry out any duties imposed on it by the rules:

(b) insure and keep insured all buildings and other improvements on the land to the replacement value thereof (including demolition costs and architect's fees) against fire, flood, explosion, wind, storm, hail, snow, aircraft and other aerial devices dropped therefrom, impact, riot and civil commotion, malicious damage caused by burglars, and earthquake in excess of indemnity value:

(c) effect such other insurance as it is required by law to effect or as it may consider expedient:

…

(f) keep the common property in a state of good repair:

…

(h) subject to this Act, control, manage, and administer the common property and do all things reasonably necessary for the enforcement of the rules:

…

(2) The body corporate shall also—

(a) establish and maintain a fund for administrative expenses sufficient in the opinion of the body corporate for the control, management, and administration of the common property, and for the payment of any insurance premiums, rent, and repairs and the discharge of any other obligations of the body corporate:

(b) determine from time to time the amounts to be raised for the purposes aforesaid:

(c) raise amounts so determined by levying contributions on the proprietors in proportion to the unit entitlement of their respective units.

…

**16 Powers of body corporate**

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.

[72] Sections 32, 33, 34 and 34A relate to contributions and monies payable by proprietors:

**32 Recovery of contributions**

Any contribution levied in accordance with the provisions of paragraph (c) of subsection (2) of section 15 shall be due and payable in accordance with the terms of the relevant determination; and so much of the amount as from time to time becomes payable may be recovered as a debt by the body corporate in an action in any Court of competent jurisdiction from the person who was the proprietor of the unit at the time when the amount became payable or (subject to the provisions of section 36) from the proprietor of the unit at the time when the proceedings are instituted.

**33 Recovery of money expended for repairs and other work**

Where the body corporate does any repair, work, or act which it is required or authorised by or under this Act or by or under any other Act to do (whether or not the repair, work, or act is done pursuant to any notice or order served on it by a local authority or public body) but the repair, work, or act is substantially for the benefit of 1 unit only, or is substantially for the benefit of some of the units only or benefits 1 or more of the units substantially more than it benefits the others or other of them, any expense incurred by it in doing the repair, work, or act shall be recoverable by it as a debt in any Court of competent jurisdiction …

**34 Recovery of money expended where person at fault**

Where the body corporate does any repair, work, or act which it is required or authorised by or under this Act or by or under any other Act to do (whether or not the repair, work, or act is done pursuant to any notice or order served on it by any local authority or public body) and the repair, work, or act was rendered necessary by reason of any wilful or negligent act or omission on the part of, or any breach of any rule by, any proprietor or his tenant, lessee, licensee, or invitee, any expense incurred by it in doing the repair, work, or act shall be recoverable by it as a debt in any Court of competent jurisdiction from that proprietor.

**34A Interest on money owing to body corporate**

Where, under any of sections 32 to 34, any registered proprietor owes any money to the body corporate, interest shall accrue in respect of so much of the debt as remains unpaid at such rate as the body corporate shall from time to time determine, being not more than 10% per annum.

[73] Section 35 provides a limitation on liability of proprietors:

**35 Limitation of liability of proprietors**

Subject to this Act, a proprietor shall not be liable to pay or to contribute to the funds of the body corporate any amount exceeding the due proportion recoverable from him under sections 15(2) and 32

of any amount required to discharge any liability accrued or prospective of the body corporate.

[74] Section 37 relates to the rules of a body corporate:

**37 Rules**

(1) Except as otherwise provided by this Act, the control, management, administration, use, and enjoyment of the units and the common property shown on a unit plan, and the activities of the body corporate that comprises the proprietors of those units, shall, while there are more proprietors than one, be regulated by the rules for the time being applicable to that body corporate.

(2) Subject to any amendment or repeal thereof or addition thereto the rules applicable to each body corporate shall be those set out in Schedules 2 and 3.

(3) The rules in Schedule 2 and any additions thereto or amendments thereof may be added to or amended or repealed in relation to any body corporate by unanimous resolution of the proprietors and not otherwise.

(4) The rules in Schedule 3 and any additions thereto or amendments thereof may be added to, amended, or repealed in relation to any body corporate by resolution of the body corporate at a general meeting.

(5) Any amendment of or addition to any rule shall relate to the control, management, administration, use, or enjoyment of the units or the common property, or to the regulation of the body corporate, or to the powers and duties of the body corporate (other than those conferred or imposed by this Act):

provided that no powers or duties may be conferred or imposed by the rules on the body corporate which are not incidental to the performance of the duties or powers imposed on it by this Act or which would enable the body corporate to acquire or hold any interest in land or any chattel real or to carry on business for profit.

(6) No rule or addition to or amendment or repeal of any rule shall prohibit or restrict the devolution of units, or any transfer, lease, mortgage, or other dealing therewith, or destroy or modify any right implied or created by this Act.

(7) No addition to or amendment or repeal of any rule pursuant to subsection (3) or subsection (4) shall have the effect until the body corporate has lodged a notification thereof in form 4 in Schedule 1 with the Registrar, and the Registrar has recorded it appropriately on the supplementary record sheet.

…

(11) The rules shall be binding on—

(a) the body corporate;

(b) all proprietors; and

(c) any other person in actual occupation of a unit—

and shall enure for the benefit of the body corporate and every proprietor.

(12) The body corporate or any proprietor shall be entitled to apply to any Court of competent jurisdiction for an order—

(a) enforcing the performance of or restraining the breach of any rule; or

(b) awarding damages for any loss or damage arising out of the breach of any rule—

by any person bound to comply therewith or by the body corporate.

**Issues**

[75] This appeal and cross appeal raise the following issues:

(a) Does r 3.10 give the power to require entry into the Protocol and payment of the security deposit?

(b) If not, did the respondents otherwise have the power to impose those requirements under the Unit Titles Act?

(c) Did the respondents' actions constitute trespass?

(d) Did the respondents' actions constitute a private nuisance?

(e) Whether the cross appeal should be allowed and in particular:

(i) Should Mr Wu have mitigated his loss?

(ii) Should damages have been awarded for the costs of the locksmith?

**Interpretation of r 3.10**

[76] As noted above,[69] the Court of Appeal considered that the version of r 3.10 as originally inserted allowed the Body Corporate to restrict access to common areas for both owners and occupiers if there were valid security concerns.[70] It held that there were valid security concerns in relation to Mr Wu's potential student tenants[71] but not in relation to Mr Wu.

[77] Therefore, the Court of Appeal held that the respondents were not entitled to refuse an electronic key to Mr Wu but were entitled to refuse to issue one to Mr Wu's student tenants, if those potential tenants were not prepared to enter into suitable security arrangements (by paying the security deposit and entering into the Protocol).[72]

*The parties' submissions*

[78] Neither party sought to challenge the Court of Appeal's conclusion that the operative rule is r 3.10 as originally inserted.[73] However, neither party supported the Court of Appeal's interpretation of that rule.

