

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA362/2023
[2024] NZCA 250

BETWEEN	CY KENNEDY AND KAJSA KARIN ELEONORA BJORS Appellants
AND	BODY CORPORATE 82981 First Respondent
AND	NEIL DOUGLAS CHARLES COOPER Second Respondent
AND	ANTHONY VOLPICELLI Third Respondent

Hearing: 14 March 2024
Court: French, Collins and Palmer JJ
Counsel: I J Stephenson for the Appellants
N S Wood and J P Papps for Respondents
Judgment: 20 June 2024 at 2.15 pm

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
B The appellants must pay the first respondent costs for a standard appeal on a band A basis, together with usual disbursements.
-

REASONS OF THE COURT

(Given by Palmer J)

Summary

[1] Body Corporate 82981, the first respondent, is the body corporate of a unit title development that includes the Dominion Building in central Wellington. It has generally delegated power to a committee of eight members to manage the building (the Committee). There have been tensions, and even litigation, between members of the Body Corporate. In March and September 2022, the Body Corporate passed resolutions, in effect, to grant an indemnity and to enter into a deed of indemnity (the Deed), in favour of the chairperson and members of the Committee. In particular, the resolutions indemnify Mr Neil Cooper and Mr Anthony Volpicelli, the second and third respondents. The joint owners of two units, Mr Cy Kennedy and Ms Kajsa Bjors, the appellants, applied for orders that the resolutions were outside the Body Corporate's powers and sought minority relief under s 210 of the Unit Titles Act 2010 (the Act). In the High Court, Grice J dismissed the application.¹ The appellants appeal. Mr Cooper and Mr Volpicelli abide the decision of the Court.

[2] We have concluded that a resolution to grant an indemnity for the benefit of the governance of a body corporate is not prohibited by the Act. The nature and extent of the indemnity is not outside its purposes. Neither the March 2022 resolutions, the September 2022 resolution, nor the Deed, were outside the powers of the Body Corporate. The 28 days in which a member of a unit title development may apply for minority relief under s 210 of the Act runs from the time a resolution, passed without general meeting, is notified to the members. So the application was in time. But the September 2022 resolution and the Deed were not unjust or inequitable for the minority. The appeal is dismissed.

What happened?

Tensions in the unit title development

[3] There are 31 residential units, and 12 non-residential units, in the unit title development. Mr Cooper was a director of a company which owned a unit and, from January 2012 to July 2019, was Chairperson of the Body Corporate and a member of

¹ *Kennedy v Body Corporate 82981* [2023] NZHC 1377, (2023) 24 NZCPR 204 [Decision under appeal].

the Committee. He is no longer involved with the Committee. Mr Volpicelli still owns a unit, was Chairperson and is still a member of the Committee.

[4] From 2004, there were recorded concerns about leaks in the building, which particularly affected the top units. The appellants are in top units which have suffered damage from the leaks. They have been very concerned about the remediation. In their substantive claim against the respondents, the appellants allege that Mr Cooper and Mr Volpicelli suppressed reports which suggested the roof should have been replaced earlier than it was and that they undertook unsatisfactory remediation.

[5] In 2017, the appellants threatened litigation against the Body Corporate and individual members of the Committee. AIG, the Body Corporate's insurer, covered the costs of defending the litigation between 2017 and 2020, but the litigation never eventuated. In December 2021, the appellants filed proceedings with causes of action against the Body Corporate for negligence, breach of statutory duty, and nuisance and against Mr Cooper and Mr Volpicelli for breach of statutory duty. AIG refused further insurance cover. The substantive proceedings have made little progress due to a number of interlocutory applications. Two further defendants have been added to the proceedings since then, who have both been members of the Committee.

March 2022 resolutions

[6] On 17 March 2022 the Body Corporate held an extraordinary general meeting (EGM) to discuss the proceedings. The Committee's approach is reflected in the EGM notice as follows:

The Committee considers that there is no ground whatever for any claim against Neil [Cooper] or Tony [Volpicelli] (including by the Body Corporate).

The Committee considers the Body Corporate should stand behind and support all volunteer Committee members over the years who give their time and expertise so willingly and selflessly for the benefit of the Body Corporate.

The Committee proposes that Chapman Tripp continue to act for the Body Corporate, Neil and Tony, at no cost to Neil or Tony. Of course, there is little incremental cost in doing so.