[79] Mr Wu submits that r 3.10 should not be interpreted as allowing restrictions on access to be imposed for either occupiers or owners, where such restrictions effectively lock owners or occupiers out of the unit they own or occupy. He argues that the rule merely reflects the reality that multiple unit residential buildings are never left open to the public and that owners and occupiers will need electronic access keys.

[80] In the respondents' submission, r 3.10 allows restrictions on access to be imposed on both owners and occupiers where they have not paid the security deposit and entered into the Protocol. There were valid security concerns and real issues with insurance which justified these measures.

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69 See above at [63].

70 Subject to the apparent inconsistency identified above at n 62.

71 We use the word tenant, rather than licensee, as we do not know whether Mr Wu intended to enter into leases or licences with the student occupiers.

72 See above at [64]–[65].

73 We therefore assume for the purpose of this judgment that this is the operative rule.

*Our assessment*

[81] We do not read r 3.10(a) as directed at restricting access for certain owners and occupiers. We see it rather as an enabling provision, allowing electronic keys to be issued to all owners and occupiers where access has to be restricted (for security purposes) to those holding electronic security keys. This interpretation is reinforced by r 3.10(b) and (c), which are rules directed at all owners and occupiers holding security keys. We thus accept Mr Wu's submissions as to the proper interpretation of the rule.

[82] It follows that we do not consider that r 3.10 authorised the respondents to require the entry into the Protocol and the payment of the security deposit before issuing security keys. These requirements do not appear explicitly in r 3.10 and do not arise by necessary implication. If there is a power to impose those requirements, it must be found elsewhere in the Rules or in the Unit Titles Act.

**Power to impose the security deposit and Protocol?**

[83] The respondents did not seek to argue that the measures were justified under any rule but r 3.10.[74] Therefore the issue we discuss in this section is whether the measures can be justified under the Unit Titles Act.

[84] In this regard, we comment that the issue is not how sensible the security arrangements were commercially in the context of a student hostel. Nor is it whether or not Mr Wu's reasons for objecting to them were reasonable. Rather, it is whether the respondents had the power under the Unit Titles Act to require owners of owner-managed units to enter into the Protocol and pay the security deposit as a condition of receiving an electronic access key.

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[74] The respondents did not seek to rely on, for example, r 3.9(b), which purports to grant the Body Corporate the power to prescribe rules and regulations at any time relating to security. It is therefore unnecessary to discuss that rule. We do comment, however, that the rule could not be used to justify any informal 'rule' making process for the reasons set out below at [102]–[109].

*The parties' submissions*

[85] Mr Wu's submission is that the imposition of the Protocol and the security deposit was not within the powers of the respondents. This is because they restricted Mr Wu's access to his unit, contrary to s 11 of the Unit Titles Act. In his submission, they also interfered with his ability to lease his unit, contrary to s 37(6). Further, he submits that, when the respondents required Mr Wu to sign the Protocol, they were in effect attempting to impose rules other than rules promulgated under s 37. They were therefore acting unlawfully.

[86] In addition, the respondents were requiring him to enter into the Protocol with and pay the security deposit to Theta and not the Body Corporate. Mr Wu objected to the provision in the Protocol providing that Theta should have control of the common areas and facilities and that it should also have the right from time to time to establish, modify and enforce rules and regulations with regard to those common areas.

[87] In any event, Mr Wu submits that the Protocol was unnecessary as there were already extensive rules dealing with behaviour in the units and in the common areas which were, by virtue of s 37(11), binding on both occupiers and owners. Section 37(12) provides that these rules can be enforced in court and damages awarded for loss or damage arising out of the breach of any rule.

[88] The respondents submit that the legal authority for imposing the Protocol and the security deposit arises from ss 15 and 16 of the Unit Titles Act.[75] Section 15 imposes a range of duties on a body corporate to control and manage the common property, including keeping it insured. Section 16 provides that a body corporate shall have all such powers as are reasonably necessary to enable it to carry out the duties imposed under the Act and its rules.

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[75] The respondents also relied on s 37(5) but that was in the context of their argument that r 3.10 justified the imposition of the Protocol and payment of the security deposit, an argument we have rejected.

[89] In the respondents' submission, the adoption of uniform building security protocols designed to ensure that the Body Corporate could meet its statutory duties, including relating to insurance, clearly falls within s 16.

*The issues*

[90] As we have noted earlier,[76] the Protocol sought to impose greater obligations on owners and occupiers than were already in the Body Corporate Rules in a number of respects. For the purposes of the following discussion, only three of those are relevant. The first was the requirement to pay the security deposit. The second was making the entry into the Protocol and payment of the security deposit a condition of access. The third was giving Theta the power to control the common areas and to modify the rules governing the common areas. This raises the following questions:

(a) Did the Unit Titles Act allow the imposition of the security deposit?

(b) Did the Unit Titles Act permit the imposition of conditions of access?

(c) Must all 'rules' be made under s 37 of the Unit Titles Act?

(d) Did s 16 of the Unit Titles Act give the power to impose the measures?

*Power to impose security deposit?*

[91] Turning to the security deposit, there are three main provisions of the Unit Titles Act that allow the collection of funds from an owner:

(a) Section 15(2) requires a body corporate to maintain a fund for administrative expenses for the "control, management, and administration of the common property". The amounts raised for that fund are levied from proprietors in proportion to the unit entitlement

[76] See above at [31].

of their respective unit(s).[77] Section 32 allows recovery of contributions levied under s 15(2) as a debt.

(b) Under s 33, where expenditure is incurred for a "repair, work, or act" substantially for the benefit of one or some of the units, this amount can be recovered as a debt from the proprietors of those units.

(c) Under s 34, where expenditure relates to a repair, work, or act caused by the "wilful or negligent act or omission on the part of, or any breach of any rule by, [any proprietor or the proprietor's] tenant, lessee, licensee, or invitee", the amount can be recovered from that proprietor as a debt.

(d) Under s 34A, interest can be charged on any amount owing to the body corporate under ss 32 to 34.

[92] There is a real issue whether the requirement to pay a security deposit is reconcilable with those provisions. Section 15(2)(a) requires a body corporate to establish and maintain a fund, which, in its opinion, is sufficient for the control, management and administration of the common property, the payment of insurance premiums and for meeting the other obligations of the body corporate. Section 15(2)(b) requires a body corporate to determine from time to time the amounts to be raised for the purposes set out in s 15(2)(a).

[93] Sections 15(2)(a) and (b) envisage the setting up of a fund to cover the forecasted general expenses of a body corporate for its control, management and administration of the common property. It does not envisage a specific levy for possible specific expenses that may be recoverable from individual unit holders. There also does not appear to be any evidence that the Body Corporate ever made a determination, as required by s 15(2)(b), as to the amounts that may be required for the control, administration and management under s 15(2)(a). The amounts set also do not appear to be related to expenses that were forecasted to occur. Indeed, the purpose of the security deposit was to try and make sure that the expenses did not

[77] Unit Titles Act, ss (15)(2)(b) and (15)(2)(c).

arise. The requirement to pay a security deposit to Theta rather than the Body Corporate is also inconsistent with s 15(2)(a).

[94] In any event, s 15(2)(c) only allows levying under s 15 in proportion to a proprietor's unit entitlement. In this case, a security deposit was only required from the proprietors of owner-managed units and it was a set amount.[78] The owners of the units leased to Theta did not have to pay the deposit. We accept that the student licensees of the other units were required to pay a security deposit but that was because of their licence with Theta. It was not paid on behalf of the proprietors of the units and we do not understand there to have been any direct contractual relationship between the students and the owners of the units managed by Theta.

[95] Section 33 has no bearing as it is not suggested that the security deposit is used to do work for the benefit of the owner-managed units. Section 34 only allows recovery of expenses incurred by the body corporate through the wilful or negligent act or omission of a proprietor or occupier after the fact. It does not allow the imposition of a security deposit before the occurrence of the damage.

[96] We therefore do not consider that any of the above provisions allowed the imposition of a security deposit.[79]

*Power to impose conditions on access?*

[97] Mr Wu submits that the imposition of the Protocol and the security deposit, as a condition of being provided with an electronic access key, destroyed or modified his rights under s 11 of the Unit Titles Act which, in his submission, gives an owner of a unit an absolute right of access to that unit.

[98] We do not read s 11 as being concerned with access to units. It deals with incidental rights, including access to light and imposing statutory easements for the passage of services. However, while there is no explicit statutory right of access to an owner or occupier's individual unit in the Unit Titles Act, the right to use common

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[78] See also s 35 which affirms that a proprietor does not have to pay more in levies than required in proportion to his unit entitlement.

[79] We make no comment on whether a properly formulated body corporate rule could impose such an obligation.

property (owned by Mr Wu and the other owners in terms of s 9) as a thoroughfare for access to individual units is a right so basic and fundamental to the Unit Titles Act that it goes without saying.

[99] There must therefore be an implied right of access which, if abrogated, can invalidate a body corporate rule pursuant to s 37(6).[80] This provides that no rule shall "prohibit" or "restrict" any "right implied or created" by the Act. If a rule impeding access could be invalidated under s 37(6), then it follows that a right to impede access to units cannot exist outside of the rules.[81]

[100] Unlike the Court of Appeal, we do not consider that a distinction can be made between owners and occupiers in this regard. Particularly in the context of this building, any restriction on access for occupiers of owner-managed units would effectively prevent those owners from using their units at all because it was never intended that the owners would occupy their units personally. That means any restriction on Mr Wu's tenants is a restriction on Mr Wu's ownership rights.

[101] Further, any restrictions on access for tenants would also be in direct contravention of Mr Wu's right to lease his unit. Section 37(6) provides that no rule may "prohibit" or "restrict" the lease of any units.[82] If there can be no rule that allows restrictions on leasing units, it follows that a power to do so cannot exist outside the rules. As Mr Wu points out, any occupier is obliged to comply with the Body Corporate Rules in terms of s 37(11)(c).

*Section 37*

[102] The Protocol purported to impose significant duties on owners and occupiers that were additional to those in the Body Corporate Rules, such as the payment of a

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[80] Section 11(2)(a) supports the idea that there is an implied right of access. Whereas s 11(2)(a) is concerned with use and access of light to or for any doors and windows, that use is predicated on a even more basic right: access to the unit.

[81] We leave open the question of whether there could be rules restricting rights of access where, for example, there had been a continual flouting of the body corporate rules by an owner or occupier. There is no suggestion in this case that Mr Wu or any of his prospective tenants came into this category. Any evidence of student misbehaviour was by past students and in any event the past misbehaviour was only committed by certain offenders rather than by all the student tenants.

[82] We leave open whether the term "lease" would include licences of the type at issue in this case (if Mr Wu's tenants were to be licensees).

security deposit.[83] The Protocol also purported to allow Theta to establish or modify rules relating to the common areas, and restrict access if the Protocol was not signed and the security deposit not paid. The issue is whether, even if there had been power to impose the contents of the Protocol under the Act, they could have been imposed as informal 'rules' and not formal body corporate rules under s 37 of the Unit Titles Act.

[103] Section 37(1) provides: "Except as otherwise provided by this Act, the control, management, administration, use, and enjoyment of the units and the common property … *shall* … be regulated by the rules for the time being applicable to that body corporate."[84]

[104] Section 37(1) is in mandatory terms. The use of the word "shall" means that a body corporate cannot have 'rules' that are not rules promulgated under s 37 of the Act. It is true that this is "[e]xcept as otherwise provided by this Act" but this is to recognise that there are powers expressly given under the Act (for example, the powers relating to levying discussed above).

[105] There are good policy reasons why 'rules' arising outside of the formal rule making process, such as the Protocol in the current case, should be unenforceable.

[106] Having informal 'rules' circumvents the procedural processes provided in the Unit Titles Act, which are in place to ensure that any rules that govern the use of units or common property are procured in a democratic fashion and are subject to the substantive limits contained in the Act.[85] In this case, it was not even the Body Corporate that was deputed to create further amendments to the Protocol but the building manager, Theta.

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83 See above at [31].

84 (Emphasis added).

85 Through either unanimous or majority resolutions. See ss 37(3) and 37(4). See also the restrictions in s 37(5) as to the content of rules.

[107] Further, allowing informal 'rules' would also avoid the notification requirements under s 37(7) to the Registrar-General of Land.[86] Any informal 'rules' would not therefore be available for potential purchasers to view.[87]

[108] The importance of knowing any rights or duties before buying a unit has been emphasised in a number of Australian cases.[88] For example, the Victorian Supreme Court in *Body Corporate Cluster Plan No 1186 v Walsh*, said that, where such rights and duties are not registered as rules, "an interested party searching the title to discover what are the rights and duties of a lot holder, would be at risk of being misled – and perhaps seriously – by the absence of any such record of alteration".[89]

[109] Therefore, subject to s 16 and assuming, contrary to what we have decided above, that there was power under the Unit Titles Act to impose the Protocol, the informal 'rules' in the Protocol were so significant that they should have been included in formal body corporate rules. This would mean that any amendment to those rules in future would only be allowed after the proper processes under s 37 had been followed.