[7] Three of the proposed resolutions sent to owners in advance of the EGM were:

1. The Body Corporate defend the proceeding by the plaintiffs.
2. The Body Corporate stand behind and support Neil [Cooper] and Tony [Volpicelli] in all respects in their defence of the proceeding.
3. Chapman Tripp continue to act for the Body Corporate, Neil and Tony, at the sole cost of the Body Corporate.

[8] Owners of 38 of the 43 units attended at the EGM in person or by proxy. Three more participated by postal vote. The two appellants attended the EGM but they and the owner of one other unit, Mr Simon Phillips, were not allowed to vote because they had unpaid amounts owing to the Body Corporate. Mr Phillips' company, which owns three units, voted against the resolutions. The resolutions were each passed by 35 votes to three.

September 2022 resolution and indemnity

[9] On 28 April 2022, at its Annual General Meeting, the Body Corporate passed the following resolution:

That the Body Corporate take immediately any and all steps to take advice from Greenwood Roche to put in place an indemnity (to the fullest extent permitted by law) by the Body Corporate of all past, present and future Committee members against any and all claims, proceedings, liabilities and costs arising out of or in connection with their acting as Committee members.

[10] Under s 104 of the Act, written resolutions of a body corporate can be passed without a general meeting if their passage accords with certain procedures.² On 22 September 2022, three resolutions were circulated by the Committee for owners to vote on by 30 September 2022, including this resolution:

It is resolved (as an ordinary resolution) that the Body Corporate approve, enter into, and give effect to, the deed of indemnity in, or substantially in, the form circulated with this resolution.

[11] 38 of the 43 unit owners were entitled to vote on the resolution. The appellants had unpaid amounts owing to the Body Corporate in relation to one of their two units so they could only vote in relation to one of their units. They voted against the resolution. Three of the units not entitled to vote were owned by Mr Phillips, either personally or through his company. 32 unit-owners voted in favour, and three voted

² See also Unit Titles Regulations 2011, reg 16.

against. Two other unit owners sent in votes in favour of the resolution which were received after the deadline of Friday 30 September 2022, so they were not counted. Notice of the result was provided to unit holders on Thursday 6 October 2022.

[12] In summary, the Deed, drafted by Mr John Greenwood, indemnifies present or former Chairpersons and members of the Committee. The key clauses are:

3 Indemnity

Subject to clauses 4, 5 and 9 the Body Corporate irrevocably indemnifies each Indemnified Person from and against any and all loss, damage, cost, expense, harm, claim, cause of action, suit, demand, or similar liability or proceeding (threatened, alleged or actual) whatsoever including those incurred or suffered in defence or any settlement reached (*Loss*) arising out of or otherwise in connection with:

- (a) any act or omission (alleged or actual) as committee member or chairperson (as the case may be); and/or
- (b) the Indemnified Person's status as committee member or chairperson (as the case may be).

4 Exclusions

Clause 3 does not extend to Loss:

- (a) arising out of or otherwise in connection with fraud or any other wilful default, or gross negligence, of the Indemnified Person;
- (b) arising out of or otherwise in connection with the Indemnified Person's wilful failure to comply with express instructions properly given by the Body Corporate, any act or omission knowingly outside the scope of the Indemnified Person's delegated authority, or the Indemnified Person's material breach of the Body Corporate operational rules; or
- (c) for which the Body Corporate is precluded by law from providing indemnification.

5 Notification, consultation and assistance

5.1 The Body Corporate may refuse to indemnify under clause 3 if the Indemnified Person does not:

- (a) notify the Body Corporate immediately when the Indemnified Person becomes aware of any actual or threatened actions, proceedings, claims or demands, or any facts or circumstances likely to give rise to a claim against the Indemnified Person for which the Indemnified Person may be

entitled to the Indemnities or indemnification under an insurance policy;

- (b) consult with the Body Corporate on the steps to be taken, if any, in defending such actions, proceedings, claims or demands; or
- (c) give the Body Corporate and its insurers and their respective representatives (including legal representatives) such information and assistance and co-operation as may reasonably be required, having regard to the interests of the Indemnified Person, the Body Corporate and the Body Corporate insurers.

6 **Operation**

Clause 3 is a primary, continuing and irrevocable obligation of the Body Corporate, subject clauses 4, 5 and 9. An Indemnified Person will benefit, and the Body Corporate will perform its obligations, under clause 3 immediately [when] Loss arises, including where Loss arises out of or otherwise is in connection with any alleged act or omission. In particular, all costs incurred in dealing with and/or defending allegations will be met immediately.

...

9 **Termination**

The Body Corporate may terminate this Deed at any time by 30 days' written notice to the then current Body Corporate committee members and the then current Body Corporate chairperson. Nevertheless, this Deed continues to have full effect with respect to any act or omission by, or the status of, an Indemnified Person before the date of termination.

[13] The affidavit of current Committee member, Mr Christopher Street, on behalf of the Body Corporate, explained that, in his personal view, there were three critical features which underlay the proposal for the Deed. In summary:

- (a) The Body Corporate owns a heritage building with inevitable need for intensive repair and maintenance. Important and testing business issues regularly arise, which unavoidably bring correlative business risk for delegate decision-makers, such as the Committee.
- (b) Two owners, Mr Kennedy and Mr Phillips, have mounted a campaign to undermine, challenge, and reject many steps approved by owners and the Committee in recent years. Their approach has been underpinned

by a constant refrain of personal liability arising out of impending or current legal proceedings against individuals. Mr Street estimates more than half of the Committee's time is spent dealing with matters connected with these two owners.

- (c) Between 2017 and 2020, AIG paid out over \$200,000 under the Body Corporate's insurance policy dealing with claims threatened by Mr Kennedy and Mr Phillips. They declined cover for the claims in the proceedings brought by the appellants, in which the Body Corporate has incurred approximately \$150,000 of costs plus GST. Without the indemnity, Mr Street wonders who would put up their hand to volunteer to run the building.

[14] Mr Kennedy, in his affidavit, disputed many of the opinions Mr Street held about Mr Kennedy and Mr Phillip's use of litigation. Mr Kennedy said he is litigating so the Body Corporate will finally take the water damage to his apartment seriously. Mr Kennedy said the reason the insurer declined cover for these recent proceedings is because of the presence of mould and a lack of preventative maintenance. We do not need to examine these issues further for the purpose of this appeal.

[15] The appellants applied to the High Court for orders, under the Declaratory Judgments Act 1908, that the March and September 2022 resolutions, as well as the Deed, were ultra vires, or outside the powers of the Body Corporate. They also sought minority relief under s 210 of the Unit Titles Act in relation to the September 2022 resolution.

[16] We treat the two issues that arise in turn. Before doing so, we note that the High Court excluded affidavits by Mr Phillips and Mr Kennedy because they were, respectively, filed by Mr Phillips not the appellants, and filed by Mr Kennedy after the hearing without leave.³ Those decisions are challenged on appeal as well. But we are satisfied they were correct, for the reasons the Judge gave. We dismiss the appeal of those decisions on admissibility.

³ Decision under appeal, above n 1, at [151]–[152].

Issue 1: Were the resolutions and Deed outside the powers of the Body Corporate?

Unit title law

[17] The Act provides, most relevantly:

3 Purpose

The purpose of this Act is to provide a legal framework for the ownership and management of land and associated buildings and facilities on a socially and economically sustainable basis by communities of individual owners and, in particular,—

- (a) to allow for the subdivision of land and buildings into unit title developments comprising units that are owned in stratum estate in freehold or stratum estate in leasehold or licence by unit owners, and common property that is owned by the body corporate on behalf of the unit owners; and
- (b) to create bodies corporate, which comprise all unit owners in a development, to operate and manage unit title developments; and
- (c) to establish a flexible and responsive regime for the governance of unit title developments; and
- (d) to protect the integrity of the development as a whole.

77 Core things body corporate may do

- (1) A body corporate may do anything authorised by this Act or any other Act.
- (2) A body corporate may do anything a natural person of full age and capacity may do except as provided for in this Act or any other Act.

78 Act must be for purpose of performing duties or exercising powers

A body corporate may do an act under section 77 only for the purpose of performing its duties or exercising its powers.

[18] Other relevant sections include:

- (a) section 84, which non-exclusively enumerates the powers and duties of bodies corporate as set out in 26 specified provisions of the Act;

- (a) section 108, which empowers a body corporate to delegate any of its duties or powers to a body corporate committee by special resolution, except for the powers set out in four provisions of the Act;
- (b) section 115, which requires bodies corporate to maintain an operating account for the purposes of meeting the expenses relating to the management and governance of the unit title development and provision of services and amenities for its benefit, among other expenses;
- (c) section 135, which requires bodies corporate to insure buildings and improvements and empowers them to take out additional insurance “if it considers it practical to do so”; and
- (a) section 138, which requires a body corporate to maintain and repair common property, assets used in connection with common property, assets owned by the body corporate, and any elements or infrastructure that serve more than one unit.