*Section 16*

[110] The respondents rely on s 16 of the Unit Titles Act, which provides that the body corporate shall have all powers reasonably necessary to enable it to carry out the duties imposed on it by the Act and the body corporate rules. They point to the duties imposed under s 15, including insuring the buildings and improvements, keeping the common property in a state of good repair and managing the common property. They say that requiring entry into the Protocol and payment of the security deposit was incidental to those powers. They point to the major difficulties with the management of the building before the Protocol and security deposit system was

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86 The position of the 'District Land Registrar' was abolished and the powers vested in that position were transferred to the Registrar-General. Pursuant to s 38(1)(a) of the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, the words "District Land Registrar" in s 37(7) of the Unit Titles Act should be read as 'Registrar-General'.

87 Under s 37(2), the sch 2 and 3 rules are the default rules. Any amendment to those rules is not valid until notified to the Registrar-General of Land on form 4 of sch 1, which requires that the amendments that have been made to the relevant schedules are set out and that they are certified to having been made in accordance with the Unit Titles Act.

88 See *Ballard v Body Corporate Strata Plan No 1492* [1974] VR 818 (VSC) at 826 and 827; and *Body Corporate Cluster Plan No 1186 v Walsh* [1986] VR 155 (VSC) at 160.

89 *Body Corporate Cluster Plan No 1186 v Walsh*, above n 88, at 160.

instituted and the improvements since. They also point to the difficulties with insurance cover.[90]

[111] While recognising that the problems identified by the respondents were very real, s 16 only gives the powers that are "reasonably necessary" to carry out the duties imposed under the Unit Titles Act and the body corporate rules. Section 16 is also subject to the provisions of the Unit Titles Act. Section 16 cannot therefore give powers that are inconsistent with the powers under the Unit Titles Act or the rules or with the rights of unit title holders.

[112] Further, we do not consider that s 16 can be used to override the mandatory nature of s 37(1) and the policy considerations discussed above. Even if there had been power to impose the Protocol, it would have been unenforceable as it was not promulgated in accordance with the formal rule making process.[91]

*Conclusion*

[113] The respondents had no power to impose a requirement for owners of owner-managed units to enter into the Protocol and pay the security deposit as a condition of being provided with electronic access keys to the building for them and their prospective tenants.

**Trespass**

[114] Trespass was pleaded as an alternative first cause of action in Mr Wu's third amended statement of claim. It was discussed by Asher J in the High Court but not conclusively dealt with.[92] The Court of Appeal did not consider the trespass cause of action. As indicated above, at the hearing in this Court, it was indicated to the

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90 See above at [21]–[23]. We note, however, that it does not appear that entry into the Protocol and payment of the security deposit was imposed as a condition of insurance by the insurance company. We make no comment on the position if it had been a formal requirement of insurance.

91 R Thomas "Chapter 12: Unit Titles" in Tom Bennion and others *New Zealand Land Law* (2nd ed, Thomson Reuters, Wellington) 983 at 1019. See also R Thomas "Duties and Powers of Bodies Corporate" [1998] NZLJ 337 at 337.

92 *Wu* (HC), above n 1, at [73]–[75].

parties that trespass, rather than private nuisance, may be the most appropriate cause of action on the facts.[93]

[115] Trespass is an unjustified direct interference with the land in the possession of another.[94] Mr Wu had possession of his unit and joint possession of the common property,[95] once the liquidator disclaimed the Academic lease.[96]

[116] With respect to property owned in common, since each co-owner is entitled to be present on the land and to make normal use of it, neither can sue the other for trespass, unless one co-owner expels (ousts) the other from the land or destroys the subject matter of the tenancy.[97]

[117] In this case, the respondents, who act on behalf of the co-owners in managing, maintaining and controlling the common property,[98] have unlawfully excluded Mr Wu from accessing the common property that he has a legal interest in. Mr Wu therefore has an action in trespass.

*Conclusion on trespass*

[118] The above finding of an actionable trespass means that we must allow the appeal against the Court of Appeal's judgment, subject to the question of mitigation of loss and the issue of damages for the costs of the locksmith.

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93 See above at [6].

94 Bill Atkin "Trespassing on Land" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) 467 at 468.

95 As recognised above at [98], as per s 9(1) of the Unit Titles Act, Mr Wu has a proprietary interest proportionate to his unit entitlement. Upon the disclaiming of the leases by the liquidators, Mr Wu's lease ceased and possession reverted back to Mr Wu.

96 See above at [16].

97 Atkin, above n 94, at 474. For recognition of this rule in New Zealand, see *Ferguson v Miller* [1978] 1 NZLR 819 (SC) at 824–825. See also *Halsbury's Laws of England* (5th ed, 2010) vol 97 Tort at [578] and the cases cited therein. The rule has been also recognised in Australia: for example, see *Greig v Greig* [1966] VR 376 (VSC) at 377.

98 Unit Titles Act, s 15(h).

**Nuisance**

[119] Given that we found Mr Wu has a cause of action in trespass,[99] it is not strictly necessary for us to consider the issue of the Body Corporate and Theta's liability in private nuisance. However, given it was the main cause of action dealt with by the High Court and Court of Appeal, we make the following observations.

[120] The tort of nuisance protects two types of rights from unreasonable interference: (a) the use or enjoyment of a plaintiff's land, and (b) rights over or in connection with a plaintiff's land.[100]

[121] The harm complained of in this case, or the so called 'nuisance', was the electronic reprogramming of the electronic locks for the entry to the common areas, the lifts and Mr Wu's unit. As a result, Mr Wu could not access his unit on the eighth floor and rent it to prospective tenants.

*Use or enjoyment of land*

[122] For an action for private nuisance to be sustained on the basis of interference with the use or enjoyment of land, some emanation of the effect of the nuisance from the defendant's land to the plaintiff's land is usually required.[101] There may be circumstances where the "activities on the defendant's land are in themselves so

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99 See above at [114]–[118].

100 Bill Atkin "Nuisance" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) 509 at [10.2.02], citing *Read v J Lyons & Co Ltd* [1945] KB 216 (CA) at 236. See also JW Neyers and J Diacur "What (is) a nuisance? *Antrim Truck Centre Ltd v Ontario (Minister of Transportation)*" (2012) 90(1) Can Bar Rev 213 at 219–220. See also FH Newark "The Boundaries of Nuisance" (1949) 65 LQR 480 at 482 where he said, "[t]he essence of nuisance was, therefore, that it was a tort to land. Or to be more accurate it was a tort directed against the plaintiff's enjoyment of rights over land, for nuisance might also be brought for interference with a man's rights over the land of another by way of easement or profit"; and MA Jones (ed) *Clerk & Lindsell on Torts* (20th ed, Thomson Reuters, London, 2010) at [20–01].