The High Court judgment

[19] In the High Court judgment, of 6 June 2023, Grice J held:

- (a) Nothing in the Act prohibits a body corporate from funding the defence of one of its members in respect of matters that relate to the management and governance of the body corporate. That is similar to indemnification of directors of companies or members of Crown Entities.⁴
- (b) Under ss 77 and 78 of the Act, a body corporate can do anything a natural person can do if it is done for the purpose of performing the duties and exercising the powers of the body corporate.⁵ The departmental report on the Bill, which became the Act, envisaged that

⁴ At [80]–[85].

⁵ At [94].

body corporates would be free to take out insurance.⁶ It would be extraordinary if a body corporate could not take commonly accepted standard business steps to protect its committee.⁷ There is little difference between that and giving an indemnity on reasonable grounds.⁸

- (c) The wording of the indemnity means it is difficult to see how the Body Corporate could have provided an indemnity beyond its legal powers.⁹ It was within the powers of the Body Corporate to make the March 2022 and the September 2022 resolutions and to execute the Deed.¹⁰

Submissions

[20] Mr Stephenson, for the appellants, submits:

- (a) Section 78 of the Act allows a body corporate to do an act “only for the purpose of performing its duties or exercising its powers”. As the High Court stated in *Body Corporate 401803 v Vermillion Wagener Ltd (Vermillion)*, in relation to the Unit Titles Act 1972 (the 1972 Act), the exercise of power must be “anchored to” a duty in the Act, not just related to it.¹¹ The 2010 Act did not change that interpretation. Section 77 is still to be read down or controlled by s 78. This aligns bodies corporate with Crown Entities.¹²
- (b) The March 2022 resolutions had a collateral purpose of serving the interests of individual committee members. Paying a member’s costs is not incidental to the power in s 138. Section 84 does not say a body corporate can indemnify for unlawful acts. The resolutions are only related to, not anchored to, the duty to repair, so it was outside the

⁶ At [98], citing Department of Building and Housing *Departmental Report to the Social Services Select Committee on the Unit Titles Bill 2008* (July 2009) at 53.

⁷ At [112].

⁸ At [113].

⁹ At [107]–[108].

¹⁰ At [125].

¹¹ *Body Corporate 401803 v Vermillion Wagener Ltd* [2015] NZHC 285, (2015) 15 NZCPR 758 [Vermillion] at [72].

¹² Compare Unit Titles Act 2010, s 78 and Crown Entities Act 2004, s 18.

powers of the Body Corporate. The Body Corporate's obligation to govern or manage its affairs is more relevant, but that must be for the overall goal of performing its duties and the overall purpose of the Act. An irrevocable indemnity with pre-emptive payment, notwithstanding a breach of duty, cannot be reasonably necessary for that. The indemnity is different from insurance because it is pre-emptive, and even if insurance could require an irrevocable element in principle, it is priced accordingly in the marketplace. The Body Corporate is not a trading entity and does not have funds on hand to cover such costs; everything it does is underwritten by its members.

- (c) In providing an irrevocable indemnity with such limited exclusions, the September 2022 resolution is not reasonable, especially in terms of being anchored to a duty. An irrevocable pre-emptive indemnity could cover costs that are ultimately contrary to law. The indemnity offends against the democratic decision-making of the Body Corporate. The insurance provision, where liability insurance has been declined, means the Body Corporate can levy members to cover the liability. The termination clause does not affect prior acts or omissions so there is a contingent liability that could last for six years, until limitation. So that resolution is also outside the Body Corporate's powers as well as being inequitable and unjust to the minority.

[21] Mr Wood, for the Body Corporate, submits it is within the Body Corporate's powers, under ss 77 and 115 of the Act, to defend underlying proceedings jointly at the Body Corporate's sole cost. The appellants' reliance on *Vermillion* is misplaced. The allegations in the proceeding go directly to the powers and duties of the Body Corporate in managing and governing the unit title development. Neither s 78 nor anything else in the Act prevents the Body Corporate from exercising its power to indemnify. The September 2022 resolution is not outside its powers nor unjust or inequitable. The indemnity was limited in scope and contained appropriate exceptions. The pre-emptive nature of the resolution was necessary to ensure there was cover before a trial determines liability. Clause 4(c) of the Deed means it is impossible to indemnify beyond the Body Corporate's powers. The newly inserted

s 114C(4)(a) of the Act recently confirmed Parliament’s intention that a body corporate has the power to grant indemnities.

Were the resolutions outside the powers of the Body Corporate?