101 *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL), which has been cited in numerous cases in New Zealand, including: *Harbourcity Developments Ltd v Owen* HC Auckland CIV-2006-404-1400, 30 March 2007 at [61]; *BP Oil New Zealand Ltd v Ports of Auckland Ltd* [2004] 2 NZLR 208 (HC) at [81]; and *Hawkes Bay Protein Ltd v Davison* [2003] 1 NZLR 536 (HC) at [30]. *Hunter v Canary Wharf Ltd* also illustrates that the law of nuisance protects some but not all amenities commonly associated with the beneficial use and enjoyment of land. See also the discussion in Neyers and Diacur, above n 100, at 219–220.

offensive to neighbours as to constitute an actionable nuisance".[102] However, those circumstances will be "rare".[103]

[123] Emanation is the connecting act between the activities done on a defendant's land and the alleged interference with the use and enjoyment of the plaintiff's land. Emanation requires a transposition of the alleged nuisance (such as noise, dirt, noxious substances or vibrations) from the defendant's property to the plaintiff's property. When the alleged nuisance reaches the plaintiff's property, and substantially and unreasonably interferes with plaintiff's right to use and enjoy his or her land, there will be an actionable private nuisance.

[124] The requirement for emanation stems from the maxim *sic utere tuo ut alienum non laedas* (enjoy your own property in such a manner as not to injure that of another person).[104] Thus, in order to sustain an action for private nuisance, "it must be proved not only that the plaintiff's use of his land has been interfered with but also that the defendant maintained on his land a harmful state of affairs which caused that interference."[105]

[125] In this case, wherever the reprogramming of the electronic keys and the refusal to issue one to Mr Wu and his potential tenants took place, it is hard to see how those acts 'emanated' (in the sense used in the caselaw) from the common (or other) property. We thus doubt that Mr Wu could sustain an action for private nuisance under this limb (because of lack of emanation).[106]

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102 *Hunter v Canary Wharf Ltd*, above n 101, at 685.

103 At 686. We do not need to make any comment on this point as it is not suggested that this case is within those category of cases.

104 JG Pease and H Chitty *Broom's Legal Maxims* (8th ed, Sweet & Maxwell Ltd, London, 1911) at 289.

105 R Chambers "Nuisance – Judicial Attack on Orthodoxy" [1978] NZLJ 172 at 176.

106 The Court of Appeal in *Wu* (CA), above n 3, at [95] and [97(b)] said that there is no "immutable rule that the interference must 'emanate' from land occupied or controlled by a defendant". Atkin, above n 100, at 515 observed, when referring to *Wu* (CA), above n 3, that the Court of Appeal's approach of not requiring emanation is a "departure from traditional norms, maybe merited on the facts, and reveals the resilience of the tort of nuisance".

*Rights over and in connection with a plaintiff's land*

[126] An action in private nuisance can also be brought for interference with an easement, a profit à prendre, or natural rights attached to the land.[107] These actions in nuisance are less common and they do not necessarily fit within the classic paradigm generally associated with nuisance: a neighbouring landowner indirectly interfering with an adjacent landowner's land.

[127] At common law, certain natural rights have been considered to exist automatically as incidents of the ownership of land (subject to any statutory constraints). One such right has been an owner's right of support for land in its natural state.[108] For example, if a neighbouring land owner excavates soil on his or her land so as to remove the support of the neighbouring land causing the land to slide or subside, there will be an actionable nuisance for interference with the natural right of support.

[128] Another natural right is the common law right that a property owner has to gain access to or from a public highway as a legal incident of his or her ownership of the adjacent land.[109] This right has been recognised by New Zealand,[110] English[111] and Canadian Courts.[112] However, such right is only present where the land abuts the public highway.[113]

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107 Jones, above n 100, at [20–01].

108 See the commentary of Atkin, above n 100, at 516, and the cases cited therein.

109 RFV Heuston and RA Buckley *Salmond & Heuston on the Law of Torts* (21st ed, Sweet & Maxwell, London, 1996) at 82–83.

110 For example, see *Middleton v Takapuna Borough* [1945] NZLR 434 (SC); and *Fuller v MacLeod* [1981] 1 NZLR 390 (CA). We note, however, that, in *Fuller v MacLeod*, the plaintiffs did not bring an action in private nuisance. The proceedings were rather for unreasonable infringement to their 'frontager rights'.

111 For example, see *Marshall v Blackpool Corporation* [1935] AC 16 (HL); and *Cusack v Harrow London Borough Council* [2013] UKSC 40, [2013] 1 WLR 2022.

112 For example, see *Toronto Transportation Commission v The Corporation of the Village of Swansea* [1935] SCR 455 at 457 where the Court notes, "it is his [or her] private right to be fully and freely permitted at all points of his private property to have freedom of access to the adjoining public highway".

113 For example, in *Marshall v Blackpool*, above n 111, at 22, Lord Atkin notes the requirement that the land 'adjoins' a highway. See also *Toronto Transportation Commission v The Corporation of the Village of Swansea*, above n 112, at 457; *Empringham Catering Services Ltd v The City of Regina* 2002 SKCA 16, [2002] 3 WWR 286, at [11]; and *Cusack v Harrow London Borough Council*, above n 111, at [4].

[129] There is a distinction between a landowner's right of access to an adjacent highway and the public right for members of the public to pass along a public highway. While interference with the latter right is interference with a public right (thus giving rise to a claim for public nuisance if special damage is shown), interference with the latter is a private wrong.[114] As noted in *Winifield and Jolocwiz on Tort*:[115]

> the owner of property adjoining the highway has a common law right of access to the highway which is a private right remediable by an action of private nuisance, so that anything which prevents his access (as opposed to making it less convenient for his purposes) enables the recovery of at least nominal damages.

[130] There is an implied (and fundamental) right to access one's unit under the Unit Titles Act.[116] It is arguable that this right can be seen as a "natural right" that is an incident of ownership of that unit, similar to frontager rights. A public highway is the means by which an land owner adjacent to that highway accesses his or her land. The common property, which must be passed through to reach a unit (such as the hallway and lifts), is the thoroughfare for unit title holders. This would suggest that, by analogy, a substantial[117] and unreasonable interference with the access right gives a unit owner a right to bring an action in private nuisance.[118]

[131] If there is a right to bring an action in private nuisance, then we consider it would have succeeded in this case. There has been a substantial interference because Mr Wu's right of access to his individual unit has been completely abrogated. This is due to the fact that, not only were he and any prospective tenants unable to access

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114 While not in the context of nuisance, this distinction was most recently made by the Court of Appeal in *Murray v Wellington City Council* [2013] NZCA 533, [2014] NZAR 123 at [32]. See also *Walsh v Ervin* [1952] VLR 361 (VSC) at 362. See the following commentaries and the cases cited therein: WVH Rogers *Winifield and Jolowicz on Tort* (18th ed, Thomson Reuters, London, 2010) at [14–39]; Jones, above n 100, at [20–180]; and Heuston and Buckley, above n 109, at 82–83.

115 Rogers, above n 114, at [14–39].

116 See above at [99].

117 See Atkin, above n 100, at 517; and John Murphy *The Law of Nuisance* (Oxford University Press, New York, 2010) at 34. The requirement for substantial interference arises because the law is not concerned with interferences of a "trifling … character": *Sturges v Bridgeman* (1879) 11 Ch 852 (CA) at 863 per Thesiger LJ. Often the concepts of substantial and unreasonable will overlap; in that respect, see the discussion of Murphy, at 44.

118 This would not give an unfettered right to access every part of common property; it would just protect the natural right of thoroughfare that is reasonably necessary to access an individual unit.

the building, but the reprogramming of the access cards also meant that they were unable to access to Mr Wu's unit.[119] There was no lawful basis to impose the requirement for Mr Wu to enter into the Protocol and pay the security deposit as a condition of entry for Mr Wu and/or his tenants.[120] While unlawful interference will not always amount to unreasonable interference, in this case the complete abrogation of access and the unlawfulness of the acts leading to that denial of access would indicate that the respondents' conduct was unreasonable.

*Conclusion on nuisance*

[132] Given the conclusion we have reached above with regard to trespass, it is unnecessary to come to a definitive conclusion on the issue of nuisance.

**The cross appeal**

[133] Most of the grounds for the respondents' cross appeal related to the approach taken by the Court of Appeal of distinguishing between owners and occupiers. As we have not taken the same approach as the Court of Appeal, those issues fall away. Two issues remain: mitigation of loss and damages for the costs of the locksmith.

*Mitigation of loss*

[134] A plaintiff is always under a duty to take reasonable steps to mitigate his or her loss.[121] In this case, the respondents submit that there are two actions Mr Wu should have taken to mitigate his loss.

[135] The first is that Mr Wu should have taken advantage of the offer in the letter of 22 October 2007 to show potential tenants through his unit.[122] We do not accept that this would have resulted in any mitigation of loss. This is because no electronic

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119 With regards to the analogy with frontager rights, we see this as broadly similar as to an individual welding an owner's gate shut so he or she is unable to enter or leave their property and thus enter from, or exit onto, the public highway.

120 See above at [113].

121 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [55] per Elias CJ. The classical statement of this duty is found in the judgment of Viscount Haldane LC in *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Rail Co of London* [1912] AC 673 (HL) at 689.

122 See above at [27]–[29].

access key would have been issued to Mr Wu or to any tenants of his, absent Mr Wu's agreement to enter into the Protocol personally and, as we discuss below, this was not a required step in mitigation.[123]

[136] The second is that Mr Wu should have accepted the offer made in the letter of 25 March 2008 whereby a reduced sum of $1000 would be paid as the security deposit (to Theta) as long as the Protocol was signed and the proprietors undertook to ensure that any tenant would abide by any relevant rules and regulations.[124]

[137] With regard to the security deposit, we consider it significant that the payment of the reduced security deposit was to be made to Theta[125] and not the Body Corporate and that the payment was unsecured.[126] Given the background of Academic's failure to pay the fixed rent and the apparent connection of Mr Chen of Theta with Academic,[127] it may be thought to be understandable that Mr Wu was concerned about the security of any deposit to be paid.

[138] As regards the Protocol, this was not an agreement with the Body Corporate (with which Mr Wu had an existing relationship because of the Body Corporate Rules) but with a third party (Theta). It also imposed obligations that exceeded those under the Body Corporate Rules.[128] Theta was not a party to the District Court proceedings and the Body Corporate had taken the view in those proceedings to date that it could not control Theta. Therefore, Mr Wu and the other owners would have been justified in fearing that the substantive proceedings would be unlikely to be regarded by Theta (or the Body Corporate) as releasing Mr Wu and the other owners from the Protocol, even if they succeeded in those substantive proceedings. In any

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123 See above at [51]. Both the owner and the occupier were required to sign the Protocol. This also disposes of the respondents' argument that there was no evidence Mr Wu ever tried to show his unit to tenants. Even had he done so, he would not have been able to let the unit to a tenant without him signing the Protocol personally.

124 See above at [46].

125 Which was not a party to the District Court proceedings.

126 As indicated it appears that the deposit was to be held in a separate account but Mr Wu seemed to have been unaware of this.

127 See above at [16]–[19]. As noted there, Mr Wu was told that Mr Chen had resigned from Academic to join Theta (although it appears now that this may not have been the case).

128 See above at [31] and [90].

event, even in the interim, Mr Wu would have been signing up to a Protocol that purported to allow Theta to change the rules relating to the common areas at will.[129]

[139] William Young J considers that the case of *Uzinterimpex JSC v Standard Bank Plc* supports the respondents' contention that Mr Wu should have mitigated his loss.[130] We do not agree. The current case differs from *Uzinterimpex* in two material ways.[131] First, in contrast to *Uzinterimpex*, the current case involved the Body Corporate and Theta demanding the payment of the security deposit to Theta (and unsecured) before the keys were handed over.[132] Secondly, this case does not involve a one off commercial relationship. Instead, it involves ongoing relationships among Mr Wu, the Body Corporate and a third party, Theta. It can be seen as involving an issue of principle that could affect the relationships between the parties in the future and even in the interim, given that the Protocol gave the power to Theta to manage the common areas.

[140] William Young J also suggests that Mr Wu should have put a counter offer to the Body Corporate. We do not agree. The clear message from Lang J was that it was for the Body Corporate to provide access and this was unqualified with no conditions attached. This clearly put the onus on the Body Corporate to find a means of complying with that order.

[141] Whether a plaintiff has taken reasonable steps to mitigate his or her loss is a question of fact. In the current case, Mr Wu's conduct needs to be seen in light of all

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129 See above at [31].

130 *Uzinterimpex JSC v Standard Bank Plc* [2008] EWCA Civ 819, [2008] Bus LR 1762. The case involved a contract for the sale of cotton by Uzinterimpex to a cotton trader. The respondent, Standard Bank Plc, provided finance. A dispute ensued after the buyer went into liquidation. Uzinterimpex refused an offer by the Bank to sell the cotton and pay the proceeds into a joint account pending the determination of the substantive dispute. The Court held, and this was upheld on appeal, that Uzinterimpex had failed to act reasonably and should have mitigated its loss by accepting the Bank's offer.

131 See also the comments of Asher J in *Wu* (HC), above n 1, at [61] where he distinguished *Uzinterimpex* the following way: "There is a difference between a *Uzinterimpex* type of proposal for a one-off commercially sensible step to minimise loss, and the Theta proposal. There is a distinction between accepting a reasonable offer to, say, supply goods that the buyers want and will ultimately sue for, or in preserving the value of goods of which ownership is contested, and a refusal to engage in a new long-term contract with the wrongdoer, because of pressure from that wrongdoer."