[22] The purpose of the Act is to provide a legal framework for the ownership and management of a unit title development “on a socially and economically sustainable basis”.¹³ In particular, among other purposes, it establishes “a flexible and responsive” governance regime.¹⁴ That casts light on the conferral of power upon a body corporate to “do anything a natural person of full age and capacity may do except as provided for in this or any other Act except as provided for in this Act or any other Act”.¹⁵

[23] A resolution to grant an indemnity for the benefit of the governance of a body corporate, as was done here, is not prohibited by the Act. It was a natural and understandable reaction to the threat of disruptive litigation against members of a body corporate personally. It is directly related to the Body Corporate’s duty to meet expenses relating to the management and governance of the unit title development under s 115(2)(a) of the Act. It goes some way to preventing individuals from being deterred from participating in the governance and management of the unit title by threats of potential personal liability.

[24] The requirement of s 78 that a body corporate “may do an act under section 77 only for the purpose of performing its duties or exercising its powers” reflects the ordinary public law requirements of a body established under statute. The case of *Vermillion* was a very different situation where the power to appoint a building manager was relied upon to guarantee the lease of the manager’s apartment and to guarantee a lease of amenities, such as a tennis court and a swimming pool, comprised in individual units. The High Court, upheld by this Court on appeal, used the terminology that the exercise of power must be “anchored to” a duty in the Act.¹⁶ But that was in the context of s 16 of the 1972 Act, which only gave to bodies corporate the powers which were “reasonably necessary to enable it to carry out the duties

¹³ Unit Titles Act, s 3.

¹⁴ Section 3(c).

¹⁵ Section 77.

¹⁶ *Vermillion*, above n 11, at [72], upheld in *Vermillion Wagener Ltd v Body Corporate 401803* [2015] NZCA 313, (2015) 16 NZCPR 483.

imposed on it by this Act and by its rules”. Now, the requirement of s 78 is to be read in light of the purpose of the 2010 Act as outlined above and in light of bodies corporate having the powers of natural persons. Section 78 simply requires any such act to be done for the purpose of performing a duty or exercising a power.

[25] We do not consider the nature and extent of the indemnity here means that the resolutions were outside the Body Corporate’s powers. Any indemnity in favour of a person is likely to serve that person’s individual interests. That does not necessarily put it outside the Body Corporate’s powers. Here, as noted above, there is a direct relationship between the indemnity and the Body Corporate’s duties. The fact the indemnity cannot be revoked retrospectively, and that payments are made forthwith, is not prohibited by the Act nor is it outside its purposes. Those features add to the functionality of the indemnity in giving certainty of protection to the individuals who are indemnified. The Body Corporate retains the power to terminate the Deed, prospectively, if it wishes. Clause 5.1 provides reasonable exceptions to the indemnity. Clause 4 limits the extent of the indemnity in usual and sensible ways and is explicit in limiting it from extending to loss for which the Body Corporate is precluded by law from providing indemnification.

[26] Accordingly, neither the March 2022 resolutions, the September 2022 resolution, nor the Deed, were outside the powers of the Body Corporate.

Issue 2: Were the appellants in time to challenge the September 2022 resolution and indemnity and, if so, were they unjust and inequitable to the minority?

When does the Act say a resolution is passed?

[27] Sections 104 and 210 of the Act provide:

104 Passing of resolution without general meeting

- (1) A resolution may be passed without a general meeting in accordance with this section.
- (2) Notice of the resolution must be given to eligible voters in accordance with the regulations.
- (3) A resolution in writing signed by a majority of eligible voters in respect of an ordinary resolution, and not less than 75% of eligible

voters in respect of a special resolution, is as valid as if it had been passed at a meeting of those voters.

...

210 General relief for minority where resolution required

- (1) In any case where this Act requires a resolution and the resolution is passed, any person who voted against the resolution may apply to the appropriate decision-maker for relief on the grounds that the effect of the resolution would be unjust or inequitable for the minority.
- (1A) Subsection (1) does not apply if the resolution is a designated resolution.
- (2) An application for relief under subsection (1) must be made within 28 days of the passing of the resolution.

[28] The Unit Title Regulations 2011 are also silent on when a resolution is passed.