132 There was no such requirement to pay money in *Uzinterimpex* and this was one of the reasons why the Court held that Uzinterimpex had failed to act reasonably: *Uzinterimpex*, above n 130, at [52]. The Court held that the Bank "had not permanently deprived Uzinterimpex of [the property] and was not seeking to extort money from it as the price of [the property's] release".

the circumstances, including the legal background of the case. Mr Wu had two courts orders in his favour (upheld on appeal) requiring unqualified access. Instead of complying with those orders, the Body Corporate and Theta refused to grant access unless Mr Wu paid a security deposit to and signed a contract with a third party (Theta) with whom Mr Wu had no previous "contractual nexus". Even in the interim, pending the determination of the substantive proceedings, the Protocol granted Theta the right unilaterally to change the rules relating to the common areas. Further, even if Mr Wu had succeeded in his substantive action, there was no guarantee, given that Theta was not then a party to the proceedings, that it would have released either the deposit or Mr Wu from his obligations under the Protocol.

[142] In addition, the offer of 25 March 2008 was made without prejudice. It was not accepted, the non acceptance being the alleged failure to mitigate. In our view, it is contrary to the without prejudice principle to allow the respondents to invoke the offer and its non acceptance as amounting to a failure to mitigate. Neither party to an unaccepted without prejudice offer can invoke the offer for this or indeed any other purpose. Further, even if that is not so, the offer was objectively unclear as to its ambit and how far it would bind Mr Wu in the longer term. It was not reasonable to expect him to accept it in that situation.

[143] For these reasons, we hold that it was not a reasonable step in mitigation for Mr Wu to be required to accept the offer from the Body Corporate dated 25 March 2008.[133]

*Damages*

[144] The respondents say that, if we restore the High Court orders as to damages, we should not include the costs of replacing the physical locks in Mr Wu's unit as this did not arise from the nuisance but from flat batteries.

[145] The issue was not argued before the Court of Appeal and that Court made no comment on it, although all of the damages orders (including that related to the

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[133] This accords with both the High Court and the Court of Appeal's conclusion as to the issue of mitigation: see above at [61] and [67]–[68].

locks) were quashed when the Court of Appeal sent the matter back for the High Court to reconsider damages.

[146] The respondents are asking us to overturn factual findings when the point was not argued in the Court of Appeal and not dealt with by that Court. We are not prepared to do so. In any event, Mr Wu did not have control over the locks or the batteries during the period when they ceased working, given that he had no access to the building.

**Result and costs**

[147] The appeal is allowed and the judgment of Asher J on the first cause of action is reinstated.[134]

[148] The cross appeal is dismissed.

[149] The respondents are to pay to the appellant costs of $25,000 plus reasonable disbursements (to be set by the Registrar if necessary).

[150] The costs orders made in the Court of Appeal are set aside[135] and the costs and interest awards made in the High Court reinstated.[136]

[151] If costs cannot be agreed for the Court of Appeal, costs should be set by that Court in light of this judgment.

**WILLIAM YOUNG J**

[152] Counsel for the respondents accepted that Mr Wu is entitled to damages unless the rules of Body Corporate 366611 authorised the actions of the Body Corporate and Theta Management Ltd in denying him access to his unit. For this reason, I do not propose to express a concluded view whether the claim lies in trespass or nuisance (or perhaps under s 37(12) of the Unit Titles Act 1972 for a

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134 For Asher J's quantification of damages, see *Wu* (HC), above n 1, at [65]–[72] and the result at [135]–[139]. The damages award is now on the basis of trespass and not nuisance, however.

135 *Wu* (CA) above n 3, orders D and E. The Court of Appeal set aside the costs orders in the High Court but made no order for costs in the Court of Appeal.

136 *Wu v Body Corporate 366611* HC Auckland CIV-2009-404-5756, 4 October 2011 at [17]–[19].

breach of the Body Corporate Rules by the Body Corporate). Instead, I am content to proceed on the basis that the claim lies in nuisance, which is the approach taken by Asher J[137] and the Court of Appeal.[138]

[153] I agree with the majority that the rules of the Body Corporate did not justify the actions taken by the Body Corporate and Theta. I thus accept that Mr Wu is entitled to damages. The only point on which I disagree with the majority is as to mitigation.

[154] Included in the common bundle of documents at trial was an email of 25 March 2008, from counsel for the Body Corporate[139] to Mr Wu's solicitor. It was in these terms:

> **CIV 2008-404-809 – BODY CORPORATE 366611 v MAI & ORS**
>
> 1. I refer to our without prejudice discussion Thursday last. I am now in a position to relay the following without prejudice offer to settle your clients' interlocutory application for interim orders only:
>
>    a. Theta will [accept a] $1,000 refundable security deposit from each of [your] client owners rather than the full $2,650;
>
>    b. My client will cover the remainder of the security deposit;
>
>    c. Theta would then provide access to each of your client owners conditional upon each of them:
>
>       i. signing the security access protocol;
>
>       ii. providing written authorisation from the owners personally (rather than just your firm in light of the fact it appears that your firm is acting without some plaintiff owners authority); and
>
>       iii. undertaking that their occupant tenant will be required (as a term of any occupation or tenancy) to agree to abide by the Empire Rules and Regulations (attached).
>
> 2. Alternatively, Theta would be willing to enter into the following arrangement:

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137 *Wu v Body Corporate 366611* [2011] 2 NZLR 837 (HC) [*Wu* (HC)].

138 *Body Corporate 366611 v Wu* [2012] NZCA 614, [2013] 3 NZLR 522 (Hammond, Arnold and Heath JJ) [*Wu* (CA)].

139 See fn 36 of the judgment of the majority.

a. Your client owners will enter into management agreements (i.e.: rental agreements by which Theta finds occupants for the apartments) on Theta's standard terms as attached;

b. Theta would not then require any payment of the refundable security deposit from either such plaintiff owners or my client, and instead would receive such amounts from the occupants;

c. The occupants will sign the security access protocols rather [than] your client owners; and

d. Your client owners would have the right to inspect their apartment on 48 hours prior written notice to Theta.

3. Could you please advise as a matter of priority whether either or both of the above options are acceptable to your clients.

[155] Although counsel for the appellant has suggested that this email was not sent, its admissibility was not challenged at trial, its authenticity was acknowledged by its inclusion in the bundle of documents and it was referred to in both the High Court and Court of Appeal judgments. I therefore accept that the email is what it purports to be and that it was sent and received on 25 March 2008.

[156] This email was written not long after the decision of Lang J delivered on 6 March 2008, a decision which foreshadowed the likelihood of further applications for injunctive relief.[140] At that time the substantive proceedings were those which had been commenced in the District Court. The injunction granted by Judge Hole and largely upheld by Lang J was interim in nature and Theta was not a party to the proceedings.

[157] In the High Court and Court of Appeal, the judges were of the view that the offer, if accepted, would have required the owners to enter into long term agreements with Theta.[141] That, however, is not my interpretation of what was proposed. The offer was not intended to resolve the substantive dispute as to access. Rather it was addressed to, and only to, what was described – and not very happily – as the owners' "interlocutory application for interim orders". In the context of a settlement offer as to how a dispute should be dealt with in the interim, the expression "without prejudice" can be taken to indicate that the proposed settlement is not intended to be

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140 *Body Corporate No 366611 v Mai* HC Auckland CIV-2008-404-809, 6 March 2008.

141 See *Wu* (HC), above n 137, at [62], and *Wu* (CA), above n 138, at [112].

a compromise of the whole dispute.[142] It follows that acceptance of the offer would not have affected the entitlements of the parties to pursue their substantive claims. The owners would thus have been entitled to recover back any payments made should they have been successful on the substantive issue and to have been discharged from their obligations under the Security and Access Protocol (the Protocol). A plaintiff who declines to engage with such an offer is at distinct risk of being held not to have acted reasonably in mitigation of loss.[143]

[158] The offer made on 25 March 2008 showed that the door to an interim settlement was open.[144] Any uncertainty in Mr Wu's mind as to the substance of what was being offered could have been resolved by direct negotiation. As to this, I think it relevant that Mr Chen gave evidence that offers were made between March and May 2008 offering access on part payment of $1000 to be made under protest to the Body Corporate without prejudice to the ability to challenge the Protocol if they chose. Although this evidence is open to criticism given its generality, it was not challenged.

[159] I do not attribute to the letter of 1 April 2008 from Theta's solicitors the significance which it is accorded by the majority.[145] I do not see it as intended to override the earlier offer made by the Body Corporate. Indeed I think it is reasonably clear that the letter represented an attempt at settling the substantive dispute and was not concerned with interim arrangements pending trial.

[160] Accordingly, I am of the view that, in March 2008, Mr Wu could have obtained access to his apartment on the interim basis set out in the 25 March 2008 email. This would not have required him to enter into a long term agreement with the Body Corporate or Theta. Instead, he could have paid $1,000 and entered into the Protocol on the basis that the money would be refunded and the Protocol discharged if he prevailed at trial. Neither Asher J nor the Court of Appeal

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142 Compare *Houndsditch Warehouse Co Ltd v Waltex Ltd* [1944] KB 579 (KB).

143 As in *Houndsditch*, above n 142.

144 Refer Harvey McGregor *McGregor on Damages* (19th ed, Sweet & Maxwell, London, 2014) at [9-070]–[9-073], where the author discusses the situation "where the door to mitigation is opened by the party in default".

145 See [49] of the majority's reasons.

approached the offer on this basis and, as a result, I consider that their conclusions as to mitigation warrant reconsideration.

[161] While the present dispute has given rise to much ill-will and suspicion, it is commercial in character. I thus see as relevant the comments of Scrutton LJ in *Payzu Ltd v Saunders*:[146]

> [Counsel] has contended that in considering what steps should be taken to mitigate the damage all contractual relations with the party in default must be excluded. That is contrary to my experience. In certain cases of personal service it may be unreasonable to expect a plaintiff to consider an offer from the other party who has grossly injured him; but in commercial contracts it is generally reasonable to accept an offer from the party in default. However, it is always a question of fact. About the law there is no difficulty.

[162] Also relevant is *Uzinterimpex JSC v Standard Bank Plc.*[147] In that case, the defendant bank had converted the plaintiff's cotton but the English Court of Appeal held that the plaintiff had failed to mitigate its loss when it refused to enter into an interim arrangement with the bank under which the cotton was to be sold with the proceeds held pending the outcome of the litigation. Moore-Bick LJ observed:

> [51] … Uzinterimpex had some justification for thinking that the Bank had embarked on a cynical attempt to improve its own position. It had, after all, adopted contradictory positions, first insisting that it had no interest in the cotton, then at the last minute asserting that it had. However, I do not think that significantly affects the matter. Self-interested conduct of that kind, though unattractive, is not unknown in the world of commerce and rarely justifies a complete breakdown in relations. Commercial institutions, including banks and those who trade in commodities, are in business to make money and in the absence of fraud generally find it more rewarding to maximise their profits and minimise their losses in whatever way is open to them rather than to stand on principle.
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> [52] Equally, I do not think that there is much force in the argument that it was unreasonable to expect Uzinterimpex to enter into negotiations with a thief (to use [counsel's] own expression). However badly the bank may be thought to have behaved, it was asserting an interest in the goods, had not permanently deprived Uzinterimpex of them and was not seeking to extort money from it as the price of their release. It was merely suggesting that the goods be converted into money so as to preserve their value for the benefit of whichever party should ultimately prove to be entitled to them. …
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> [53] The judge found that Uzinterimpex's attitude to the bank was coloured by a lack of faith and confidence and one can see why that should have been so. I can understand, moreover, why [counsel] submitted that the

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146 *Payzu Ltd v Saunders* [1919] 2 KB 581 (CA) at 589.

147 *Uzinterimpex JSC v Standard Bank Plc* [2008] EWCA Civ 819, [2008] Bus LR 1762.

> relationship was further soured by the tone of the correspondence emanating from the bank's solicitors. None the less, it would have been a simple matter to arrange for the proceeds of sale to be paid into an account over which neither party had independent control, thereby ensuring that Uzinterimpex's position was fully protected. Similarly, Uzinterimpex's concern about the manner and timing of any sale need not have prevented the disposal of the cotton if the parties had been willing to co-operate in a sensible way. In the end the judge had to decide whether objections based on practical considerations of that kind were strong enough, taken in conjunction with Uzinterimpex's other objections, to justify its refusal to accede to the disposal of the goods. He came to the clear conclusion that they were not, and I am not persuaded that on the evidence before him his decision was wrong.

[163] I accept the criticisms made by the majority of the conduct of the Body Corporate and Theta. Their responses to the interim injunctions were inappropriate. Mr Wu was entitled to think that he was being given the run-around. That said, the case is just about money and should have been approached accordingly. To use the language of Moore-Bick LJ, if Mr Wu "had been willing to co-operate in a sensible way" with the Body Corporate and Theta over what was to happen to the apartment pending trial, it would have been let far earlier than was the case.

[164] For those reasons I conclude that Mr Wu failed to mitigate his losses and I would reassess damages accordingly.

Solicitors:
Terry Hibbitt, Auckland for Appellant
Clendons, Auckland for First Respondent
Minter Ellison Rudd Watts, Auckland for Second Respondent