Regulation 16 provides:

16 Passing of resolution without general meeting

- (1) A notice of a resolution to be passed without a general meeting must contain the following information:
 - (a) a statement that the resolution that accompanies the notice is to be passed by the body corporate without a general meeting; and
 - (b) instructions on how to vote in favour of, or against, the resolution; and
 - (c) the name and address of the person to whom the resolution indicating the vote must be returned; and
 - (d) the date by which a vote must be cast; and
 - (e) the percentage of eligible voters required to vote in favour of the resolution for the resolution to pass; and
 - (f) a statement that no poll can be requested in relation to the resolution.
- (2) A notice of a resolution to be passed without a general meeting must be accompanied by the resolution.
- (3) As soon as is reasonably practicable after votes have been counted, the body corporate must notify unit owners of the result of the vote.

The High Court judgment

[29] In the High Court, the Judge noted that s 210 requires an application for relief for a minority under s 210 to be brought “within 28 days of the passing of the resolution”. She held that the timeframe begins when the resolution passes, not when the result of the vote is notified to members — which is something different.¹⁷ Here, the Judge held that the resolution passed at the time voting closed, which was 30 September 2022. An interpretation based on the plain meaning of the section, that provides a definite cut-off date, is consistent with the statutory purpose.¹⁸ So the appellants’ application under s 210 of the Act, brought on 4 November 2022, was out of time.¹⁹ If it was not out of time, the effect of the September 2022 resolution on the appellants did not differ in its effect on all other owners, so they were not prejudiced as a minority.²⁰

Submissions

[30] Mr Stephenson submits the High Court erred in finding the resolution was “passed” when votes were required to be received by post. Section 104 does not confirm a specific time a resolution is passed. The effect is that a delayed vote count, early completion of postal voting, or delayed notification of the result would effectively truncate the 28 days in which an application under s 210 can be made. Passage of this resolution was when unit holders were notified. Parliament could not have intended the inevitable mischief of a committee that is careless or acting in bad faith, truncating that right. The irrevocable nature of the indemnity and the nature of the claim here mean that the indemnity has a fundamental chilling effect. It makes litigation pointless where the appellants consider the committee members have breached their duties.

[31] Mr Wood submits the High Court was correct to hold that a s 210 application must be made within 28 days of the passing of a resolution. The resolution was passed on Friday 30 September 2022 when the votes were in the hands of those delegated to receive them. There is no evidence of when they were counted, which is more relevant

¹⁷ Decision under appeal, above n 1, at [135].

¹⁸ At [138].

¹⁹ At [141].

²⁰ At [150].

to notification than passage. Regulation 16 requires the outcome to be notified as soon as reasonably practicable after the votes have been counted, but notification is not passage. There was no prejudice to the minority because they are not treated any differently to anyone else. Indeed, Mr Kennedy benefits from the indemnity because he was a member of the Committee and could be again.

Was the s 210 application out of time?

[32] Section 210(2) requires an application for minority relief to be “made within 28 days of the passing of the resolution”. The purpose of that requirement is to ensure that an application is made in a relatively timely fashion, given that an applicant can be expected to need some time to understand the resolution and potentially take advice on whether to apply. A potential applicant does not have 28 days to do so if the period runs from the time at which postal votes are received because they will not know what the result is. Mr Stephenson is correct in identifying the potential for that to be exploited by the cynical. The purpose of the 28-day period is better achieved by the period running from notification, in relation to a resolution passed without general meeting. Notification is required by reg 16 to be as soon as reasonably practicable after votes have been counted.

[33] Here, the members of the Body Corporate were notified of the results of the vote on the resolution on 6 October 2022. Accordingly, members had until 4 November 2022 to apply for relief for a minority under s 210, which is what they did. The application was in time. We do not consider a declaration has to be made about this. It is enough that the Court has clarified the law.

Was the September resolution or indemnity unjust or inequitable to the minority?

[34] However, we agree with Grice J that the September 2022 resolution was not unjust or inequitable to the minority. We have traversed above the natural and understandable motivation for the indemnity, its purpose in preventing individuals from being deterred from participating in the governance and management of the unit title development, and the functionality of the nature and extent of the indemnity. The indemnity does not make litigation pointless if the point is to pursue a genuine substantive point about governance rather than punish particular decision-makers.

Mr Kennedy and Ms Bjors are not treated any differently to any other member in their ability to pursue such litigation. The resolution to give the indemnity, and the Deed, were not unjust or inequitable to a minority.

Result

[35] The appeal is dismissed.

[36] The appellants have not succeeded in relation to the substantive outcome of the appeal. They must pay the first respondent costs for a standard appeal on a band A basis, and usual disbursements.

Solicitors:
Lane Neave, Auckland for Appellants
Chapman Tripp, Wellington for Respondents